

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

**CR NO's 289/2021  
334-342/2021**

**R**

v

**CLARKE-IN-CHARGE TOU**

Hearing dates: 8-9 March 2022

Counsel: Ms A Maxwell-Scott for the Crown  
Mr N George for defendant

Sentence: 29 April 2022 (via Zoom)

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**SENTENCING NOTES OF HUGH WILLIAMS, CJ**

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[10:39:31]

[1] Clarke-in-Charge Tou, at the age of 54, and with no previous appearances in Court, you were, on 9 March 2022, at the conclusion of a jury trial convicted by the jury on two charges of sexual intercourse without consent, effectively rape, where the maximum sentence is 14 years imprisonment; two charges of indecent assault on a girl between 12 and 16, with the maximum 7 years imprisonment; and four charges of doing an indecent act on a girl between 12 and 16 where again the maximum sentence is 7 years imprisonment.

[2] Having presided at the trial, I do not intend to re-victimise the young woman concerned by going through the facts of the matter, but it involved, as she said in her victim impact statement, your use of her body for your own pleasure in a number of degrading ways.

[3] In early 2021, when she was only 14, she came from Manihiki on a scholarship to improve her education and was sent to live with her aunt and you; you and the aunt being long term partners. She was living in a separate house from them on the same piece of land but in which a mama was also living.

[4] Within the first week of her arrival, there were two indecent assaults and later that same month, despite her efforts to protect herself by locking her door, there was further offending.

[5] You were not only in a position of trust for her but also because you took her to school every day, you had the advantage over this vulnerable young woman.

[6] In April 2021, when there was a party at the property, there were further indecent assaults and indecent acts and a further rape. Despite her efforts to protect herself, you were persistent enough to try and get her, through the window, to open the door by a use of a stick, and there was a further indecent assault in your truck when you were driving about the island.

[7] It came to light and was reported to the authorities as a result of a conversation with a school friend which was elevated to the school authorities and then to the Ministry of Internal Affairs in the Cook Islands, the victim was uplifted from your property and lived with Mrs Oliver and I will come back to that.

[8] The Probation Service makes it clear that you had a reasonable education, a reasonable upbringing, not lavish but it was not deprived. You have been with your partner for 16 years and there has been a child of that union. She gave evidence supporting you at the trial and also talking to the Probation Service. There were some doubts raised by of you and your partner in talking to the Probation Service which echoed her evidence during the trial. I put those entirely to one side.

[9] The Probation Service helpfully annexed a schedule of convictions and sentences for rape charges, thankfully only a few in number given that the schedule covers a span from 1983 onwards, but it omits the three cases that I will come to and

discuss later when focusing on the sentence for you. There is, however, a surprising variation in the outcome from the list of charges.

[10] Ms Maxwell-Scott for the Crown points out that your offending was repeated over four months against a girl who was only 14 to 15 at the time and submits that the end sentence should be in the range of 12 years. She has read out the victim's impact statement and also the impact statement from Mrs Oliver with whom the victim is now living. Those statements are unusually graphic but they are very helpful in demonstrating the impact on this young woman of the actions you were convicted of doing to her.

[11] The aggravating features – those making the matter worse in this case – are her age at the time and her vulnerability, coupled with which there was an element of grooming. She knew almost nobody on Rarotonga when she came to live with you and your partner. That increased her vulnerability.

[12] The Crown submits that the circumstances show planning and targeting. I am not sure there was much planning involved in this but there was certainly persistence. But then you definitely targeted the young woman and took advantage of her isolation and the fact that she was available close at hand and, as I have said, in the circumstances where in the truck and the like you were in a position of trust with her.

[13] This is a case where there was a very significant breach of trust in the circumstances. As I have said, she was staying with people she barely knew. She had no recourse then to friends or family on Rarotonga. You were taking her to school. She was reliant on you. You took advantage of that. And there was of course the repetitive offending, essentially in two groups, in January when she came to stay, and then again at the party in April.

[14] There was a degree, as there always is in these cases, of pain and you held her down on occasions despite her efforts to protect herself and this is a case where there was a very large disparity in age between you and the young woman at the time.

