

**IN THE DISTRICT COURT
AT WELLINGTON**

**CRI-2014-096-003809
[2016] NZDC 3677**

THE QUEEN

v

TAUINAOLA SITULI

Hearing: 7 March 2016
Appearances: I Auld for the Crown
M Baker and J Nelson for the Defendant
Judgment: 7 March 2016

NOTES OF JUDGE J M KELLY ON SENTENCING

[1] Mr Situli you appear for sentencing today having been found guilty at a jury trial of 13 charges. Those charges are as follows:

- (a) Five charges of sexual violation by unlawful sexual connection against s 128(1)(b) Crimes Act 1961. The maximum penalty for this offence is 20 years' imprisonment;
- (b) Six charges of doing an indecent act on a child under 12 against s 132(3) Crimes Act. The maximum penalty for this offence is 10 years' imprisonment;
- (c) One charge of attempting to induce an indecent act on a child under 12 against s 132(3) Crimes Act. The maximum penalty for this offence is 10 years' imprisonment; and

(d) One charge of doing an indecent act on a young person under 16 against s 134(3) Crimes Act. The maximum penalty for this offence is seven years' imprisonment.

[2] The lead charges for the purposes of sentencing today are the charges of sexual violation by unlawful sexual connection.

[3] I sentence having regard to the following facts.

[4] [Details deleted] the first victim, who I will refer to as Zoey. She is now aged 17. Your offending against Zoey occurred when she was aged between nine and 12 years old. Zoey referred to you as [details deleted].

[5] The second victim, who I will refer to as Serina, is now aged 15. Your offending against Serina occurred when she was aged between eight and 10 years old.

[6] Zoey's and Serina's families are not related. They are however very close friends. Zoey referred to Serina as her cousin.

[7] You arrived in New Zealand from Samoa in August 2008 and began living with Zoey and her family at their home in [address deleted].

[8] You later moved to [address deleted].

[9] Zoey and her family later moved to [address deleted].

[10] I adopt the very brief summary of the circumstances of each charge as set out the Crown's submissions.

[11] In relation to the first charge of unlawful sexual connection this offending involved you performing oral sex on Zoey in her bedroom at the family home in [address deleted].

[12] The second and third charges of unlawful sexual connection involved you performing oral sex on Zoey following which you ejaculated onto a pair of shorts before using your fingers to rub ejaculate into her vagina.

[13] The fourth charge of attempting to induce an indecent act on a child involved you attempting to induce Zoey to touch your penis.

[14] The fifth charge of unlawful sexual connection involved you digitally penetrating Zoey's vagina while you were in the kitchen with her at the [address deleted] address.

[15] The sixth charge of unlawful sexual connection involved you following Zoey into the toilet and preventing her from leaving. You made her sit on the toilet and remove her underwear. You then performed oral sex on her.

[16] The seventh charge of doing an indecent act on a child involved you lifting up Zoey's top and placing your mouth on her chest and sucking her breasts.

[17] The eighth charge of doing an indecent act on a child occurred at the family church. You touched Zoey on her bottom over her clothing.

[18] The ninth charge of doing an indecent act on a child involved you touching Zoey's genitals and buttocks over her clothing in the kitchen at your home in [address deleted].

[19] The 10th charge of doing an indecent act on a young person involved you touching Zoey's breasts underneath her top and bra while she was living in her family home in [address deleted].

[20] The 11th and 12th charges are representative charges of doing an indecent act on a child. These involve you touching Serina a number of times on the breast both over and under her clothing and thighs over a period of about three hours at [address deleted].

[21] The 14th charge of doing an indecent act on a child involves you touching Serina on her thighs at [address deleted].

[22] I have read the victim impact statements from Zoey, her mother and her father. I have also read the victim impact statement from Serina and her mother.

[23] I acknowledge the presence of Zoey's mother and Serina's mother in Court today.

[24] The effect of your offending on Zoey and Serina and their families is immense. They all talk about the breach of trust. Zoey looked upon you as [details deleted]. Zoey's father trusted you [details deleted] to look after his children. Serina says you were really close to their family and she has known you since she was eight years old.

[25] Zoey talks about how you took away her innocence. She says every time she saw you it was dreadful. She had to pretend she was all right. She said every time you came close to her, her skin would crawl. She said it was extremely hard as her family did not know anything was wrong.

[26] Zoey says her first year of college was a rollercoaster. She never really slept well and her schooling suffered. She was sort of out of it for that entire year. She said she started distancing herself from her parents. She carried the burden of keeping a secret from her family because she thought her dad would blame her and take your word over hers.

[27] Zoey says she is really sad that her family has had to go through this and carry the shame of others in their culture and church finding out what had happened.

[28] Zoey says the emotional damage of having to go to Court is unexplainable. She says it was by far the scariest thing she has ever had to go through. She says she will carry that with her for the rest of her life.

