

**IN THE HIGH COURT OF THE COOK ISLANDS  
HELD AT RAROTONGA  
(CRIMINAL DIVISION)**

**CR NO. 550/16**

**CROWN**

**v**

**MARAKAI MAHITU**

Date: 17 March 2017  
Counsel: Ms A Mills for the Crown  
Mr N George for the Defendant

---

**SENTENCING NOTES OF HUGH WILLIAMS, CJ**

---

[8:55:39]

- [1] Marakai Mahitu, you appear for sentence today having belatedly pleaded guilty to one count of rape. The sentencing remarks should commence by noting that you use aliases – Malakai Teata, Marakai Teata, Malakai Nikoro, Marakai Teata Nikoro, Marakai Nikoro. It is necessary to recite those so that your criminal record covers all the ways in which you have been known when you come to Court.
- [2] You pleaded guilty on 6 March this year, the date on which your jury trial was scheduled to start. I will refer again to the lateness of the plea.
- [3] On 11 June 2016 the victim went to a party to enjoy a drink. You were also there and in the early hours of the morning you tried to pick a fight. At about 3am in the morning she went home to bed and she awoke to find a blanketed hooded man on top of her who had, at that stage, penetrated her. It seems from your description of the matter that you may have digitally fondled her before she awoke. She unsuccessfully tried to push you off. She bit you. Finally she managed to get you off her, pulled the blanket off from your head and recognised you as a cousin. She told you to leave and you did with an apology at that point.

- [4] To the Police next day you said you had gone to the property to borrow a motorcycle but became aroused and committed the offence.
- [5] There is a very full victim impact report before me which I have read. I do not intend to re-double the effect on her of your raping her on this particular night but it gives graphic details of the reaction on her part to what you did to her. You knew she was a widow. You knew her father and her husband had died relatively recently. You must have known that she had a couple of jobs to try and make ends meet. She moved house. Now she has lost all confidence, particularly in social situations as a result of what you did to her and the report makes graphic reading.
- [6] The Probation Service has furnished their usual helpful report giving details of your upbringing on Aitutaki. Mr George said that because your parents had left the island, you were left to run – pretty much – wild, working at odd jobs. You did not have much of an education. You drifted between Aitutaki and Rarotonga. The Service says, and Mr George says, that when you are sober you are described as a humble young man influenced by your peers. But you plainly have a problem with alcohol. And when you get drunk you become abusive, belligerent and short tempered.
- [7] That is borne out by your list of previous convictions. From 2011 through to last year there are 12 previous convictions, involving a number of dishonesty offences or breach of community service orders and the like, but particularly relevant to this matter are a couple of assaults on a female in 2013 – in fact your sister – and a male assaults female and a common assault just last year. You were sent to jail in 2011 for five months. The same term was imposed on you in 2013, three months imprisonment for the assaults on the female, six months imprisonment for the male assaults female and the common assault last year.
- [8] Notwithstanding all that, Probation Service recommends a short custodial sentence followed by probation but, in my view, they have not fully taken into account the Court of Appeal's decision in *Katuke*<sup>1</sup> which sets out – as I will come to – the terms of jail that need to be imposed for rape.

