



**IN THE CENTRAL MAGISTRATES COURT OF SOLOMON ISLANDS
AT HONIARA**

(Criminal Jurisdiction)

Criminal Case No: 4 of 2021

REGINA

-V-

GEORGE OTTO

PRESIDING MAGISTRATE: HOLLISON F (PRINCIPAL MAGISTRATE)

Appearances:

Ms Amanda Mono, Senior Legal Officer, Office of the Director of Public Prosecutions for the Crown

Mr Wayne K. Ghemu and Mr Mali for the defendant Mr George Otto

Date of Sentence: 20th July 2021 at 10am

Notice: *This copy of the Court's Reasons for Judgment/Sentence is subject to formal revision prior to publication.*

SENTENCE

INTRODUCTION

1. The defendant Mr George Otto pleaded guilty to one count of Indecent Act-child under 15 years contrary to section 139(2)(a) of the *Penal Code* [Cap 26] as amended by the *Penal Code (Amendment)(Sexual Offences Act 2016)*. By pleading guilty, the defendant agrees that all the elements of the offence have been established. I now convict him based on the plea entered.

FACTS

2. The basic facts are as follows:
3. The defendant's name is provided above and he is 31 years of age. He is from Kwaibala village, Central Malaita in the Malaita Province.
4. The complainant or victim is Ms DM. I now order that the victim's name is completely suppressed and she must be referred to as simply "DM" or the "complainant". She is a native of Tikopia and Isabel Province and she resides with her father and mother at Ngossi area, West Honiara, in the country's capital.

5. The complainant was 6 years old at the time of the incident and currently attending Preparatory classes (2) within the Primary Division at St Nicholas College in Honiara. She resides at Ngossi Area with her father and mother.
6. At the time of the incident, the defendant and the complainant were both living at Ngossi area and their families are known to each other.
7. On the 4th January 2021, the complainant was playing underneath their house when the defendant approached her.
8. The defendant took the complainant to pierce his ear using a lemon thorn. At the material time, the defendant was sitting down on a chair while the complainant was standing up in front of him.
9. After that, the defendant took the complainant's right hand and placed it in front of his trousers towards his penis. The complainant pulled her hand from the defendant and shouted the following words: "Otto you how ya, you mental ya." (This can be translated as follows "Otto, how are you, are you retarded?") The defendant then left the crime scene.
10. The defendant was granted bail when he appeared in court earlier on the 9th January 2021.

DISCUSSION AND ANALYSIS

11. Section 139 of the *Penal Code* [Cap 26]¹ as amended by the *Penal Code (Amendment)(Sexual Offences)* Act 2016 provides as follows:

2) A person commits an offence if the person commits an indecent act on or in the presence of a child who is under 15 years of age.

Maximum penalty:

(a) if the child is under 13 years of age – 7 years imprisonment; or

(b) if the child is between 13 and 15 years of age and the offender is a person in a position of trust in relation to the child – 7 years imprisonment; or

(c) in any other case – 5 years imprisonment.

(3) It is not a defence to a charge for an offence under this section to prove that the child consented to the relevant act.

RELEVANT FACTORS FOR CONSIDERATION

¹ *Penal Code* [Cap 26], s 139

SENTENCING PRINCIPLES

12. The sentencing principles such as deterrence, punishment and retribution must always be considered to guide the court to reach a just and appropriate sentence. In *Mulele v Director of Public Prosecutions; Poini v Director of Public Prosecutions* [1986] SBCA 6; [1985-1986] SILR 145 (14 January 1986)², the Court of Appeal stated that each case must depend on its own facts. It further held that the factors that should always be considered in sexual offences, amongst others, are as follows:

- 1) *Disparity of age*
- 2) *Abuse of Position of trust*
- 3) *Subsequent Pregnancy*
- 4) *Character of the girl herself*

Aggravating Factors

13. The Aggravating factors in this case are as follows:

Maximum sentence.

14. The maximum sentence for this offence is 7 years imprisonment.

Seriousness of the actions

15. It is apparent from the facts that the defendant approached and took the victim on the pretext that he would pierce her ear with a lemon thorn. That is arguably a form of trickery and could be an indication of premeditation. He also held one of the hands of the complainant and put it in front of his trousers towards his penis which is an indecent act because it is common knowledge, which I also take judicial notice of, that a man's private organ is located on the front aspect of the body at the base of the Pelvis³ which is normally covered by pants and or trousers. This is despite the fact that there was no physical touching of the penis as far as the facts are concerned.

