

**PERMANENT NAME SUPPRESSION ORDER PROHIBITING PUBLICATION OF THE VICTIM'S NAME AND IDENTIFYING DETAILS 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. 825/16  
(Manihiki 5/16)**

**POLICE**

**v**

**PEPEOTE NIUKENA**

Date: 7 March 2017  
Counsel: Ms A Herman for the Crown  
Mr M Short for the Defendant

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**SENTENCING NOTES OF HUGH WILLIAMS, CJ**

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[9:23:32]

- [1] Pepeote Niukena, at the age of 26 you appear here for sentence on one charge of having unlawful sexual intercourse with a girl aged between 12 and 16 on Manihiki. Although there is only one charge the sexual intercourse between you took place on a number of occasions over a period of about ten months, so the charge you face should be regarded as what the law calls a representative charge, where everything is rolled up into the one charge instead of a whole series of charges being brought against you for each act of sexual intercourse.
- [2] The maximum period of imprisonment for which you can go to jail for this charge is seven years.
- [3] The girl concerned was only about 14 to 15 at the time the offending took place.
- [4] The offending was on Manihiki. As I said to Mr Short acting for you and to Ms Herman for the Crown, I regard your plea of guilty as being entered at the earliest

practical opportunity and you are entitled to, and will get, a discount in this instance for that.

- [5] The offending came to light when the girl discovered she was pregnant in about September last year and that arose because her school work and school behaviour fell off and caused alarm on the part of the school staff. But the relationship began well before Te Maeva Nui in about August 2015 when she texted you by phone, initially anonymously, but then you worked out who she was. After Te Maeva Nui, when she went back to Manihiki, there were numerous secret meetings between you. There was no sexual intercourse at first but then it began, and not only began it was repeated many times over the next ten months or so.
- [6] You knew she was at school and at one stage you asked her age. She probably lied to you at that point and told you she was then 15 or 16, but a friend alerted you before too long to the fact that you were dating a girl who was underage in terms of consent and yet you persisted.
- [7] In addition you knew on 10 January 2016 from her Facebook page that she just celebrated her 14<sup>th</sup> birthday. So at that point you were well aware that she was under the age when she could legally consent and the two of you continued to have intercourse fully and consensually until about September last year.
- [8] So the intercourse took place on many occasions over a period of about ten months, perhaps as much as a year.
- [9] Probation, in the usual helpful report - and Mr Short confirms this - says that you were born in Tuvalu and had a fairly unsettled childhood, being passed around between your parents and relatives. But in about 2009 you went to Manihiki and began working on one of the pearl farms there, initially as a contract diver. It seems clear that from the material in front of me that the people who owned the pearl farm befriended you and trusted you and gave you positions of increasing responsibility including running their little grocery store there. The lady who employed you says that you are immature but you are a good employee with good work ethics.
- [10] These charges are difficult in the sense that although lawyers regard the girl concerned as the victim, as I have remarked to counsel she does not see herself as a victim at all. Or if she does it is only because the legal process has been commenced

and carried through against you. Her main feeling of victimhood is that you have not supported her, your not being able to support her during her pregnancy and the fact you cannot support her now. And you have not yet seen your baby son who was born a few months ago.

[11] It is clear from what we have to regard as a victim impact statement that she decided to court you and it was she who initiated the contact and made it easy for you and herself to have intercourse on a number of occasions. She became incensed at the fact that her parents went to the police about the matter once it became clear she was pregnant.

[12] The main victims in this matter, apart from you, are the girl's parents who have been treated very badly by the Manihiki community once it became known that a schoolgirl was pregnant and pregnant to you. As a result the parents have - so far successfully - tried to keep you and the girl apart. So you have not seen your son. They say they will continue to try to do that in the future.

[13] For the Crown Ms Herman emphasises the seriousness of this offence and suggests that the features that make your offending worse than other cases of this sort are, first, that the girl was only about 13 when sexual intercourse began, possibly 14, but certainly far under the age of when she could legally consent to have intercourse with you. She stresses the 12 year difference in your ages. That is a substantial factor when it comes to sentencing. You were the older partner. You had unprotected sex with her on a number of occasions and, it seems clear, did nothing to try and prevent pregnancy occurring. The repetitious nature of your offending is important because, as I have said, sexual intercourse occurred on a number of occasions over about ten months. And Ms Herman emphasised the position of trust and the impact on the family, although as I said to her the question of trust probably bulks fairly small in this case.

[14] In mitigation, reducing the sentence is the fact that you have no previous convictions and you pleaded guilty at an early stage.

[15] So Ms Herman suggests I should start my consideration of the appropriate sentence to impose on you at about 18 months imprisonment.

