IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA **via VIDEO LINK**
(CRIMINAL DIVISION) **CRN 458-459/20 & 662/20**

POLICE

v

WILKIE RASMUSSEN

Date: 18 August 2021

Appearances: Ms A Maxwell-Scott for the Crown
Mr B Mason for the defendant

Sentence: 18 August 2021

SENTENCING NOTES OF WOODHOUSE J

[11:44:48]

[1] I will make clear at the outset, given the discussion we have just had, and having taken account of what are comprehensive written submissions, together with the matters that I have heard this morning, I am satisfied in this case, having regard to all relevant factors in relation to the offending and the offender, that prison is not warranted and that a fine will be imposed.

[2] I am bound, of course, now to explain the reasons for this decision, which I proceed to do. It will take some time.

[3] I will say at the outset that the various remarks that I am going to make are not to be taken as diminishing the relative gravity of the two indecent assault offences, or the offence of attempting to pervert the course of justice. But, as Mr Mason quite properly submitted, every case has to be assessed on its own terms relating to the particular facts and the particular offender, and that is stating a fundamental principle.

[4] In outline, the facts of the indecent assault offences are as follows. And, generally, I will address these remarks to you, Mr Rasmussen, although of course they are intended also for the entire community to the extent that the community wishes to consider these matters.

[5] You are a lawyer, or you were until very recently practising as one.

[6] In July 2020 you were at Court for a client. The victim of the indecent assaults, who I will call "X", was at the Court to support your client. Your client is her nephew. X was 22 at the time. You were 62. You asked X to wait for you when the case finished, which she did. At the end of the case, you asked her to go with you to your office. You did not explain to her why you wanted her to go to the office. She went willingly, thinking you wanted to talk about her nephew. At the office, you in fact asked her if she would have sex with you. There were various statements by you to that end, including an offer of money. She rejected, and quite clearly rejected, your advances which you continued orally or verbally. You then put your hand on her leg and kissed her, forcing your tongue into her mouth. She pushed you off and tried to leave. You grabbed her coat and forced your tongue into her mouth again. She pulled away and she left. The offending, in terms of your acts, ended at that point. The consequences for her continued.

[7] The two assaults, which in substance were a single event, probably lasted no more than about a minute. And I would say at this point, in relation to facts, and much else relating to the indecent assault offences, you pleaded not guilty and elected trial by Judge alone and I was the Judge who presided at your trial.

[8] The attempt to pervert the course of justice, the remaining offence, occurred on 12 October 2020. That is three months after the indecent assault charges were laid. You went to the Court registry to deal with some land matters, and I apprehend from the submissions for the Crown that it is accepted that you went to the Court on that occasion purely to deal with your legal business.

[9] The Court officer who dealt with you is an aunt of X. You asked the aunt, and seemingly opportunistically, if you could talk to her outside the Court house on a personal matter. She agreed. Outside, you asked her if she could speak to X about dropping the indecent assault charges. You also told her that you would defend yourself and, if successful, you would sue X.

[10] The agreed statement of facts to which you pleaded guilty records that your behaviour in your conversation with the aunt was normal – that is the word used I think. The aunt said she would try and talk to her niece, but that she did not think that it would be helpful because of the no drop policy of the Police and because the matter was serious. That, Mr Rasmussen, is the extent of your attempt. The aunt did not raise the matter with X. She did raise it with Crown counsel and the charge of attempting to pervert the course of justice followed.

[11] I am bound to take account of the impact – the effect – of your offence on X and I have a victim impact statement from her. X did not sustain any physical injury, but she did suffer material emotional and psychological, or mental, harm. From the evidence I heard, and which I accepted, X was plainly distressed by the assault on the day of the incident and I am sure the impact of what you did continued for an extended period. Notwithstanding a submission from Mr Mason, it is not something that X is going to forget. X's own statement, however, indicates that the biggest impact on her was coping over the period of almost a year before the trial was finished. As she put it in her victim impact statement, in part, and I quote: "In a way during this time I was broken mentally and emotionally and now I feel all the stress, struggle and burden being lifted from my shoulders". It is perhaps fortunate for you, Mr Rasmussen, that she has that mental and emotional fortitude to look forward positively now; to positive things in her life.

[12] I will now discuss aspects of your personal circumstances and your personal history. These matters are of importance. I have received a full pre-sentence report, although that was directed only to the indecent assault charges and prepared and issued some time ago, and I have received comprehensive submissions from the Crown and from Mr Mason on your behalf.

