

**PERMANENT NAME SUPPRESSION ORDER PROHIBITING PUBLICATION OF THE
VICTIM'S NAME (INCLUDING ANY DETAILS THAT MAY LEAD TO THE VICTIM'S IDENTITY)
IN THE NEWS MEDIA, ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE
WITHOUT FURTHER ORDER OF THE COURT**

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

CR NO. 799/16

POLICE

v

CLARK IONA

Hearing: 27 to 30 November 2017

Counsel: Ms A Mills for the Crown
Mr N George for the Defendant

Sentence: 8 December 2017

SENTENCING NOTES OF THE HONOURABLE JUSTICE CHRISTINE GRICE

[3:33:0]

[1] Mr Iona, you appear today for sentencing on two charges of which you were found guilty following a trial by jury last week. They are serious charges under s 146 of the Crimes Act. They are both indecent assault on a girl under 12 by kissing her. The maximum penalty each is imprisonment for a term of 10 years.

[2] Before I go further, the Crown is seeking permanent suppression of the victim's name and all identifying details. This is not opposed.

[3] I have no hesitation in granting that order for permanent suppression of the victim's name and any matters tending to identify her. This recognises that the privacy interests of the young victim in this case outweigh any public interest in knowing her name and identity. The protection of her reputation is a primary concern and this is recognised under s 76 of the Criminal Procedure Act. It also minimises the risk of additional publicity during her recovery. I also refer to s 25 of the Criminal Justice Act which gives me discretion to order

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suppression of names and identifying details. Section 76 allows for the exercise other powers including to exclude people from Court and forbidding publication of a report of the evidence.

[4] Accordingly an order for permanent suppression of the victim's name together with any identifying details is made.

[5] Turning to the sentencing.

[6] At the time of this offence you were 17. The victim was only [identifying details suppressed.]. [Identifying details suppressed.] You were seen by the family as the big brother and trusted by them implicitly.

[7] At the time of the offence you had only turned 17 the month before. In this country childrens court procedures only apply to children and young people under the age of 16.

[8] I note that the Family Protection and Support Act 2017 which came into force last week, on 1 December, has given more recognition to the fact that the development of a young person is not fully reached until they are at least 18 and older. That Act defines a child as being someone under the age of 18. That legislation deals with parenting and children in need of care and protection. The definition is not consistent with the existing provisions in criminal justice for youth offenders. However I can do nothing about that. Mr George has referred to the need for some reform in this area and the Crimes Act. I am faced with the situation where you must be treated as a full adult despite the fact you had just turned 17. So I must sentence you accordingly.

[9] The charges arise out of one incident during a family holiday. A group of children including you were sleeping on the veranda because the night was hot. The victim woke to find you kissing her on the mouth and forcing your tongue into her mouth. This occurred on two separate occasions although part of one incident. She tried to turn away, tried to push your tongue out of her mouth, she could not. She did not disclose the offending at the time.

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She told a friend about it a year or two later but it was not until four years later that she told her mother about the offending and that put in motion the laying of these charges.

[10] Delayed disclosure is not unusual in relation to child victims. At the trial there was evidence from an expert about the behaviour, not of the child in this case, but rather of research in the area which indicates delayed reporting is not unusual. In fact it appears to be more likely than not in cases of sexual abuse of children. The research does not pinpoint what the effects of offending on a victim might be because it varies so much from victim to victim. It depends on their personal makeup as well as the level and seriousness of the offending, and importantly, the support for the child, how the offending is dealt with, and the developmental stage of the child. In this case the victim was fortunate to have a very supportive family. They were able to deal with this matter in a sensible way. Her parents recognised the importance of ensuring the charges were laid and did come before the Court rather than being hushed up. That might have been the preference of some of the other family members.

[11] There was a hint in Mr George's submission on your behalf that there was some doubt about the guilt, about the verdicts, and the evidence that led to them. I do not accept that. The victim gave compelling evidence. I reject any suggestion that it should be undermined in some way in sentencing. I regard it as reliable and the jury regarded it as reliable. It came back with convictions on two charges and that is what I am dealing with today.

[12] An added difficulty here is that the family has been torn apart by this offending. Mr George gave graphic submissions about what it has meant to the family. You are fortunate in that it is supportive and wants to heal and move on. That the family has been torn apart is not something that you are directly responsible for. Various members of the family have taken a different view of events and how they should have been dealt with.