Age of the victim and Psychological abuse

16. The complainant was 6 years old at the time of the offending. She was very young and the defendant had corrupted her mind and innocence when committing the offence. There is no victim impact statement tendered in court, however, this early experience of indecent act normally would affect victims of sexual violence psychologically for a considerable period

² *Mulele v Director of Public Prosecutions; Poini v Director of Public Prosecutions* [1986] SBCA 6; [1985-1986] SILR 145 (14 January 1986)

³ Elizabeth Boskey, PHD, "The Anatomy of the Penis" in *VeryWell health* <https://www.verywellhealth.com/penis-anatomy-4777189> (Accessed 15th July 2021)

and that has been judicially noted. In such cases, the protection of the victim is an important consideration. In *Talivo v Public Prosecutor* [1996] VUCA 2; Criminal Appeal Case 02 of 1996 (25 October 1996)⁴; the Court said:

All children are entitled to be protected by adults. Children must be safe in their own homes. When men who have the care of children abuse that trust we agree with the Chief Justice that they forfeit the right to remain within the community. In this case the custom dealing with the matter could not in and of itself be sufficient to deal with it. We cannot see how on any basis it could be said that the sentence imposed was manifestly excessive. What this man did was deplorable conduct. The Court had an obligation to mark the community's disapproval of it in a serious way.

17. The *Convention on the Rights of the Child (CRC)*⁵, in Article 1 of the CRC defines a 'child' as a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger. Article 3 of the CRC requires that the paramount consideration in making any decisions for a child is his or her 'best interests'. Article 4 requires the member countries to take all the necessary measures to make sure the children's rights are respected, protected and fulfilled. Article 19 of the CRC provides as follows:

Article 19 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.⁶

Disparity of the age

18. The age gap between the defendant and the victim is 24 years. The complainant is a vulnerable and innocent person, trusting the defendant that her ears would be truly pierced.

Lack of respect and loss of trust

19. The complainant's family had a close relationship with the defendant prior to the offending. They are known to each other. The complainant's family trusted the defendant as an adult member in their neighborhood, and as a family friend. His actions clearly breached that trust and their relationship will never be the same again.

⁴ *Talivo v Public Prosecutor* [1996] VUCA 2; Criminal Appeal Case 02 of 1996 (25 October 1996) (Court of Appeal of Vanuatu)

⁵ *Convention on the Rights of the Child (CRC)*. Solomon Islands ratified this Treaty in 1995.

⁶ *Convention on the Rights of the Child (CRC)*, Article 19.

Mitigating Factors

20. The mitigating factors include the early guilty plea and remorse, first offender, cooperation with the Police and the defendant's personal circumstances, his psychological issues and chances of rehabilitation. These are addressed in detail later in the ruling.

COMPARATIVE SENTENCES & STARTING POINT

21. The sentencing tariff for similar cases in the past mostly attracted custodial sentences and few suspended sentences.
22. In *Regina-v-John Mae* [SBMC]-Criminal Case No. 235 of 2020 (27th May 2020) (Unreported)⁷, this court sentenced the defendant to 14 months for one count of Indecent Act-child under 15 years contrary to section 139(2)(b) of the *Penal Code* [Cap 26] as amended by the *Penal Code (Amendment)(Sexual Offences Act 2016)*. That case involved the touching of the vagina. The defendant received a total of 17 months because he committed another offence (criminal trespass) on a different date which was ordered to be served consecutively with the indecent act charge. In that case, the offence was committed in 2018, but the defendant was only charged in 2020 and there was a 2 years of delay when the defendant was sentenced last year.
23. In *R v Puisasa* [2019] SBMC 21; Criminal Case 190 of 2018 (3 May 2019)⁸, the accused was charged and pleaded guilty to a count of indecent act on a child under 13 years of age contrary to section 139(2)(a) of the *Penal Code* (as amended).⁹ The accused was sixty years of age whilst the victim was 19 years of age at the time of offending. Basically, the accused took the victim inside his bedroom and closed the door, and then undressed the victim and placed her on the bed, The accused then blind-folded the victim using his shirt and he used his fingers to touch her vagina. He then made the victim to wear her clothes again and she left. The accused was sentenced to ten months imprisonment. In *Puisasa*, there is no suspended sentence.
24. In *R v Velo* [2021] SBHC 31; HCSI-CRC 540 of 2019 (25 February 2021)¹⁰; the defendant was convicted of one count of Sexual intercourse with a girl under 15 years of age contrary to section 139 (a) of the *Penal Code* (Cap 26) as Amendment by the *Penal Code (Sexual Offences) Act 2016*, and one count of Indecent act on a girl under 15 years of age and contrary to section 139 (2) (a) of the *Penal Code* (Cap 26) as *Amendment by the Penal Code (Sexual Offences) Act 2016*. The defendant was sentenced to 3 years and 2 years respectively. The one count of indecent act was suspended on good behaviour bond which was to commence after the defendant has served his imprisonment term in count 1.