- [16] Mr Short's helpful submissions on your behalf also emphasise the unsettled nature of your early background, your early plea and the lack of previous convictions and the fact that you made something of yourself on Manihiki and built yourself up to a position where people gave you responsibility which you discharged.
- [17] Mr Short also emphasised the fact that you attempted to apologise to the family once it became clear the girl was pregnant but were rebuffed. And that you have been excluded from your son throughout his life so far.
- [18] The psychologist report also gives me additional material concerning your early background, including your heavy use of alcohol from the age of about 11, heavy use of cannabis and heavy smoking. You were expelled from school for alcohol abuse at about 16 years of age. You went to a maritime training institute and you were expelled from that because of your use of alcohol. But to your credit you seem to have shucked off a number of those habits.
- [19] But you are now for sentence here. The sentence I impose on you must emphasise the gravity of the offending, and this is serious offending. I need to try and impose and instil a sense of accountability on your part for the harm you have done not just to the victim but to her family and to the community. I need to promote a sense of responsibility in you and in particular to denounce the conduct in which you were involved and hopefully deter others from becoming engaged in this kind of behaviour.
- [20] I have been given a schedule of sentences over the period from about 1991 for offences of this kind. The sentences imposed start fairly low but in recent years have been firming up and in particular Ms Herman gives me three cases:
- a) *Police v Ioane*<sup>1</sup>, in March 2012, where there were ten charges and the participants were, she was aged 12 and he was 39, and the offending occurred in pretty unusual circumstances. The Chief Justice there started with a term of 4 years imprisonment and after making allowance for other factors imposed a term of 2 ½ years jail.

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<sup>1</sup> Police v lone, [CR 682-691/10] 30 March 2012, Weston CJ

- b) *Police v Tekopua*<sup>2</sup>, in March 2013. There was one charge, as in this case, where the man and the complainant were niece and uncle and the age range was 14 on her part and 25 on his part, so somewhat similar to your case but circumstances were very different. I was the sentencing judge. The starting point in that case was 3 to 4 years jail and after allowance for a plea and personal circumstances, 2 years and 3 months was imposed.
- c) *Police v Teinakore*<sup>3</sup>, in November 2013. The circumstances were very similar to your case. There was one charge, even though there were a number of occasions when intercourse had taken place. The girl became pregnant, she did not want the police brought in, it was a first offence, there was an early plea, all similar to your case. And Justice Grice started at 12 months imprisonment but did not explain why she chose a starting point so much lower than in the other two cases I mentioned. Ultimately she imposed a 5 months jail term.

[21] Looking at your case, the law about consent and the inability of girls under 16 to consent exists because, whatever the girls think, they are regarded by Parliament and the community as too immature to properly evaluate the pluses and minuses of their situation and make sensible reasoned decisions on their own on matters like this which are going to affect them for the rest of their lives.

[22] In your case what makes the situation worse is, as I mentioned, the number of offences that occurred even though you are only facing one charge. You must have known that you should never have gone near her sexually despite her encouragement. Understandably you gave in to human frailty but the law requires older men to refrain from conduct like this, however much it might be induced by underage girls. And you not only engaged in intercourse but persisted in intercourse, even after you have been warned of and knew how young she was. You went on with this offending for more than ten months. There was an 11 or 12 year gap between you in terms of age and you, as the older participant, must have known you should not have been doing what you were doing and yet you carried on. You gave, it seems, no thought to the future,

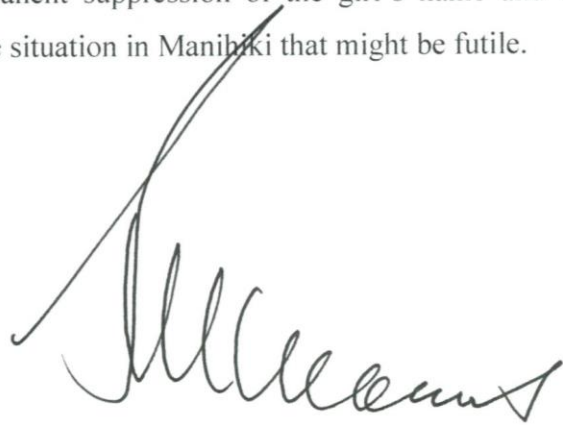
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<sup>2</sup> *Police v Tekopua*, [CR 73/13] 22 March 2013, Hugh Williams J

<sup>3</sup> *Police v Tuainekore*, [CR 219/13] 28 November 2013, Grice J

no thought to looking after this girl despite you knew the ways of the world better than she.

- [23] There is, as I said, a 7 year maximum for this offence. As in the previous cases the starting point in my view should be about half that, about 3 ½ years. You are certainly entitled to a reduction in that for your early plea and for the fact that you have never offended against the criminal law before and I am prepared to make a modest reduction in the jail term that you are about to serve for the fact that she threw herself at you and, as I said, as an act of human frailty you succumbed. But you should never have participated in this behaviour as long and as often as you did.
- [24] So reducing the possible 3 ½ year term to the maximum I can for you, in my view, the jail term you should serve is 2 years.
- [25] There will be an order for the permanent suppression of the girl's name and her personal circumstances although in the situation in Manihiki that might be futile.
- [26] Stand down Mr Niukena.

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**