[13] In offending like this often there will be ripples that go wider than the immediate family and this is what has happened here. That will impact the child and her immediate family. That has to be considered as well. To some extent they are all victims and they all have to deal with the offending.

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[14] As to the effect the offending has had on the victim, letters from her parents and more importantly from her setting out the impacts that she felt had been imposed on her were produced. She gave evidence in the trial, confidently and competently. But she was clearly shaken by these events and very upset. Her evidence in chief was videotaped she was subject to cross-examination. It was a traumatic process as it is in any trial but she has also experienced many difficulties as a result of the offending. She said she has lost sleep and felt scared in the night. This incident happened in the night. The victim would go to school tired with low concentration levels because of lack of sleep. She is now insecure about talking about her personal feelings to family and friends and is uncomfortable about talking about her body. She is more secretive about things that have happened to her. It is not known what the future effects on her may be as Mr George quite candidly accepted.

[15] The victim feels frustrated about why it happened to her. She doubts her safety around her own extended family. She attributes some of her behaviour to feeling angry about this incident and lashing out when her mother asked personal questions. She also fears her relationship with her parents has been affected.

[16] The victim's parents have provided a letter saying how much they loved you, as if you were their child. While they may forgive you for the behaviour they feel that the relationship will never be healed until you accept responsibility for your actions. You continue to deny that the event happened, although you have accepted the verdict of the jury.

[17] The family spent a lot of time and resources bringing this matter to trial. They have taken time off work. The children have taken time off school. They have travelled to Rarotonga for the trial and provided support for the victim throughout. They are very concerned about the lasting impacts it may have on her.

[18] Mr George on your behalf gave a plea in mitigation. He pointed out that you were only 17 at the time, it was five years ago. He also provided a number of personal references which are very supportive and I will come to. I also note while you have some previous offending, it is not of a similar nature to this and it occurred after this event. So I put that to one side. Nevertheless you cannot claim the benefit of being a first offender.

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[19] The Crown reminded me of the sentencing principles. I must promote a sense of responsibility in you, denounce the conduct or show disapproval, and deter you and others in this community from similar offending. At the same time I have to consider your rehabilitation and reintegration into the community. I must impose the least restrictive outcome in the circumstances. I must also consider the gravity of the offence and your culpability, how much you were to blame. In addition I must consider the effect on the victim.

[20] Whatever I sentence you to must be reasonably consistent with other cases of similar offenders in similar circumstances. As the Crown said there is no tariff or no firm guidelines in cases of this type because the circumstances vary so much. The Crown pointed to *Taufahema*¹ involving one charge of indecent assault on an adult woman and one charge of burglary. In that case the offender was 18. The offence occurred in the course of a break into tourist accommodation. The offender indecently attacked the sleeping woman and touched her leaving her traumatised. He was on probation. The starting point taken by the judge in that case was 2 years. It was an adult woman. The indecent assault charge carried a maximum term of imprisonment in that case of 7 years. The burglary carried a maximum term of 10 years. The youth of the offender led to a discount of a one third reduction in sentence. The offender had also entered an early guilty plea. Although it was not as early as was possible, it was taken into account as the victim did not have to give evidence in that case.

[21] In *Tebano*² which the Crown noted was the most similar to that here, Justice Doherty sentenced the offender on three charges of indecent assault on a young girl of 14 years of age. The offender was 61 at the time of the offence and in a position of trust. He lured the girl into his room and the offending involved rubbing her breasts and genitalia. She had no way of escape. The judge noted that Parliament had decreed that these types of offences are

¹ *Police v Taufahema* [2016] CKHC 9; CR 505 & 527. 2015 Hugh Williams CJ (31 May 2016)

² *R v Tebano*, CRs 887-889/16, Doherty J, 27 July 2017

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particularly reprehensible. In that case the maximum term of imprisonment was 7 years. (In this case it is a maximum term of 10 years.)

[22] The aggravating factors in *Tebano* included the disparity in ages, that she was vulnerable and she was in his care so had nowhere to go. In addition the offending was premeditated and occurred over a successive number of days. It also had a significant impact on the victim. However the offender was a first offender and was highly regarded in the community.

[23] In that case the judge took a starting point of 2½ years and added an uplift of 18 months for the aggravating factors. That led to a point of 4 years on the charges. The offender showed no remorse nor was there a guilty plea. He only had his previous good character to rely on. Taking that into account the judge reduced the sentence by 6 months. The final sentence was 3½ years imprisonment.