[15] The effect on the young woman has certainly been extensive and is likely to be ongoing for a very long time. Just listening to the victim impact statements emphasised the very deep distress your actions visited on her.

[16] Ms Maxwell-Scott makes the point that because the circumstances in which rape can occur are so wide, on such wide there is no tariff judgment either in New Zealand or in the Cook Islands, but she draws attention to the New Zealand Court of Appeal leading case on the sentencing for rape and associated sexual offending, *R v. AM*<sup>1</sup>, and I will come back to that. The Court of Appeal there divided sentencing for rape into four bands, and although the sentences they suggest are higher than the comparable starting points in Rarotonga, because in the Cook Islands the maximum sentence for rape is 14 years whereas in New Zealand it is 20, the classifications remain helpful even if the starting points need to be reduced to reflect the disparity in maxima by about a third.

[17] In *AM* the sentencing for rape in what they call Band 1, is where the level of violence is serious and the case involves extended abduction, a victim who by reason of fact is, such as age or mental or physical impairment is vulnerable or an offender acting with others.

[18] Their Band 2 says is appropriate for where the offending, in levels of violence and premeditation are in relevant terms moderate. The band covers offending involving a vulnerable victim or an offender acting in concert.

[19] Band 3 applies where there are aggravating features at a, relative speaking, serious level. It is appropriate for offending which involves three or more factors of particularly vulnerable victims, serious additional violence, particularly cruel, callous or violent single episodes involving rape will fall into this band.

[20] And then Band 4, towards the higher end, is when it covers multiple offending over considerable periods of time.

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<sup>1</sup> CA 27/2009, [2010] NZCA 114, 31 March 2010, at [93], [98], [105], [198].

[21] The recommended starting points are for Band 1, 6 to 8 years; Band 2, 7 to 13 years; Band 3, 12 to 18 years and Band 4, 16 to 20 years, but those starting points need to be reduced because the maximum sentence in the Cook Islands is only about two-thirds of what it is in New Zealand.

[22] Ms Maxwell-Scott also helpfully draws attention to *Police v. Engu*<sup>2</sup> and *R v. Mahitu*<sup>3</sup>. And as I have said there is a schedule of sentences for rape, sometimes in association with other charges, attached to the Probation Service report but that schedule does not include *Engu* or *Mahitu* or I think *Katuke*<sup>4</sup> which both those cases discuss. In *Katuke*, in an uncontested case, the starting point was 4 years for a single charge of rape. *Engu* was also a single charge of rape where the sentencing starting point was 5 years.

[23] Ms Maxwell-Scott points to the fact that here we have nine convictions on four occasions over four months against a vulnerable young woman. She suggests that you are in the top of the Band 2, lower Band 3 in *AM*, but in the Cook Islands that should result in a global starting point, in association with the other offences, of 11 ½ to 12 ½ years.

[24] Totality also needs to be taken into account and there is a question as to whether a cumulative sentencing might be appropriate.

[25] I appreciate that much of this will pass over your head Mr Tou but all of these are issues a sentencing Judge needs to take into account.

[26] Mr George on your behalf cautions against of the wholesale transfer of New Zealand sentencing levels to the Cook Islands and that is, as I have said, an appropriate submission given the difference in the maximum sentences for rape. He talks of the erectile problems which were mentioned in evidence and the absence of injuries indicating absence of physical force. Those come within what is referred to, in cases and in the literature, as rape myths, and I have put them entirely to one side.

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<sup>2</sup> CR 349/15, 2 December 2015, Grice, J.

<sup>3</sup> CR 550/16, 17 March 2017, Hugh Williams, J, at [14]ff.

<sup>4</sup> (2008) 2 CKCA 9.

[27] He points to your previously unblemished life and the testimonials from persons supporting you and suggests the end sentence should be between 7 and 7 ½ years imprisonment.

[28] Of the principles of sentencing helpfully collected in the New Zealand Sentencing Act 2002, there is in this case as an aggravating feature, the gross abuse of trust and the known vulnerability of the young woman concerned. These were very serious offences committed against her.

[29] The purposes of sentencing are in part to try and promote a sense of responsibility in you. The fact that you have been remanded in custody since conviction and know you are facing a lengthy jail sentence no doubt promotes a sense of responsibility in you. Mr George mentioned your remorse this morning.

