

and bananas. The prisoner and the other students were on the back of the truck. The other teacher was in the cab of the truck. On the return journey, the prisoner discovered that some of the boys drank the coconut and he became frustrated. Whilst they were driving along the prisoner told the complainants to lie down on coconut fronds that had been collected. He told one of the complainants A to take off his pants and instructed another boy B to rub a banana on A's buttocks. He did so because he was scared of the prisoner. The prisoner gave his mobile phone to a third boy C to take photos and record the incident. He then told B to take off his pants and for A to rub the banana on his buttocks. Again A complied with the instruction because he was afraid to do so. He then ordered a fourth boy D to take his pants off and for B to rub his buttocks. The accused then took the banana and inserted it into D's anus. After this, he told another boy E to take off his pants and he told B to place the banana in E's anus which he did because he was afraid. The complainants reported the matter to Police on the 16th September 2015. The prisoner was co-operative and admitted to the offending.

- [4] By his offending, the prisoner has admitted that his actions amounted to sexual assaulting the boys who were all under the age of 12. At the relevant times they were in his care. During the course of the offending, he was responsible for instructing one of the boys to sexually violate the anus of another, and he himself engaged in this activity with another child. Others were also indecently assaulted by ordering their pants to be removed and other boys touching them on the buttocks with a banana. I consider these are serious departures, from what could be viewed by members of the Tongan community or for that matter any other community, of the ordinary standards of decency and conduct that would not be expected of a school teacher having care of boys still of a young age. It was to say the least humiliating conduct. It involved not merely an assault on the

buttocks of boys but sexual violation of the anal areas of two of his young students. I was informed by his counsel there was no injury to the boys and by counsel for the Crown that the boys did not make complaint but the prosecution arose through another boy telling his parents what had happened. I was also advised that one set of parents of a boy who was violated were talking of taking their child out of this school. I do not consider this is conduct which as the probation report opined was for fun's sake that the boys would shame each other.

- [5] The Court has an obligation to protect children against conduct of this kind. It is impossible to assess what, if any, long term effect this kind of offending will have on the boys but the sentence imposed must be one which protects young and vulnerable people from any kind of sexual exploitation, and deter others minded to use their authority, such as being a school teacher for such a purpose. The Crown cited to me a decision of *R v Atonio Tavake* CR152/11 where an accused pleaded guilty to five counts of indent assault on girls aged between 8, 9 and ten years old respectively. The defendant was a first offender and aged 31. These incidents involved at different times fondling the breasts and vagina of the children. The trial Judge regarded the sexual offending as worthy of a starting point of 5 years. He sentenced the defendant there to 4 years in prison with the last 18 months suspended. Because of the plain breach of trust that was involved here and the fact that the sexual activity involved actual anal penetration on two occasions, and also the fact that the conduct was humiliating and in the presence of other boys, I consider a sentence of imprisonment is required; however I consider the offending was not marked with the same degree of premeditation as in *Tavaki* where the offending was engaged in over different periods. A starting point which adequately reflects the breach of trust and the serious nature of the offending involving anal violation of children under the age of 12 and in the

presence of others is in my view 3 and half years imprisonment. The starting point would have been higher had there been evidence of injury to either of the boys where there had been anal interference.

[6] I have read the probation report which suggests that the prisoner was otherwise a person of good character. Indeed, he came from a good family with parents involved in teaching and in religion and he had done well at school in Niuafu'ou before also doing well at school in Tongatapu and working for a bank before embarking on teaching. He has also been extensively engaged in various community works and as a youth leader. The references I have read suggest his conduct was aberrational and an unlikely event to be repeated. That said any sexual offending with children by a person in trust is serious and must be responded to by the Courts appropriately. He has no previous convictions, and by his plea he has saved the boys any further humiliation. He has expressed contrition for his offending and I am informed has rendered an apology. His counsel, Mr Tu'utafaiva placed before me all the mitigating factors I having mentioned. Taking into account all the factors I have mentioned and also his inexperience as a teacher at the time, I allow mitigation of twenty months imprisonment.

[7] I impose, accordingly, on each of counts 4 and 5 sentences of one year and ten months. On the other counts of indecency (counts 1, 2 and 3), I impose sentences of 4 months imprisonment on each to be served concurrently with one another and with the sentences on counts 4 and 5. The sentences of imprisonment are backdated to his period on remand in custody prior to sentence.

[8] I now turn to the issue of suspension. Mr Tu'utafaiva submitted that I should fully suspend his sentence but Ms Moa for the Crown expressed concern with this. Mr Tu'utafaiva emphasised

his youth, lack of experience and expressed the view that the offending was out of character and unlikely ever to reoccur. In my view, it would not, however, be appropriate or send the correct message to the community to fully suspend the sentence bearing in mind that this is sexual offending with children by a person in trust. I consider, however, the prisoner by his early guilty pleas, his co-operation with police and his expression of remorse and with no previous convictions and the fact that the offending was out of character is a good candidate for rehabilitation and qualifies for part of the sentence to be suspended. I accordingly suspend the final 12 months of his imprisonment on both counts four and five on the following conditions that he;

- a. Commit no further offences punishable by imprisonment for the period of suspension;
- b. He is placed on probation for that period;
- c. That he attend a course on child abuse under the direction of probation and the Women and Children's crisis centre during the period of his suspension.



C. B. Cato

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J U D G E

DATED: 8 MARCH 2016