**In the Court of Appeal of the Cook Islands**
**Held at Rarotonga** **CA No 11/2018**

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| | **IN THE MATTER** | of an appeal against sentence under section 67 of the Judicature Amendment Act 2011 |
| | **BETWEEN** | **CHRISTIAN TEMARU GOODWIN**<br>Appellant |
| | **AND** | **THE CROWN**<br>Respondent |

**Coram:** Williams P
Barker JA
Paterson JA

**Hearing:** 3 April 2019
**Judgment:** 3 May 2019
**Counsel:** Mr J Wiles & Mr W Rasmussen for the Appellant
Mr S C Baker (Solicitor General) for the Crown

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**JUDGMENT OF THE COURT OF APPEAL**

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**Solicitors:** Rasmussen Law PC for Appellant
Crown Law Office for Respondent

## Introduction

[1] On 16 November 2018, after a three-day trial before Keane J, Mr Christian Temaru Goodwin (**the appellant**) was convicted by a jury of three charges in the High Court, namely:

a) One charge of wounding with intent to cause grievous bodily harm pursuant to s 208(1) of the Crimes Act 1969 (**the Act**) (which carries a maximum penalty of 14 years' imprisonment);

b) One charge of wounding with intent to injure pursuant to s 208(1) of the Act (which carries a maximum penalty of 7 years' imprisonment); and

c) One charge of wounding with reckless disregard for the safety of others pursuant to s 208(2) of the Act (which carries a maximum penalty of 7 years' imprisonment).

[2] The appellant filed a notice of appeal against conviction on 22 November 2018.

[3] On 23 November 2018, Keane J sentenced the appellant as follows:

a) Wounding Mr Tefaatau Ataera with intent to cause grievous bodily harm – 7 years' imprisonment;

b) Wounding Mr Jarrod Tangaroa with intent to injure – 2 years' imprisonment; and

c) Wounding Mr Al Jermaine Epati with reckless disregard for safety – 18 months' imprisonment.

[4] The sentences were to run concurrently. The total sentence was 7 years' imprisonment. Keane J took into account time in which the appellant had spent in custody.

[5] As at the date of sentence, the appellant had been remanded in custody for 41 days from the date of the offence on 10 February 2018 to the date of his release on bail on 22 March 2018, and a further 21 days from the date of his conviction until he was granted bail pending appeal.

[6] On 11 December 2018, the appellant filed an application for release on bail pursuant to s 72(1) of the Judicature Act 1980-81 (as amended by the Judicature Amendment Act 2011). On 14 December 2018, the Judge decided on the papers that the appellant should be granted bail until the hearing of the appeal.

[7] On 4 March 2019, the appellant's grounds of appeal against conviction were amended to include an appeal against sentence.

[8] At the commencement of the hearing of the appeal on 3 April 2019, the appellant withdrew his appeal against conviction.

**Appeal against sentence**

[9] The appellant appeals against his sentence on the grounds that the sentence imposed was manifestly excessive.

*Factual background*

[10] The unfortunate turn of events that played out at approximately 2:00am on 10 February 2018 outside the Rehab bar in Avarua happened in circumstances that deteriorated very quickly.

[11] Half an hour earlier, inside the bar, there had been a standoff between the appellant's friend, Mr Teina Tane and Mr Epati. The appellant claimed that he had tried to make peace between the two but was told to "watch his

back". As a result of the altercation., security personnel then ejected Mr Tane who remained at the bar door until Mr Epati exited the bar.

[12] The evidence as to what immediately followed was disputed. The two versions of events are set out below:

a) The Crown's case was that there was another standoff between the two which came to a head at a bus stop a short distance away. The Crown said that Mr Tane challenged Mr Epati and there was an exchange of blows following which Mr Tane was knocked to the ground. The Crown said that the appellant reacted by using the knife on Mr Epati. Mr Ataera, who was across the road, then entered the fray and punched the appellant in an attempt to protect Mr Epati. The appellant wounded Mr Ataera in response using the knife. Having witnessed the events, Mr Tangaora tried to protect Mr Ataera and was stabbed by the appellant in the process.

b) The appellant's case was that Mr Tane was, in his drunken state, taunted and lured to a bus-stop. He was then set upon by at least three people. He was put to the ground and assaulted. The appellant said that he reacted by trying to get the attention of security but was prevented from doing so by people exiting the bar. He then grabbed a large knife from a nearby food-stall. By the time he got to the bus stop, Mr Tane was on the ground being assaulted by Mr Epati and two others. When he tried to extract Mr Tane, he became a target himself whilst left in a squatting position. He responded by punching his way back to his feet with the knife in hand but was then knocked to the ground at which point he used the knife in order to defend himself.

[13] Keane J said at sentencing that the appellant initially attempted to defend his friend, Mr Tane (and then subsequently to defend himself), at the time he picked up the knife. He was genuinely fearful that there could be an

attack on him, not just confined to those three victims whom he ended up wounding.

[14] The jury found that the appellant wounded Mr Ataera with intent to cause grievous bodily harm. Mr Ataera suffered life-threatening wounds including a 13-centimetre-long full thickness wound to the lower back of his head; a 12-15-centimetre-long and deep wound to his left arm; a 5-centimetre-long and deep wound to the left base of his neck, just short of major blood vessels and a 4-centimetre-long and deep laceration to the front of his right shoulder. Mr Ataera lost 2 litres of blood for which he required transfusions. As to the lasting consequences of the injuries, Mr Ataera could not move his neck for a month, suffered severe headaches and tenderness, had great difficulty sleeping in a natural posture and was left with a large obvious scar on the back of his head. Additionally, he was unable to return to school for another month or more, suffered a variety of financial costs, suffered emotional distress and continues to live with the fact that he almost lost his life.