[13] With Mr Mason's submissions there are 12 letters or statements in your support. There is one from your wife which I will come back to. Others are from friends from a range of backgrounds, from other lawyers, from an elder on Penrhyn island where you were born, from former Members of Parliament, and from the Mayor of Penrhyn. Also of some note, given your offences, there is a letter from the coordinator of the organisation Violence against Women for Punanga Tauturu. This refers to your legal assistance for legal aid cases which she said was always provided in a professional manner. Other information I have received in relation to your personal circumstances indicates, and satisfies me, that you have provided legal services not infrequently for no charge to those who needed legal help. There is also, as I mentioned, the letter from your wife. She is a teacher on Penrhyn. My recollection of what I have read is that she has been there, while you have been on Rarotonga most of the time, over the last 20 months or so. It is clear that you have her full and clear eyed support. I do emphasise my use of the expression "clear eyed". This, in my judgement, is important in assessing an appropriate sentence having regard to the range of principles and purposes of sentencing.

[14] What also is apparent, from all of the information that I have received, is that from a humble start you set out to obtain a range of good academic and other qualifications, including as a lawyer. You have used your qualifications, intelligence and increasing experience over the years to contribute, in substantial ways, to help individuals and communities in the Cook Islands, and to help the nation as a whole. You were High Commissioner for the Cook Islands in New Zealand in 2000. This was followed by 12 years as a Member of Parliament. For a time you were Deputy Prime Minister and Acting Prime Minister.

[15] I pause there to pick up on one submission for the Crown to the effect that you are entitled to a "nominal" – and it is the Crown's word, "nominal" – discount for the fact that you have no previous convictions. In some circumstances that might be an appropriate way of putting what is required. What I am seeking to emphasise is that you have actively and constructively contributed in important ways to the community as a whole. It is not simply having gone through your life without having had a previous conviction.

[16] You have been married for 34 years and you are clearly fortunate, Mr Rasmussen, to have a loyal and supportive wife. You have two children and six grandchildren. You were admitted to the New Zealand Bar in 1994 and to the Cook Islands Bar in 1996. You established your own practice in Rarotonga in 2014. Following your convictions, you have voluntarily surrendered your practising certificate. You face the possibility of being struck off. You are automatically disqualified from standing for Parliament for five years.

[17] I will move now to an assessment of the gravity of the offence as a first step in determining penalties and, as I have indicated, a sentence in this case which will be non-custodial. Both of the offences I am dealing with have maximum penalties of seven years imprisonment. The severe maximum penalties, however, do not mean that, on sentencing, a prison sentence must always be considered as likely to be more appropriate than not. In simple terms, there can be sentences other than prison and often there are. There is need in each case to assess the relative gravity of the particular offence against the very wide range of factual circumstances that come before the courts; what is often referred to as a continuum from the lowest level of offending to the worst. This may indicate a prison sentence as a starting point, but it does not necessarily do so. Usually, the Court will firstly fix a starting point for the sentence based on the relative gravity of the offence and then make adjustments, up or down, having regard to the defendant's personal history and circumstances. But the process is not a rigid one, let alone a mechanical process, and personal factors can have a significant bearing on an overall assessment of the appropriate type of sentence. I emphasise the "appropriate type of sentence", to distinguish it from the level of a prison sentence as the first part of the process of assessment.

[18] These general comments are pertinent in your case, Mr Rasmussen, but I will nevertheless begin by assessing a starting point for the indecent assault charges.

[19] The Crown has referred me to four New Zealand sentencing decisions[1]. In reliance on these cases, it was submitted in the Crown's original submissions, dealing

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[1] *R v Nuntoon* NZHC, Auckland, CRI-2007-090-8562, 15 September 2009.
R v Eraki NZCA 73/03, 1 April 2003.
R v Palmer [2009] NZCA 616.
R v Hohaia NZCA 221/05.

only with the indecent assaults, that there should be a starting point of 18 months imprisonment. In the Crown's more recent submissions, directed mainly to the attempt to pervert the course of justice, it was recognised that no account had been taken in the earlier submission of a decision of the Cook Islands Court of Appeal in *Goodwin v. R*[2]. The Court held in that case that sentences in the Cook Islands should be "slightly more lenient" than those in New Zealand. The *Goodwin* case concerned crimes of violence, but the Court's reasoning extends the leniency principle to all crimes. The Crown accepts that is the case. Taking account of *Goodwin*, the Crown now submits that the starting point for the two indecent assault offences, taken together, as I apprehend, should be 12 months imprisonment.