---

<sup>1</sup> R v Katuke, CA 3/07, 30 November 2007

- [9] The Crown points to the fact that you could go to jail for 14 years as a maximum for this offence. It draws particular attention to the violence in your past as disclosed by the previous convictions. After referring me to the purposes of sentencing, the Crown's view is the aggravating features – those making this worse than, if there is such a thing, a standard rape. This was a home invasion, a home invasion at night, a home invasion where there were children and other women there, all of whom were vulnerable as borne out graphically by the victim impact report. She was your first cousin. She looked after you, helped you with food, helped you with money. There was a slight degree of force involved in the offence but one of the aggravating features is undoubtedly that you were concealed with putting the blanket over your head.
- [10] The Crown makes the point that it was an unprovoked offence and that there is violence in your past. They make the point also that the mitigating features – those which reduce the sentence which will be imposed on you – include the plea, but it was at the last minute. And they refer me to the Court of Appeal decision in *Katuke* in 2007 and a later decision of this Court in *Engu*<sup>2</sup> to suggest that *Katuke* is now out of date.
- [11] Mr George emphasises your – what he calls – “destabilised” background and points to the fact that, although your record includes violence, it is not sexual violence. He explains the late plea by his late receipt of the depositions in this case and says that you are hugely ashamed and embarrassed by what occurred.
- [12] All rapes are serious – very serious – and this rape is towards the top of the range. The aggravating features are that it was completely unprovoked. You went into somebody else's house and raped a person you knew well and tried to camouflage yourself by putting a blanket over your head.
- [13] I mentioned the Court of Appeal decision in *Katuke* in 2007. In that case, the Court of Appeal said the starting point for an uncontested rape with no aggravating features should be 4 years in jail. It is my view that *Katuke* is now out of date for the Cook Islands and needs to be reviewed. There are a number of reasons for that and I

---

<sup>2</sup> Police v Travel Engu, CR 349/15, 2 December 2015, Grice J

appreciate you may not understand what I am about to say but it needs to be recorded publicly.

- [14] *Katuke* was influenced by New Zealand sentencing practice for rape running back into the 1980's when sentences for rape were much less in New Zealand than they now are. If you were in New Zealand you would be facing a starting point of at least 8 years imprisonment and probably more. It is also necessary to note that *Katuke* was a prosecution appeal which means that the starting point would have been set at the lowest permissible range.
- [15] New Zealand practice has changed over time and sentences are now much longer than they were when *Katuke* was decided. It is possible, also, to say that the atmosphere surrounding rape sentences has, in the last ten years or more, given greater recognition to the rights of women and their rights to the autonomy of their body and inviolability of the body except pursuant to freely given consent. Here in the Cook Islands the Family Law Bill before Parliament recognises those rights. Also since 2007 the sentencing methodology in New Zealand and here in the Cook Islands has altered so that the way in which sentences are made up is now more visible.
- [16] In Justice Grice's decision in *Engu* she took the view that a starting point for the rape in that case should be 5 years imprisonment. The case has some similarities with yours except that the victim was an elderly lady. Justice Grice added 3 years for the aggravating features in that case, then took off a year for the plea to arrive at a final sentence of 7 years.
- [17] I endorse Justice Grice's starting point. In my view the starting point for rape should be at least 5 years jail here in the Cook Islands.
- [18] The aggravating features – those, as I said, making the ultimate sentence higher – are the home invasion, the unprovoked nature of the attack, the rape on a close relative, the concealment and, of course, your previous history which involves violence if not sexual violence. In my view that should increase the potential sentence for you to about 6 years imprisonment, almost certainly more.
- [19] There are almost no mitigating or reducing features in your case. The plea of guilty was at the last minute and although I accept Mr George's comment, that he could not properly evaluate the case until he received the depositions in mid-February, it is still,

nonetheless, the case that the indication that you would plead guilty to the offence was only received at the time when the complainant and the other witnesses had experienced the stress of preparing themselves for trial and various other arrangements had been made for bringing everybody here from Aitutaki for the case. Nonetheless you are entitled to some reduction because the complainant and those witnesses were spared the ordeal of having to go into the witness box and talk about these details in front of members of the community.

[20] You are also entitled to a small reduction for the fact that you have been in custody on remand on this offence for a short period.

[21] In my view, therefore, the correct starting point should be at least 5 years imprisonment.

[22] The aggravating features add at least 3 years imprisonment to that.

[23] I will allow approximately a year for the mitigating features – which might be seen as generous.

[24] And the end result is you will go to jail for 7 ½ years.

[25] Stand down.

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style. The signature is positioned above a horizontal line.

**Hugh Williams, CJ**