[29] Serina says that since your offending she is too scared to get close to anyone. She does not trust anyone to get close to her in case something happens.

[30] Serina says your offending significantly affected her school work. She says that in 2015 when this went to Court she was in year 11 which was an important year at school and her family had big expectations of her. She feels like she has let her family down because she did not do better.

[31] Serina says her relationship with her mum has been hard because of what happened. It took her six years to tell her mum. She was scared to tell her mum because she was scared of everyone finding out and them not understanding. She said "It was a whole big mess."

[32] Serina says Court was the worst thing she has ever done. It was her worst nightmare. She felt so frustrated and wanted to cry herself out of the situation. She said it was really weird having to watch her video and hearing the stuff all over again. She said when she watched she got flashbacks and pictured all the stuff in her head. She said it was horrible. She said she did not mind telling what happened to her but she would never ever want to go to Court again.

[33] I have read the pre-sentence report dated 5 February 2016.

[34] Your personal circumstances are that you aged 33.

[35] The report says when you arrived in New Zealand from Samoa in August 2008 you lived with one of the victim's family [details deleted].

[36] You moved out of the address to live with your then partner and future wife and her parents. You married her in 2009. However you divorced in 2012.

[37] You have subsequently formed a relationship with your ex-wife's mother, Ms Ester Lesa.

[38] I acknowledge both your ex-wife and Ms Ester Lesa in support of you today.

[39] Ms Ester Lesa told probation that she separated from her husband in 2011 due to him being abusive and controlling. She told probation that you are a very caring person and she is very supportive of you.

[40] Ms Ester Lesa told Probation that she is convinced the offending did not happen. She believes it was a story concocted by your relatives and her ex-husband who, for various reasons, do not approve of your relationship.

[41] As an aside, I note this is essentially the defence that you ran at your trial which was obviously not accepted by the Jury.

[42] Ms Ester Lesa has two young children, a boy aged nine years and a girl aged eight years. Both children have been placed with family members in Auckland due to your offending.

[43] Ms Ester Lesa told Probation that she has a large number of health issues including heart problems, kidney failure and asthma. She is on home dialysis daily and said she relies heavily on you to assist her with day-to-day health issues.

[44] Probation says you have provided a number of letters of support from various community members who describe you in positive terms. Probation also spoke to your employer where you had been employed for three years. Your employer described you as an excellent worker and said he would be more than happy to employ you again should there be a position available at the time.

[45] Probation says you are maintaining your innocence in relation to this offending. You told probation that you will be appealing your convictions. Accordingly probation says you demonstrate no remorse for or insight into your offending behaviour.

[46] Probation says the factors identified as contributing to your offending are inappropriate sexual arousal, your relationship with the victims and their families at the time and an attitude of entitlement. You are assessed as being at medium likelihood of re-offending. Because you are not taking responsibility for your actions you are assessed as being of medium harm to any potential future victims.

[47] I have read the submissions filed on behalf of the Crown.

[48] Mr Auld, on behalf of the Crown, submits that a starting point of between 12 and 14 years' imprisonment is appropriate.

[49] The Crown says there are no personal features that would warrant either an uplift or a reduction of the sentence.

[50] The Crown submits a minimum period of imprisonment of 50 percent should be imposed.

[51] I have read the submissions filed on your behalf.

[52] Ms Baker submits that a starting point of between eight to 10 years' imprisonment is appropriate.

[53] Ms Baker also submits that a minimum period of imprisonment of one-third should be the maximum period imposed, should the Court consider that a minimum term is appropriate.

[54] The purposes of sentencing you today are to hold you accountable for the harm done to the victims and to promote in you a sense of responsibility for and an acknowledgement of that harm. It is also to denounce your offending and to deter you and others from committing the same or similar offences. It is also to protect the community from you.

[55] In sentencing you I remind myself that I must take into account the gravity of your offending, the seriousness of the offences, the information provided to the Court concerning the effect of your offending on the victims and the general desirability of consistency with appropriate sentencing levels in respect of similar offending.

[56] It is well established that *R v AM* [2010] NZCA 114 is the guideline judgment for sentencing today. In that case the Court of Appeal identified three bands of offending for unlawful sexual connection and identified culpability assessment factors to assist in placing offending in the appropriate band.

[57] The Crown submits that the circumstances of your offending mean that your offending should be placed in the lower to mid range of band 3. The Crown also submits that the overall gravity of your offending is similar to that in *R v L* [2014] NZHC 2471.

[58] The defence submits that your offending is somewhere between the higher end of band 2 and the lower range of band 3. The defence submits that the culpability of the offending in *R v L* was greater than your culpability.

