IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CR NOS. 422/2008, 1016/2008 AND 1017/2008

THE QUEEN

v

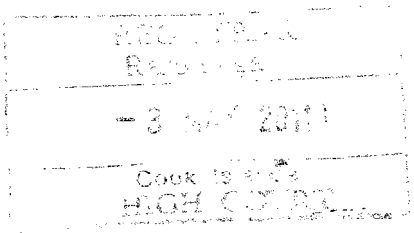
TEMU OKOTAI, RUHAU TAMAUNU AND MATAIO JOHNSON

Date: 8 April 2011

Counsel: T Elikana and Ms King for Crown
Mr N George for R Tamaunu and M Johnson
Mr W Rasmussen for T Okotai

Sentence: 8 April 2011

SENTENCING NOTES OF HUGH WILLIAMS J



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Mr Rasmussen,

[1] Messrs Johnson and Tamaunu, at the conclusion of the Crown case in the jury trial over the past few days you pleaded guilty, as you know, to charges of intentionally and in a manner likely to injure endangering the safety of persons. On 13 May 2008 at Tukao in Manihiki, you dug holes in the runway of the Manihiki Airport and planted uto, or young coconut plants, in those holes.

[2] You, Mr Okotai, were charged with inciting or counselling Mr Johnson to commit the offence of endangering transport, that being the offence the other two faced. And by way of a directed verdict, at the conclusion of the Crown case, you acknowledged that the elements of the offence were made out and you have no defence. The jury accordingly convicted you.

[3] All three of you now come before the Court for sentence.

[4] In terms of the elements of the charge of endangering transport there was, as the Ruling said at the conclusion of the Crown case, no doubt the offence had been committed. The digging of holes and the planting of uto in the runway were actions which are forbidden under s 225(1)(a) and (b) of the Crimes Act. In digging those holes and planting the uto there was no doubt that the actions were taken intentionally. In fact at public meetings on Manihiki beforehand you had notified your intention to do just that. And there is no doubt that those actions, at the time of the digging and planting, were likely to injure or endanger the incoming Air Raro Flight GZ710 on its way from Rarotonga to Manihiki via Aitutaki.

[5] No one who has ever flown in an aircraft would fail to doubt that the most hazardous part of air travel is taking off and landing, and that the capacity of a pilot of an aircraft landing at 150 knots – 220 kilometres an hour – to do anything to avoid any obstruction or deficiency in the runway is exceptionally limited, almost to vanishing point. So the likelihood or the possibility of danger to the aircraft and, more importantly, danger to the passengers and crew is very obvious indeed.

[6] So it was clear at the end of the Crown case that the charges were made out and the reasons you had for digging those holes and planting the uto were irrelevant.

You dug the holes, you planted the uto, and that was sufficient in the circumstances to make out the offence. And, of course, it was for that reason at Mr George's advice that you pleaded guilty.

[7] Your position Mr Okotai was a little different. Here in Rarotonga you made a number of telephone calls early on the morning of 13 May. We do not know the content of all those calls. It may have been that you suggested to Mr Johnson that they do what they did – go and dig up the runway and plant uto. In a later conversation with the Police - probably while the aircraft was still at Rarotonga but that is a bit uncertain – you suggested you may have told people on Manihiki to drive their trucks onto the runway. That was a matter that was not actually proved but the evidence suggested that was what you had done. And, of course, it was for that reason that you acknowledged the elements of the offence being made out and submitted to a directed verdict of guilty by the jury.

[8] As mentioned, however, during the Ruling and the discussion between Bench and Bar at the conclusion of the Crown case, although your reasons for doing what you all did were irrelevant to the question of whether you were guilty or not, they were very relevant to the question of what sentence should be imposed. No one who heard the evidence and read the documents and listened to what was said could doubt the sincerity of your views as landowners, that in some way the status of your rights as owners of parts of the airstrip was in danger of being changed - changed forever and changed hastily.

[9] Now, as I asked Mr George, as a matter of fact that probably was not the case. Certainly lawyers would have understood that letters you wrote to the government asking for the Land Court's visit to be postponed could have no effect because no government has any power to direct the Judiciary what to do. That is a very important Constitutional principle in force all around the world, and the government was simply powerless to say to the Land Court 'Do not go to Manihiki'.