[20] Mr Mason submits on your behalf that the objectives of sentencing can be met without imprisonment. He referred me to one additional case, this was a sentence of this Court in *R v. Karakia Numanga*[3]. Mr Mason advised me that this is the only case he could find with facts broadly comparable to the facts of this case.

[21] In *Numanga*, a shop keeper indecently assaulted a 17 year old girl on two occasions, two months apart. On the first occasion, he put his hand under her top and rubbed between her breasts. On the second, he put his hands around her neck, kissed her on the mouth and rubbed her stomach and breasts. The Judge imposed fines of $1000 for each offence. It is impossible to read the transcript of this decision, and I treat it with a degree of caution as a precedent for the present case. It is not possible to read the transcript because it is a photocopy in blue of the Judge's handwritten sentencing notes and very blurred. But I do take this particular decision into account on the basis of Mr Mason's submission on the facts and other aspects of the case. I would interpolate at this point a further observation made by Mr Mason directed more generally to an appropriate sentence. This relates in part to the smallness of the community in Rarotonga and the Cook Islands generally. As Mr Mason observed, the shop keeper in the *Numanga* case is still working in Rarotonga, as I apprehend it as a shop keeper. He was allowed to continue with his occupation and he has not further offended.

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2 *Goodwin v. R* [2019] CKCA 1.

3 *R v. Karakia Numanga* CIHC CR 311 & 312, 21 April 2005. *Police v. Numanga*.

[22] I do accept Mr Mason's submission that, of the cases that have been referred to me, the facts of this are the closest to the facts that I have to deal with, subject to the reservation that I do not have all of the information of relevance, including the extent of the harm to the young victim in that case. But it might be observed, as already indicated, the victim in that case was 17 years old whereas in this case the victim was 22. The age difference at that level is not insignificant. I might also add that I am satisfied that X in this case, in terms of what happened to her, did have the ability, reasonably quickly, to extricate herself from that situation in your office, Mr Rasmussen, and it is fortunate that she did.

[23] I am not persuaded that, if prison was a necessary sentence in this case, the starting point should be anywhere near 12 months. There was a degree of aggravation in the assault because you forced your tongue into X's mouth and, on the second occasion, you grabbed her coat before forcing your tongue into her mouth. The emotional and mental harm suffered by X was not insignificant. Fortunately, it appears from her own victim impact statement that the serious harm of this nature has not been long lasting. What will remain, I am satisfied, is her memory of what occurred. However, her own statement indicates that the greatest harm was the impact of waiting for finality over the 12 months.

[24] This offending, Mr Rasmussen, relative to the wide range of cases, was at the low end of gravity. If prison was appropriate I consider it could not be more than six months. When all relevant personal factors are brought into account, and giving due weight to the relevant principles and purposes of sentencing, I am in no doubt that prison is not justified. All your personal attributes and positive contributions I have already referred to underpin that conclusion. There are more considerations.

[25] I am satisfied that you are remorseful for what you have done. Ms Maxwell-Scott, quite properly, referred to an observation in the pre-sentence report, that you still denied your offending. Having heard from Mr Mason on this and discussing the matter with him, I am satisfied that the position is that you admit and fully acknowledge your offending and that you are truly remorseful.

[26] The pre-sentence report was only received by your counsel this morning and an opportunity to deal with what was recorded in that has been limited. But there is further information that I had already received, including your letter to X, and your own actions in surrendering your practising certificate, and other matters, which satisfy me that you fully acknowledge your offending and that you are truly remorseful. This is important.

[27] You have taken further personal responsibility for your criminal acts by surrendering your practising certificate. Mr Rasmussen, you are responsible, as you have recognised, for the consequences of what you have done, and you must be penalised for this. But these consequences cannot be ignored. They include what amounts to a humiliating and devastating end to your career in law and in politics. I emphasise that you have brought this upon yourself, but these are consequences that this Court in my judgment simply cannot put to one side because you are responsible for what you have done to yourself. And it should not be overlooked that conviction for these three offences is in itself a penalty.

[28] There is another matter in respect of which I received information this morning. Your health, coupled with your age, points against a prison sentence, in addition to all of the other matters I have talked about. You suffer from hypertension, type 2 diabetes, high blood pressure, and obstructive sleep apnoea. Your doctor has high concern about the sleep apnoea and has recommended assessment in New Zealand. You are on medication for the other matters.