[59] The defence also submits that the following mitigating factors are relevant to you and should be taken into account. First your previous good character. Secondly your compliance while on bail and thirdly the consequences for your family.

[60] Bearing all those matters in mind I now need to assess an appropriate starting point to reflect the nature and seriousness of your offending and your culpability.

[61] The Crown have suggested that planning and pre-meditation is an aggravating factor because the Crown says you created opportunities to be alone with the victims and exploited these opportunities to sexually abuse them. In particular the Crown says you took the opportunity to abuse Zoey when you were left to look after her and her siblings.

[62] I however disagree. I accept the defence submissions that on the evidence given at trial there was no element of forward planning or grooming or taking steps to get the victims alone or giving the victims alcohol or drugs with the view to offending. I accept the defence submission that your offending could be defined as impulsive and opportunistic in the sense that you took the opportunities as they arose. Therefore, I agree with the defence submission that the factor of planning and pre-meditation is only present to a slight degree.

[63] With regard to the vulnerability of the victims I agree with the Crown's submissions that the victims were particularly vulnerable. Zoey was aged between nine and 12 and Serina was aged between eight and 10 when your offending occurred. Due to the Samoan cultural context of the girls' families it was also very

difficult for them to tell their families about the offending. There was also a significant disparity in the ages between you and the victims at the time of your offending as you were in your late twenties.

[64] With regard to the harm done to the victims and their families I assess this factor as present to a severe degree, having regard to the victim impact statements I have already referred to.

[65] With regard to the scale of your offending, you offended against Zoey on 11 separate occasions over a two year period. You offended against Serina on a number of occasions over a two year period. It is acknowledged that your offending against Serina, whilst still serious, is less serious in nature and of a lesser frequency than the offending against Zoey.

[66] With regard to the breach of trust, that factor is severe in relation to Zoey. Her family treated you as if you were part of the family and Zoey viewed you as an uncle. When you arrived from Samoa you lived with Zoey's family and at times you were entrusted to look after Zoey and her siblings. It is accepted that once you moved out of Zoey's family home you were no longer in a position where you assumed any responsibility for Zoey. It is also accepted that you were never in a position where you assumed responsibility in relation to Serina. Therefore I assess the breach of trust in relation to Serina as moderate.

[67] In my assessment your sexual violation by unlawful sexual connection offending clearly falls within band 3, because more than three of the culpability factors identified in *R v A M* are present to a moderate degree.

[68] I however agree with the defence that your offending could be seen as slightly less culpable than that in *R v L* where the offending was over a five year period.

[69] In my assessment your offending warrants a starting point of 11 years' imprisonment. I have reached this point after considering similar cases and evaluating the gravity of your offending.

[70] There are no mitigating factors relating to your offending.

[71] I now need to consider whether your offending was aggravated or mitigated by your personal circumstances.

[72] There are no aggravating factors relating to you.

[73] In my view it is a mitigating factor relating to you that you have no previous convictions in New Zealand or in Samoa. Also you have provided character references from people within your community group and your employer. Of course this has to be balanced against the fact that you offended over a period of two years some years ago. In my view your previous good character warrants a moderate discount of nine months.

[74] The only other mitigating factors relating to you which are of limited value are your family circumstances which I have already mentioned and the time you spent on bail without incident. For those factors I am of the view that a small discount of three months is appropriate.

[75] Obviously you are not entitled to any reduction for a guilty plea as this matter went to a jury trial which had a significant impact on both the victims and their families.

[76] Neither are you entitled to any discount for any remorse as you have maintained your innocence as you are entitled to do.

[77] I now need to consider the totality principle. Standing back and assessing your overall culpability I am satisfied that a total sentence of 10 years' imprisonment is appropriate for the totality of your offending.

[78] With regard to the imposition of a minimum period of imprisonment I am not satisfied that a minimum sentence of imprisonment is required to hold you accountable for the harm done to the victims by your offending, or to denounce your offending or to deter you or others from committing similar offences or to protect the community from you.

[79] I am of the view that serving at least one-third of 10 years is sufficient to achieve these purposes.

[80] I am satisfied that appropriate release conditions will be imposed by the Parole Board. Those conditions will obviously be influenced by whether you accept your offending subsequent to sentencing and are therefore eligible for any sex offenders' programme in prison.

[81] For the reasons given you are sentenced as follows.

[82] On each of the five charges of sexual violation by unlawful sexual connection you are convicted and sentenced to imprisonment for 10 years.

[83] On the six charges of doing an indecent act on a child under 12 you are convicted and sentenced to imprisonment for two years.

[84] On the charge of attempting to induce an indecent act on a child under 12, you are convicted and sentenced to one year's imprisonment.

[85] On the charge of doing an indecent act on a young person under 16, you are convicted and sentenced to imprisonment for one year.

[86] All sentences are concurrent.

J M Kelly
District Court Judge