[10] Secondly, even had the Land Court sat in Manihiki lawyers would certainly have understood that the probability is that not much could have been accomplished

towards the government's aim of putting a lease in place in order to enable money to be spent on upgrading the Airport at that hearing.

[11] And, thirdly, lawyers would have understood that if Mrs Browne or any of the Islanders had stood up at the Land Court hearing on Manihiki that day and told the Judge of your concerns about the land issues - about the haste with which the matter was being progressed - and asked for the matter to be adjourned, there is every possibility the Judge would have agreed and so the hearing on the land issues would not have taken place.

[12] So from lawyers' point of view there were at least three very good reasons why doing what you did was not justifiable. But I certainly understand and accept that as lay-folk, landowners with a passionate interest in the ownership of land and the resolution of land issues on Manihiki, you would not have understood all that.

[13] So what you did that morning was legally indefensible. What you did that morning is morally, culturally and, in your capacity as landowners, entirely understandable. It is ironic that as a result of what you did that morning the pilot very sensibly decided to turn back rather than run any risk whatever that there may have been danger to himself, his aircraft, crew and passengers on trying to land: and that what you did this morning and this prosecution have apparently meant that land issues on Manihiki relating to the Airport have not progressed one jot in the three years since the events giving rise to these charges.

[14] That has had the probably unfortunate consequence that because the land issues have not been sorted out, the land status of owners in Manihiki Airport remains undetermined and therefore no lease has ever been able to be put in place or progress made on that issue. The government has been unable to spend the money it hoped to spend on upgrading the Airport, making it safer and thus progressing both the black pearl industry on Manihiki and the safety of the Islanders who might be in need of urgent medical treatment. So your actions accomplished what you wanted but have had severe downsides to them as well.

[15] The real question, of course, is what is to be done. Mr Solicitor-General very responsibly has suggested that a custodial sentence, a period in jail, is inappropriate in this case. People convicted of the offence of which you have been convicted of can go to jail for up to five years, so that is a very responsible concession on the part of the Crown.

[16] Obviously Messrs George and Rasmussen pressed me to arrive at the same conclusion and I can tell you that I agree. It is, in my view, important that the way be clear for the Manihiki Airport land issues to progress, if possible to everybody's satisfaction, and that the improvement of the Airport for the benefit of everybody on Manihiki and Rakahanga can proceed and the communities prosper as a result.

[17] Section 113 of the Criminal Procedure Act 1980-81 gives the Court power to impose terms and conditions on an order that people be ordered to come up for sentence if called upon within a period of up to three years.

[18] Because the offence of endangering transport is so serious an offence as far as passengers and crew on aircraft are concerned, I gave consideration to whether the three of you should be ordered to pay something towards the costs of the prosecution as a condition of an order to come up for sentence. But I have decided that because of the sincerity with which you undoubtedly undertook the actions you did on 13 May, it would not be appropriate to include a financial penalty. And, in my view, that especially applies to Mr Okotai who was only a secondary party somewhat removed and whose participation in the events that morning is even now a little unclear.

[19] So the decision of the Court is that all three of you should be convicted and you should be called upon to appear for sentence at any time within the maximum period of three years, on the condition that within that time none of you take any action which might endanger, hinder or affect any aircraft movement onto or from the Manihiki Airport or the continued operation of the Airport. I believe that the terms of that condition will ensure that none of you interfere with the safety or the use of the Airport over that period, but will leave all of you free to engage in any resolution of land issues relating to the Airport over that period.

[20] There needs to be a final word. Mr Okotai's brother was sentenced similarly for a protest on his part designed to prevent the use of Aitutaki Airport on Sundays. You have been sentenced, as I have just done, to come up for sentence if called on for land protests on Manihiki. Both cases have attracted a significant amount of local publicity. People who might be minded to protest at Airports in the future in a way that jeopardises aircraft movements on those Airports should not think that the inevitable result will be that they are simply called upon to come up for sentence. These are serious issues involving the safety of all air travellers and if persons are minded to protest similarly in the future they should know that they are unlikely to be dealt with as leniently as Mr Okotai's brother and the three of you. Stand down.

Hugh Williams J