[24] Mr George also referred me to a number of cases. Those were more to show the sentencing trends in recent years. They were listed in the probation report and while in the nature of indecent assault and similar offending there are no details. There were a range of offences, many of them indecent assault not involving children. The range of sentences are from probation to 5 years imprisonment. It does show the Courts do take this type offending seriously. Beyond that it is difficult to take any general principles out of those cases.

[25] The aggravating factors in this case that the Crown has pointed to are first, the child's age – she was [identifying details suppressed] of age. The charge refers to a child under 12 years, so [identifying details suppressed] is much younger and an aggravating factor. She did not understand what was happening at the time, nor could she prevent it happening. At the trial we heard from the expert that a not uncommon reaction to sexual abuse is that the victim freezes. They suffer such a degree of fear that they cannot do anything. The experts call it tonic immobility. In this case it seems to have occurred. She froze, she did not know what to do and she was very scared. You forced your tongue into her mouth. She tried to close her mouth. She tried to turn away, you turned her back. That was an invasion of her body. She just did not know what was happening.

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[26] In addition you were a trusted member of that family, a big brother. To that extent it was a breach of trust, despite the fact you also were quite young. Young children should feel safe in their family and trust the family to protect them. You betrayed that trust not only that she had but also of her parents. It happened in the dark. It must have been terrifying for that child.

[27] You were 17 and much bigger than her. She was only a child of [identifying details suppressed]. At that age the difference between your age and her age is enormous.

[28] In mitigation, Mr George made very robust submissions. He made an impassioned plea for leniency. I interpret that as arriving at a penalty with the least restrictive outcome that I can in the circumstances. There was no planning to the offence, so no premeditation. Mr George also pointed to very strong family support and in particular your grandfather wants to heal rifts in the family. You are employed, you have a good job and regarded as a good reliable worker which was set out in a testimonial. You have good references from family and friends as well as numerous references from people who deal with you in social, sporting and other contexts. You are clearly highly regarded.

[29] You continue to deny the offending and show no remorse. That is something for you to deal with in the future. But you do have the benefit of very loving and supportive family and friends, so you are fortunate. You cannot claim the benefit of a guilty plea.

[30] The main factor, and something your counsel urged on me, is that you were barely 17 at the time.

[31] I take 2 years imprisonment on each charge as a starting point. That you were in a position of trust, the age of the child and the way it occurred – she could not escape – I consider aggravating factors. The invasion of the child by tongue kissing was a serious invasion but it could have been worse. That is all that can be said.

[32] *Tebano* involved a prolonged and premeditated series of indecent assaults where the child was under the care of an older and trusted person, although she was 14. I compare the

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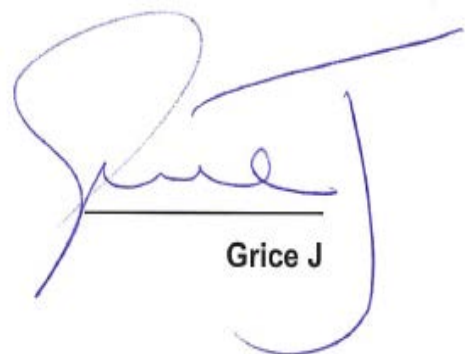
Tebano case where a longer period of imprisonment was the start point. I must consider a period of imprisonment but a lesser starting point.

[33] An uplift for the aggravating matters which I listed of an additional 6 months is appropriate. That takes me to a point of 2½ years imprisonment on each charge.

[34] There is little to be said in mitigation except your youth at the time. I apply a discount of approximately at least a third. I also factor in the good references you have and you are clearly a reliable worker and a very well supported young man. So looking at it in the round I come to a penalty of a term of imprisonment of 18 months on each charge to be served concurrently. This is not a science. I have to stand back and look at the totality of the charging. It must send a stern message to the community and to you that this type of offending is just not acceptable.

[35] In terms of the least restrictive sentence, I have come to the conclusion that 18 months imprisonment is appropriate. I have few options in terms of any community based sentence that I can impose here. Probation is not an option in this case. Rehabilitation will be a matter for the parole board.

[36] You are sentenced to a term of imprisonment on each of the charges of 18 months imprisonment to be served concurrently.



Grice J