⁷ *Regina-v-John Mae* [SBMC]-Criminal Case No. 235 of 2020 (27th May 2020) (Unreported)

⁸ *R v Puisasa* [2019] SBMC 21; Criminal Case 190 of 2018 (3 May 2019).

⁹ *Penal Code* [Cap 26], s 139(2)(a) (As amended)

¹⁰ *R v Velo* [2021] SBHC 31; HCSI-CRC 540 of 2019 (25 February 2021)

25. In *R v Latade* [2020] SBHC 36; HCSI-CRC 153 of 2019 (19 June 2020)¹¹, the defendant was convicted with one count of indecent assault on a child under 15 years old contrary to Section 139 (2) of the *Penal Code*, cap 26, as amended by the *Penal Code (Amendment) Sexual Offences) Act 2016*. In that case, the defendant followed the victim and assaulted her by hitting her from the back and she fell. Whilst on the ground, the accused rubbed his penis on the victim's lips. He was sentenced to 22 months and was released at the rising of the court as he had served that in full.
26. In this present case, it involved the holding of the complainant's hand and placed it in front of the defendant's trousers towards his penis. The complainant although 6 years of age was quick to realize that the actions of the defendant was simply not right and told him if he was retarded. It is well recognized that each case shall be decided based on its own circumstances and facts.
27. After having considered the relevant factors, I am of the view that this case must attract a custodial sentence because the victim is a young and immature 6 year old female. On the other hand, this case should be considered as falling within the lower range.
28. The maximum sentence is 7 years imprisonment and a starting point of 34 months should be appropriate (which is equivalent to 40 percent of the maximum sentence). I will now consider the mitigating features and give due allowances.

Early Guilty Plea and remorse.

29. The defendant pleaded guilty approximately 5 to 6 months after the filing of the initial charge in January earlier this year. The charge was amended at least twice and the latest charge was filed on the 4th June 2021. The early plea is also a sign of genuine remorse. I deduct 12 months (1 year) to reflect his early plea and remorse.

First offender/previous good character and Cooperation with the Police

30. The defendant is a first time offender. This means he was a law abiding citizen for the past 31 years of his life. He also cooperated well with the police during the investigations and attempted to reconcile with the family of the complainant. I deduct 4 months to reflect his previous good character and his cooperation with the Police.

Personal Circumstances/psychological issues/prospects of rehabilitation

31. The defence submitted that the defendant has been having some psychological issues, however, the medical reports available confirmed that he is not of unsound mind.¹² This is evidenced in

¹¹ *R v Latade* [2020] SBHC 36; HCSI-CRC 153 of 2019 (19 June 2020)

¹² Dr Paul Orotaloa's report on George Otto (the defendant) dated 2nd March 2021

the defence counsel's decision not to plead the defence of insanity and or to challenge the allegations in a trial.