[30] But one of the purposes is to provide for the interests of the victim, to denounce the conduct in which you were involved – and that is certainly a feature in this case – and try to deter others from engaging in conduct anything like this.

[31] So the rape charges are the main or lead convictions in your case. Having regard to the *AM* classifications, I agree with the Crown that your offending was towards the top of Band 2, perhaps the lower end of Band 3.

[32] But as I have said, the starting sentence points in *AM* need to be reduced by about a third because of the difference in maxima.

[33] In *Engu*, Justice Grice discussed *R v. Katuke* and suggested that the sentencing levels discussed in that case were now outdated because *Katuke* was dealing with uncontested sexual violation and suggested the sentence should be in the region of 4 years.

[34] Justice Grice differed from that point of view saying that in the interval between *Katuke* and *Engu*, a period of some seven years, the starting points for sentencing in the Cook Islands should be increased.

[35] That point was also discussed in *Mahitu* where the observation was made that *Katuke* was influenced by New Zealand sentencing practice for rape running back into the 1980s when the sentences for rape were much less in New Zealand than they now are. If you were in New Zealand you would be facing a starting point of at least 8 years imprisonment and probably more. New Zealand practice has changed over time and sentences are now much longer than they were when *Katuke* was decided.

[36] It is also possible to say the atmosphere surrounding rape sentences has in the last 10 years or more, given greater recognition to the rights of women and their right to the autonomy and inviolability of their body, except pursuant to freely given consent.

[37] In *Mahitu*, where I was the sentencing Judge, I endorsed Justice Grice's starting point in *Engu* where, for rape the starting point was 5 years imprisonment and I said in my view the starting point for rape should be at least 5 years jail here in the Cook Islands.

[38] Both *Engu* and *Mahitu* were cases involving two adults. Here where the young woman concerned was in a very vulnerable position for the reasons I have discussed, the starting point needs to be increased to take account of that factor and the gross breach of trust involved in your offending.

[39] If one discounts the *AM* starting point sentences for Band 2 to 3 by about a third, that suggests that the starting point here should be about 8 years if we translate the New Zealand levels as amended to the Cook Islands, as compared with the 5 years plus starting point suggested in *Engu* and *Mahitu*.

[40] To that point, I think that the starting point for sentencing you in this case is to take the 5 years plus suggested in *Engu* and *Mahitu* and increase that by about half to take account of the breach of trust, the disparity in ages, the violence which went beyond what is intrinsic in sexual offending, and her vulnerability.

[41] Therefore the starting point for sentencing you on the rapes should, in my view, be about 7 ½ years, perhaps 8 years, which also mirrors the discounted starting point for the correct banding from *AM* discounted for the difference in maxima.

[42] Because there were two groups of offending separated by two or three months, there might be a case for cumulative sentencing; that is to say to set the sentences from the first group, the second group and then add the two together. But in my view when all those circumstances of the matter are looked at, particularly the young woman's continuing living in your household between the two groups of offences and the total sentence to be arrived at, cumulative sentencing would be inappropriate.

[43] As I have said, the starting point should be about 7 ½ to 8 years imprisonment. However one fashions the sentence, it is the ultimate end sentence which is the most appropriate. The end sentence is the most telling, and of course it is the issue with which you are principally concerned.

[44] In my view, in order to arrive at an end point sentence which is appropriate to all the offending you face, the way in which it should be approached is to sentence you to 7 ½ years on each of the rapes with the sentences to run concurrently, that is together.

[45] The other offending – the other seven charges of indecent assault and indecent acts – on their own would merit a sentence of about 12 to 18 months imprisonment. I think that when the matter is looked at overall, it is appropriate to add to your sentence 18 months imprisonment on each of those charges.

[46] So that means you are to be sentenced to 9 years imprisonment in total, 7 ½ on the rapes, and 18 months on each of the other offences. The upshot of all of that is that you are going to jail, Mr Tou, for 9 years.

A handwritten signature in black ink, appearing to read 'H Williams', written over a horizontal line.

**Hugh Williams, CJ**