

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

**CR NO's 401/17, 428/18  
365, 370, 439, 427/18  
427/17 & 719/19  
192/21, 9-10/22**

**POLICE**

v

**ALBERTA ORDAIN TUTAKIAO**

Hearing date: 25 February 2022 (via Zoom)

Counsel: Messrs J Crawford & M Pittman for the Crown  
Mr M Short for defendant

Sentence: 25 February 2022

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**SENTENCING NOTES OF HUGH WILLIAMS, CJ**

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[12:10:45]

[1] Albert Ordain Tutakiao, you appear for sentence here today on one charge of careless driving causing injury which occurred on 5 August 2017; two counts of contempt of Court on 16 July and 26 August 2017; one count of possession of cannabis on 26 July 2018 and one count of possessing a utensil, namely a bong, on 13 July 2017.

[2] On the main charge, the careless driving causing injury, the maximum sentence applicable is five years imprisonment or a fine of \$5,000, on the Contempt of Court the maximum is 6 months imprisonment or a fine of \$100, and on the cannabis and utensil charges the maximum is two years imprisonment or a fine of \$5,000.

[3] The facts concerning the careless driving causing injury were that on 5 August 2017 you were driving your bike behind a pickup truck, overtook it without making sure that there was no oncoming traffic when in fact there was another scooter. There was a collision and the rider of the other bike was moderately injured.

[4] An aggravating factor in relation to that is that after the accident you took off without reporting to the Police or without finding out if the other rider was injured.

[5] The contempt of Court charges follow Police checks when you were on bail for various offences and you were not found at home where you were meant to be. You said you had gone out to cruise with your friends, or that you were elsewhere at the time.

[6] The cannabis and bong charges result from the execution of a search warrant when some cannabis leaves and the utensil were found in your possession.

[7] In addition to that, and one of the reasons why it has taken so long for these matters to arrive at sentence is that you have also been charged with various other offences over the period and it is as a result of your admission to bail on those offences that the contempt of Court charges arise.

[8] In further addition to that, your previous conviction list includes a number of charges including seven burglaries in 2008; some cannabis charges and burglary in 2009 and a further burglary charge on 4 November 2009 when you were sentenced to two and a half years imprisonment. So you are no stranger to the Court processes.

[9] The usually helpful Probation report has been filed. It records your concerns that it is unfair that it has taken so long for matters to reach this point. It records that your mother is very supportive and Mr Short this morning has read out a helpful letter from her expressing faith in you, despite the problems you have had over the years.

[10] The Probation report records Doctor Wong's diagnosis of schizophrenia and says that because of the delay in resolving these matters, you barely remember the

facts. It recommends that you do not go to jail because there is no suitable accommodation for you but that you be placed on probation for 12 months.

[11] Doctor Wong has also furnished a helpful psychologist's report dated 22 January 2020 in which she says that you are schizophrenic and that your mental ill health arises when you do not – as is regrettably frequent – take the medication which is prescribed for you. She records that you have been smoking cannabis since you were ten – you are now about 34 – you have sniffed petrol, and you got involved at a very early age – when you were about 14 – with alcohol, all of which is most unfortunate given the good education you have had and your promise for the future. Doctor Wong says that your psychosis has manifested itself on a number of occasions over the years and of interest notes that you were released on a one year's Community Treatment Order in 2017. Your condition stabilised during that period because of the supervision to which you were subject. But the following year you again went off your medication and as a result some of these offences occurred.

[12] It is also noteworthy in terms of sentence that just a few days ago, on 21 February this year, you were again made subject to a Community Treatment Order. I will return to that issue a little later.

[13] For the Crown, Ms Crawford submits that the careless driving causing injury is the lead offence for sentencing and suggests that the starting point for that should be 18 months in jail with an uplift of six months on each of the drug charges because the offending was separate. She also contends that there should be a further uplift for the contempt charges of another three months giving a total in the region of two to two and a half years imprisonment before any discount is applied for your pleas and for your mental health condition. The result, she submits should be a short term of imprisonment and probation with special conditions – and again I will revert to that in a moment.

[14] The aggravating features – those that make your offending worse – the Crown submits are the vulnerability of motorcyclists and the injuries in this case.

[15] The Crown referred me to several earlier sentencing decisions and it must be said that there is a wide variation in the sentences imposed for careless driving causing injury especially when contrasted with the schedule produced by Probation of the sentences imposed on a number of occasions on persons charged with that offence. Of the 32 in the Probation Service's schedule of charges for careless driving causing injury, only two resulted in imprisonment, and one of those appears to be for dangerous driving causing bodily harm, not for careless.

[16] On the other hand, in *Police v. Teiti*<sup>1</sup> on sentence on a conviction for careless driving causing injury charge, it was said that:

“with a massive increase in penalty and the number of charges arising from accidents such as this, people in the Cook Islands need to understand that if they are convicted of this charge or others like it, the Courts must start with a standpoint of considering a lengthy term of imprisonment. Whether that turns out to be the ultimate result depends on all circumstances of the offence and the offender ... But the Courts need to start by looking at a possible sentence and maybe half the maximum, two and a half years in jail, maybe one and a quarter years in jail. The Courts need to start from the assumption that people convicted of these offences will go to jail for quite a long time unless there are substantial circumstances to indicate to the contrary”.

[17] That comment was echoed in *Police v. Akaapa*<sup>2</sup> and it is noteworthy that the Court of Appeal in *Boyle v. The Crown*<sup>3</sup> referred to both those cases without criticism. So there is a wide variation between the maximum sentence available on careless driving causing injury – five years in jail and decisions such as *Teiti*, *Akaapa* and *Boyle* – and the results imposed in the many similar cases listed in the Probation Service's schedule. *Teiti* and *Akaapa* do not appear in that schedule, nor does *Boyle*.