[29] I need now to discuss the attempt to pervert the course of justice. I am satisfied that this does not warrant a prison sentence, by itself, or when assessed with the other offences. The Crown submits that there are five factors bearing on your culpability for this offending. The five factors in outline and my assessment in essence are as follows:

(a) First, it is submitted there was harm to X's aunt who was identified as the victim. The aunt was not the victim. To the extent that there can be said to be a victim in cases of this sort, or certainly on the facts of this case, it is the administration of justice.

(b) Second, it is submitted there was a breach of trust because you were a lawyer. You were then acting as a lawyer, but I do not consider that there was any breach of any trust, and the agreed facts do not suggest anything akin to a breach of trust.

(c) Third, it is submitted, as I understood it, that there was pre-meditation. Unless I have misunderstood that submission, I am satisfied there was no pre-meditation on the facts. I interrupted my observations at that point to clarify a matter with Ms Maxwell-Scott. She confirmed that, although the written submission refers to pre-meditation, she clarified, in her oral submissions, that she accepted that Mr Rasmussen had not gone to the Court with any intention to have that conversation with X's aunt. She submitted that the only possible element of pre-meditation was that he asked the aunt to go outside the Court house. I do not regard that as involving pre-mediation.

(d) The fourth matter referred to was the impact of the attempt. I am satisfied there was no impact to be taken into account. The aunt did nothing to advance the request. The impact was in fact on Mr Rasmussen as a consequence of what the aunt actually did.

(e) The fifth factor is important. There was the threat to sue. This must be taken into account. It does appear, from an unsigned statement you made, to have been a suggestion to the aunt that you would sue X for wrongful prosecution if you were acquitted. I will come back to this factor.

[30] The Crown submitted that the starting point should be 12 to 15 months imprisonment. The Crown referred to five New Zealand sentencing decisions, namely *Williams*[4], *Thomas*[5], *H v. R*[6], *Coombs*[7] and *M v. R*[8].

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4 *Williams v. R* [2021] NZCA 54 (10 March 2021).
5 *Thomas v. R* [2020] NZCA 257 (29 June 2020).
6 *H v. R* [2016] NZCA 101 (7 April 2016).
7 *Coombs v. R* [2015] NZHC 584 (26 March 2015).
8 *M v. R* [2013] NZCA 385 (21 August 2013).

[31] The decisions, quite apart from what I have called the leniency principle established by the *Goodwin* judgment, are not helpful. The facts of the offences are substantially different and far more serious than the present case. They also relate to a quite different type of offending. They involved acts, varying in gravity, designed to prevent a person from giving evidence, or to persuade a person to change his or her evidence.

[32] The New Zealand decisions do not support a starting point anywhere near the Crown's submissions. It would be manifestly excessive. There do not appear to be any relevant Cook Islands decisions.

[33] I noted that the only aggravating factor of your offence is your threat to sue. Without that statement the request to X's aunt would be of small consequence. It would probably be open to question whether, if there had been no threat, it would have amounted to an attempt to pervert the course of justice. It is not necessarily criminal to ask somebody to withdraw a complaint. The threat, however, was made in conjunction with the request. But it may be inferred from the agreed facts that this amounted to a relatively mild statement of intent which had no adverse impact on the aunt. She ignored it and spoke to Crown counsel.

[34] I agree with Mr Mason's submission to the broad effect that this was opportunistic, ill-conceived, badly executed and not pursued by you any further. This offence standing alone would not warrant a sentence of imprisonment as a starting point.

[35] In addition to the personal factors I have outlined, as well as the actual facts of the offending, you would also be entitled to credit for your guilty plea. The remaining question is the appropriate penalty, which will not be imprisonment.

[36] The broad options are a fine, probation and community service. In my judgment the appropriate penalties are fines. I discussed, with Mr Mason your financial ability to pay fines, because in my judgment they need to be of some substance, and certainly substantially more than the fines imposed in the *Numanga* case. I also consider that this is a case where it is appropriate that part of the fines are to be directed to be paid as reparation or compensation to X.

[37] Mr Rasmussen, I do now ask you to enter the dock and I will impose the formal sentences.

[38] Mr Rasmussen, for each of the offences of indecent assault, you are fined $2,500 with half of that amount to be paid by way of compensation to the victim.

[39] For the offence of attempting to pervert the course of justice, you are fined a further sum of $2,000. None of that is to be paid to the victim.

[40] You may stand down.

Peter Woodhouse, J