

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

CR NOS 583–584/2021

POLICE

v

MIKAELE ROKOSUVA LEAWERE

Hearing date: 1 September 2022

Counsel: Ms J Crawford for Crown
Ms L Rokoika for Defendant

Sentence: 1 September 2022

SENTENCING NOTES OF THE HON. JUSTICE C GRICE

[1] Mr Leawere, you appear for sentencing on two charges of common assault.¹ Each carries a maximum penalty of one year imprisonment. For the purposes of sentencing the Court must accept all the facts that are essential to a plea of guilty or a finding of guilt, and I base my sentencing today on the Statement of Facts which has been filed.

[2] The Statement of Facts indicate that in the early hours of 20 November 2021, Mr Leawere went back to a resort where he was staying and decided to look for his friends. He went into a villa where the defendant touched the victim, who was asleep in the sitting room area. When she woke up he put his fingers to his lips as if to say, "Keep quiet", the victim was scared but did not do anything. Then the defendant went

¹ CR 584/21, common assault under s 216 of the Crimes Act 1969; CR 583/21, common assault under s 216 of the Crimes Act 1969.

into the bedroom in the villa where the second victim and her partner were sleeping; again, he put his hand on the victim's thigh but she woke up. She was very scared and did not say anything. Mr Leawere then left the villa. The first victim locked the doors and was about to go to sleep when she saw him again at the window. She woke the others up and the second victim's partner chased the man and caught him. When Mr Leawere was interviewed by Police he said he had been looking for a toilet, and at the time he was clearly very intoxicated.

[3] The Crown says that Mr Leawere is entitled to credit for an early guilty plea, and it agreed with the recommendations in the Probation report as to sentencing.

[4] Ms Rokoika, for Mr Leawere, points to the fact that this is a young man working and making his first appearance. She produces references, which are very good, and Mr Leawere has family support. Both of the complainants accepted the apologies and, in fact, one of them wanted to withdraw the charges.

[5] The reasons given for the offending are essentially that Mr Leawere was very intoxicated. The Probation report recommends a sentence that he be ordered to come up for sentencing if called upon within a period of 12 months. Counsel for Mr Leawere also seeks a discharge without conviction, essentially on the basis that he has employment in New Zealand, which I will deal with later.

[6] Turning to consider the offending. The charges are relatively minor common assault charges and do not involve any suggestion of indecency. The defendant was remorseful and the actions were out of character. Nevertheless, there were two events and the defendant again came back to the villa. He was heavily intoxicated.

[7] Otherwise, Mr Leawere, from the references that I have before me, is a hardworking man with family support.

[8] In this case I have the views of the victim, which are supportive of the defendant. They both accept the apology and express their forgiveness. It is also Mr Leawere's credit that he entered an early plea and did not deny the offending, so

he did not put the victims through lengthy and difficult hearings. He has showed genuine remorse.

[9] Ms Rokoika, for Mr Leawere, has pointed out the principles of sentencing and noted that I must consider the gravity of the offending and the culpability of the offender, as well as the desirability of consistency with sentences for similar offending, personal circumstances of the offender, and mitigating and aggravating factors. She has dealt with those in turn. The sentencing guidelines require me to consider deterrence, prevention, rehabilitation, and also express the views of the community in relation to this type of offending.

[10] I am mindful that a process in the nature of restorative justice has been undertaken successfully in this offending and it appears, in the circumstances, an appropriate process to have taken place. There is no criticism of the proactive way in which that has been undertaken, and the Crown are supportive of that process in this case.

[11] Therefore, particularly given the youth of the offender, his family commitments and lack of previous convictions, this being out of character, I propose adopting the recommendation of the Probation Service, which is endorsed by the Crown. That is the sentence that Mr Leawere be ordered to come up for sentencing if called upon within a period of six months, under s 113 of the Criminal Procedure Act.

[12] I will now address the application which was made for discharge without conviction.

[13] While this offending is relatively low-level, nevertheless it involves two incidents and there could have been a third. Alcohol is no excuse for this type of offending.

[14] In support of an application for discharge, Ms Rokoika put before me a job offer in New Zealand which, although it is dated a year ago, she advises it remains extant. The grounds for the application for discharge without conviction were that a conviction affect visa, travel, and employment opportunities.

[15] However, there is no evidence of that. The offending, is common assault, and given the nature of the sentence I have imposed, I would require specific evidence to support any argument based on the convictions affecting employment or travel opportunities.

[16] Ms Rokoika referred me to the decision in *Police v Katoa*.² The Crown advise me that this is under appeal at present. It was a case where a discharge without conviction was made that there was a contribution made to a charity. The decision indicates there was a wealth of material before the Court which it led it to the conclusion that a discharge was appropriate.

[17] In the course of the decision the Chief Justice referred to the tests for discharge without conviction. He said:

[26] Mr Short submits that the discharge without conviction would be appropriate and refers me to the New Zealand Sentencing Act 2002, ss 106 and 107, which say that a discharge without conviction can be entered if the direct and indirect consequence of the offending are out of all proportion to its gravity. There is a limit to the extent to which one can import Statute rule from another country in the Cook Islands, but it is a useful guide as to how a discharge without conviction application should be approached.

[18] The Chief Justice went to say, at [27], where he refers to *R v Hughes*³ and *Police v Rakacikaci*⁴:

In the latter a discharge without conviction was given because the defendant would lose his job if convicted. That may not be enough to warrant a discharge without conviction in most circumstances.

[19] Therefore, I apply those principles to this case. The useful guide, as the Chief Justice described it, was:

Is a discharge without conviction warranted because the direct and indirect consequences of the offending are out of all proportion to its gravity?

² *Police v Katoa*, CKHC CR 87–90/2022, 22 April 2022, at [26].

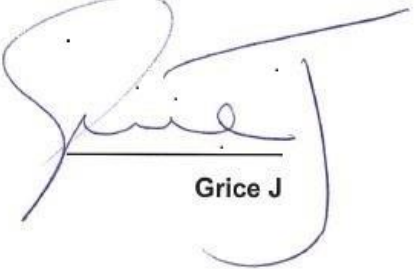
³ *R v Hughes* [2009] 3 NZLR 222.

⁴ *Police v Rakacikaci* CR 532 & 534/19, Keane J, 1 September 2020.

[20] In this case I come to the conclusion that the direct and indirect consequences based on the evidence before me are not out of all proportion to the seriousness of the offending.

[21] This type of offending must be denounced and to discharge the defendant would send the wrong message in the circumstances to allow a discharge in view of the fact I do not have the evidence before me to justify it. Therefore, the application for a discharge without conviction is refused. On each charge the defendant is ordered to come up for sentencing if called upon within a period of six months.

[22] Thank you, Mr Leawere, you may stand down.



Grice J