32. The assessment report prepared by Dr Paul Orotaloa dated 2nd March 2021 confirmed that the defendant had been suffering from a psychological condition termed as "Paranoid psychosis".¹³ The report further described his appearances and behavior as *"kempt and appropriate, calm, collected, cooperative with good eye contacts and "responding sensibly and coherent in his conversations throughout the interview."* He was deemed as *"sound and fit to plead and give instructions to his counsel."* It further stated that *"his understanding of court proceedings and guilty verses not guilty were fine. He has good insight into his situation and capable of making sound judgments. He admitted that he regretted very much what had happened and promised to himself not to do it again."*
33. The report further stated that the psychological condition *"could cause affected individuals to have unreal experiences such as hearing abnormal voices"* and *"could also blunt out their capacity to self-control and manage urges and impulses, meaning they could act out easily on urges as compared to the general population."*¹⁴
34. The Solomon Islands Red Cross Social Development Centre also described Mr Otto in a report dated 1st March 2021 that he suffered a disability called "ADD-Attention Deficit Disorder".¹⁵
35. Whilst I am taking judicial notice of the psychological conditions of the defendant, I also note that the reports were silent as to whether the defendant was actually suffering from that condition when the incident happened or at the material time. The use of the word "could" by the report shows that the defendant may experience those unreal situations (hearing of voices) from time to time but not necessarily at the time of the offending.¹⁶
36. The defendant is single and was brought up by his maternal side of the family since his parents had separated whilst he was quite young. He is now in his 30s.
37. For future references, I urge counsel to include all these relevant facts such as psychological conditions that a defendant may have been suffering in the agreed facts pursuant to section 21 of the *Evidence Act 2009*, as normally my discussion should be confined to the agreed facts.
38. Nevertheless, I deduct 8 months to reflect his personal circumstances including the psychological conditions, his relatively young age and high prospects of rehabilitation given that he is still 31 years of age.

¹³ Dr Paul Orotaloa's report on George Otto (the defendant) dated 2nd March 2021

¹⁴ Dr Paul Orotaloa's report on George Otto (the defendant) dated 2nd March 2021

¹⁵ The Solomon Islands Red Cross Social Development Centre Report on Mr Otto dated 1st March 2021

¹⁶ Dr Paul Orotaloa's report on George Otto (the defendant) dated 2nd March 2021

39. Thus, I am satisfied that 10 months imprisonment should be appropriate for the present case.

CONCLUSION

40. Sexual violence and offending is prevalent in the country at a startling rate and the courts must not be complacent but to apply the law consistently and fairly at all times to protect everyone from all walks of life from sexual exploitation.¹⁷

41. The amendments to the *Penal Code* [Cap 26] in 2016 by Parliament through the enactment of the *Penal Code Sexual Offences Amendment Act 2016* is a legislative response to the general perception that the courts had been issuing very lenient sentences on sexual offences as echoed by various stakeholders and substantiated by data collected by government agencies such as the Law Reform Commission which was also judicially noted by the appellate courts. In *Pana v Regina* [2013] SBCA 19; SICOA-CRAC 13 of 2013 (8 November 2013)¹⁸, the Court of Appeal noted that:

[10] The learned judge was referred to a number of previous sentences for defilement and rape. In one of those cases, Soni v R [2013] SBCA 6, this Court had referred to the lack of information as to the prevalence of these offences. However, the judge referred the Court to the second interim report of the Solomon Islands Law Reform Commission published, after the Soni case, in June 2013. Following a countrywide study, the Commission made reference to an "alarming level of sexual violence" and recommended the creation of new sexual offences and increases in penalties for others. It noted that, in comparison to our nearest neighbours in the Pacific Islands, sentences for sexual offences in Solomon Islands are low.

42. Hence, it is my judicial role to align my sentences to the core objectives of the *Penal Code Sexual Offences Amendment Act 2016* in order "...to provide greater protection against sexual violence and exploitation"¹⁹ especially for the vulnerable children such as the victim who is only 6 years old.

43. In view of that, I now sentence the defendant Mr Otto to 10 months imprisonment for one count of Indecent Act-child under 15 years contrary to section 139(2)(a) of the *Penal Code* [Cap 26] as amended by the *Penal Code (Amendment)(Sexual Offences Act 2016*.

¹⁷ *Pana v Regina* [2013] SBCA 19; SICOA-CRAC 13 of 2013 (8 November 2013). The Solomon Islands Law Reform Commission report in 2013 confirmed an "alarming level of sexual violence". Currently, there is no updated data, however, it could be safely said that the 2013 report is arguably reflective of the current data, and also anecdotal data based on court cases confirms that sexual violence is increasing in the Solomon Islands recently and in 2021

¹⁸ *Pana v Regina* [2013] SBCA 19; SICOA-CRAC 13 of 2013 (8 November 2013). The appellant pleaded guilty to one count of indecent assault, contrary to section 141 (1) and one count of defilement, contrary to section 142 (1) of the *Penal Code*. He was sentenced to two years imprisonment for the indecent assault and eleven and a half years for the defilement, both sentences to be served concurrently.