[18] Before I come to look at your situation in terms of sentence, I need to cover the question of mental illness particularly as far as sentencing is concerned. Under the Ministry of Health (Mental Health) Regulations 2013 a regime was put in place for the care of the mentally unwell. The objectives of the regulations in Reg. 4(c) contrast

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<sup>1</sup> CR 380/12, 29 June 2012, Williams, J, at [12].

<sup>2</sup> CR 380/12, 29 June 2012, Williams, J.

<sup>3</sup> CA 5/17, 24 November 2017.

with the normal requirements of the criminal justice system in that Community Treatment Orders are to “minimise the restrictions upon the liberty of persons with a mental disorder and interference in their rights ... so far as is consistent with their proper care, support, treatment and protection and the protection of other persons” which, in one sense, at least, contrasts with the typical thrust of criminal sentencing.

[19] Regulation 6(1) requires preference to be given for the care, support and treatment of the mentally disordered within the family and the community as opposed to being sentenced for offences where a significant period of imprisonment is the maximum available.

[20] From the sentencing point of view, however, as discussed with counsel this morning, it is important to note that Community Treatment Orders can only be imposed by a mental health care professional with a maximum term of 12 months. The Court cannot impose such orders and therefore the existence in your case, or the possibility in other cases, of Community Treatment Orders being imposed is a matter which can be taken into account on sentencing but the Court is unable to affect those orders and is of limited power, if any, to require compliance. In any case, compliance by persons subject to Community Treatment Orders is a regulatory obligation under Reg. 12 and accordingly it would be merely duplicating that obligation were the Court to try and impose some compliance condition relating to such orders on those being sentenced.

[21] Under the Criminal Justice Act 1967 s 7 contains the standard conditions on release on Probation and s 8 empowers the High Court to impose additional conditions. But the only provision which might possibly enable the Court to require compliance with a Community Treatment Order is s 8(1)(j) which empowers the Court to make “such other conditions as the High Court thinks necessary for ensuring his good conduct or for preventing the commission by him of any offences.”

[22] It would not necessarily follow that requiring compliance with a Community Treatment Order, or imposing a condition of Probation that a person being sentenced complies with any Probation Officer’s directions that the person complies with the mental health professional’s directions under a Community Treatment Order, would

actually come within that enabling power. Community Treatment Orders might be directed towards ensuring good conduct and they might be directed towards preventing commission of offences, but it is by no means clear that, in imposing that indirect route to compliance, the Court has any power to intervene in that regime.

[23] The mental wellbeing of those being sentenced is, naturally, a factor to be taken into account in arriving at the appropriate sentence to be imposed and the existence of a Community Treatment Order imposed by a mental health professional on a mentally unwell accused is also a relevant factor in sentencing, but the existence of a Community Treatment Order should not be seen as a substitute for the imposition of the appropriate sentence because the two systems run almost entirely in parallel.

[24] Turning to your personal situation, as with any sentencing, the sentences to be imposed must reflect the gravity of your offending and the seriousness of the type of offence – careless driving causing injury is a serious offence as shown by the maximum penalty. The sentence is to provide for accountability for the harm done to the community, promote a sense of responsibility and denounce the conduct and deter others from driving similarly. That is a factor in the Cook Islands, given the poor driving history, which is well documented, of road users in this country.

[25] In terms of the careless driving causing injury, this was plainly poor driving which resulted in injuries to another person and damage to their motorcycle. It is a factor making it worse that you did not remain at the scene but took off and you were only later apprehended by the Police.

[26] In terms of *Teiti* and *Akaapa* a sentence in the mid-range of the one and a quarter to two and a half years imprisonment outlined in those cases could be seen as the starting point but in the circumstances of what turned out to be a relatively minor collision involving relatively minor injuries to the other rider, that would be too severe so I take as the start point for sentencing a term of imprisonment of about 18 months.

[27] The Crown submits that I should apply an uplift to that starting point for the contempts and for the drug offences of about 3 months in each case. I regard that as producing a starting point which is overly severe in the circumstances of your

offending, even though some might say that was a lenient approach for somebody who has been involved in the criminal process of the Court so often and for so long.

[28] As to mitigating circumstances, there is the plea. It probably would be incorrect to describe it as being at the first available opportunity but these matters have been dragged out largely by the delays in getting the psychological reports, but also by such issues as the Covid19 pandemic and the like. It is a fact that you have been in custody for a couple of months – even though not for reasons related to the matters for which you are being sentenced this morning – but you are entitled to a reasonably significant discount for all those matters. You are also entitled to a discount for your mental illness although it is by no means clear that that played much of a part in the offending for which you are being sentenced.

[29] Ultimately, the task is to stand back and look at what should be the appropriate sentence for someone who has a lengthy list of previous convictions and now a number of additional convictions arising out of the matters discussed this morning.

[30] I have decided that the appropriate sentence is not as lenient as those shown in the Probation Service's schedule but that you should go to jail for 6 months. It must be accepted that jail is a less appropriate place for you, with your mental health problems, than is desirable but it is to be hoped that the new mental health facility currently under construction might be designated as a prison so that persons with mental un-wellness can be quartered there. But that is not something which can be considered at the moment as the facilities are still under construction.

[31] Following your release from prison, you will be sentenced to 12 months' probation on the statutory conditions and additional conditions:

- (a) That you not leave the Cook Islands without the approval of the High Court; and
- (b) If directed by the Probation Service, you do not go into any liquor licenced premises such as bars and nightclubs.

- (c) As for the poor piece of driving, and although disqualification is not mandatory, you will be disqualified from holding or obtaining a motor vehicle drivers licence for a period of 9 months commencing on your discharge from prison.

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

**Hugh Williams, CJ**