¹⁹ The National Parliament of Solomon Islands "Parliament Passes the *Penal Code (Amendment) (Sexual Offences) Bill 2016*" <http://www.parliament.gov.sb/index.php?q=node/1022> (Seen 7 June 2020)

44. Mr Ghemü of counsel for the defendant urged the court to discharge the defendant conditionally or in the alternative, invoke section 44(1) of the *Penal Code* [Cap 26] to completely suspend the custodial sentence because the offending in the present case is exceptionally far below compared to the *Velo case*²⁰, and should be categorized as a case that falls within the lower bracket of the sentencing range. As to the first option, it is my considered view that this case is a serious case with a maximum sentence of 7 years and the defendant should not be discharged conditionally pursuant to section 35 of the *Penal Code* [Cap 26]. The offence was couched in a manner that committing the offence even "in the presence of" the victim amounts to an indecent act.²¹ Thus, I have confirmed the conviction of the defendant earlier in this ruling.

45. Further to that, whilst I agree that this case did not involve the actual touching of the private part of either the defendant or the victim, the court should not disregard the fact that the victim is a vulnerable, innocent and six year-old female who was prematurely exposed to such a sexually indecent act. In other words, the rights of the defendant cannot be considered in isolation to the rights and the suffering of the victim. In addition to that, the defendant held her hand and put it in front of his trousers towards his penis in a sexually inappropriate manner which is an aggravating feature. In *Public Prosecutor v Gideon* [2002] VUCA 7; Criminal Appeal Case 03 of 2001 (26 April 2002)²²; the Court said:

Men who take advantage sexually of young people forfeit the right to remain in the community.

46. Therefore, after taking into account the circumstances of the case and also the defendant's personal circumstances especially the psychological issues and taking into account the *Convention on the Rights of Persons with Disabilities (CRPD)*²³, I will only partially suspend the sentence and the defendant must also serve a portion of the imprisonment term. A person who commits such an abhorrent and deplorable crime against vulnerable persons such as this present victim must be punished, and an appropriate deterrent message should be imparted to the community and the country at large.

47. Thus, I invoke section 44(1) of the *Penal Code* [Cap 26] and suspend 60 percent (which is 6 months) of the total sentence (10 months) for the duration of 24 months. He is required to keep the peace and shall not commit any offence during the said period.²⁴ This means that the

²⁰ *R v Velo* [2021] SBHC 31; HCSI-CRC 540 of 2019 (25 February 2021)

²¹ *Penal Code* [Cap 26], s 139

²² *Public Prosecutor v Gideon* [2002] VUCA 7; Criminal Appeal Case 03 of 2001 (26 April 2002)

²³ Convention on the Rights of Persons with Disabilities (CRPD). Solomon Islands had signed up on the treaty on the 23rd September 2008 in which it effectively created the obligation to not violate the object and purpose of it, however, a Party is not bound to uphold the specific obligations of the CRPD until it ratifies it. <https://www.disabled-world.com/disability/discrimination/crpd-milestones.php> (Accessed 19th July 2021).

²⁴ The suspended sentence (6 months in the period of 24 months) commences after he serves 4 months of the total sentence. If the defendant re-offends then he may be arrested and required to serve the balance of the sentence apart from being sentenced for that new offence as well.

defendant must first serve at least the other 40 percent (4 months) of the total sentence (10 months) in the correctional facility in Honiara.

ORDERS

48. The orders of the Court are as follows:

- [1] The defendant Mr Otto is sentenced to 10 months imprisonment for one count of Indecent Act-child under 15 years contrary to section 139(2)(a) of the *Penal Code* [Cap 26] as amended by the *Penal Code (Amendment) (Sexual Offences Act 2016)*.
- [2] Section 44(1) of the *Penal Code* [Cap 26] is now invoked and 60 percent (6 months) of the total sentence (10 months) is now suspended for 24 months. For the avoidance of doubt, the defendant must first serve the other 40 percent of the total sentence which is equivalent to 4 months imprisonment.
- [3] Time previously spent in custody, if any, shall be deducted from the total sentence. (Otherwise, the defendant was granted bail when he was first brought to court earlier in January 2021).
- [4] The defendant (or his surety) is entitled to receive the cash bail as he was faithful in attending to all his court sessions until his sentence now.
- [5] The complainant's name is completely suppressed and shall be referred to as simply "DM".
- [6] Right of Appeal applies.
- [7] I order accordingly.

PRINCIPAL MAGISTRATE FELIX HOLLISON
THE COURT