[15] The appellant also wounded Mr Tangaroa with intent to injure him by stabbing him in the shoulder, resulting in a curved wound which was 3 centimetres long and 7 centimetres deep. Mr Tangaroa was affected for 4 months when he was unable to work; further his interest in music or play rugby.

[16] The appellant also wounded Mr Epati with reckless disregard for the safety of others. Mr Epati suffered a significant and disfiguring cut across the bridge of his nose. He claims to have also suffered a migraine and concussion from being punched. He was unable to carry out any physical activity for a period of 2 months and has been troubled since by the concern that his life could so easily have been taken.

[17] Shortly after the incident, the appellant went to the police station and gave a statement to the police. This statement differed somewhat from his evidence at trial but since the appeal against conviction ahs been

withdrawn, it is not necessary to traverse the differences between these two narratives.

*Sentence imposed by Keane J*

[18] Keane J imposed concurrent sentences because the three offences happened "within a very short time of each other as things were moving very rapidly". In His Honour's words, the offending was "part of a single incident".

[19] His Honour recognised that any sentence imposed should seek to:

a) hold the appellant accountable for the harm done;

b) deter similar offending;

c) protect the community;

d) assist in the appellant's rehabilitation and reintegration;

e) take into account the seriousness or gravity of the offending; and

f) reflect the totality of the offending.

[20] Wounding Mr Ataera with intent to cause him grievous bodily harm was the most serious charge and therefore the lead offence for the purpose of sentencing. For this offending, Keane J relied on the guideline judgment of the New Zealand Court of Appeal in *R v Taueki* (2005) 21 CRNZ 769. The Court of Appeal in that case set starting points for sentencing in three bands, namely Band One (3 to 6 years), Band Two (5 to 10 years) and Band Three (9 to 14 years).

[21] Placing the lead offending at the upper end of Band Two and on the cusp of Band 3, Keane J took into account the following factors in particular:

a) The appellant consciously picked up a dangerous weapon in the spur of the moment in a state of fear;

b) The appellant knew what the weapon was and what it could do;

c) The four wounds inflicted on Mr Ataera were very significant and life threatening involving substantial blood loss with lasting consequences; and

d) The victim could not move his neck for a month, suffered severe headaches, had great difficulty sleeping in a natural posture, was left with a large obvious scar, was unable to return to school for an extended period, suffered a variety of financial costs, suffered emotional distress and now lives with the fact that he almost lost his life.

[22] As to the appellant's intent, Keane J noted the following:

> [22] By its verdict the jury clearly accepted that you did wound two of the three intentionally and one recklessly. The jury clearly found that the Crown had negated your claim of self-defence to the point where it was sure.
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> [23] What remains unclear, naturally enough on the jury's verdict, is why it rejected your defence. That could have been because it was convinced that you wounded intentionally or recklessly. Or because it accepted you acted in defence of yourself and Mr Tane, but went too far.
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> [24] I find on the evidence that it is more likely that you set out to defend Mr Tane, and then yourself, by recourse to the knife. But I also find you had it beforehand and that the group, as and when you began to deploy it, was, as on the Crown evidence, still confined.
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> [25] The fact that the three actively involved did suffer their injuries suggests that when you were waving the knife around ,the group was still confined. Equally, the fact that Mr Tane suffered relatively slight injuries,

> and you no apparent injuries, suggests that he and you were not subject to any sustained and mounting assault.
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> …
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> [27] So I accept your defence to the extent that I think you intent was to defend Mr Tane and yourself. I think you did have genuine fear that there could be an enlarging attack on him, not just confined to those whom you wounded. But I find that, at the time you intervened, it was when the group was equally confined.

[23] Although Keane J considered that the lead offending could justify a starting point in the vicinity of 9 to 10 years' imprisonment, His Honour adopted a lower starting point of 7 years' imprisonment to reflect the fact that (i) the appellant's initial intent was to act in self-defence and (ii) everything got "out of hand so very rapidly".

[24] Applying the totality principle, Keane J applied a 1 year uplift to the starting point of 7 years' imprisonment in recognition of the other offending.

[25] In relation to the offending against Mr Tangaroa (wounding with intent to injure), His Honour relied on the guideline Court of Appeal judgment of *R v Nuku* [2012] NZCA 584. In so doing, Keane J noted that the wounds inflicted were serious, curved and deep, affecting Mr Tangaroa for four months. Over this period, he was unable to work, further his interest in music or play rugby. This offending fell within the "cusp of bands 2 and 3" and attracted a starting point of 3 years' imprisonment.

[26] In terms of the offending against Mr Epati (wounding with reckless disregard for the safety of others), Keane J highlighted the significant wound to the face with the "very real" potential for it to have been much worse. Aside from also suffering a migraine and concussion, Mr Epati was unable to participate in any physical activity for 2 months. This offending attracted a starting point of 2 years' imprisonment.

[27] As to mitigating factors, Keane J accepted that the appellant was remorseful and regarded the offending as out of character. Indeed, His Honour considered the appellant to be of good character and highlighted three factors in particular:

a) The appellant is a creative and talented graphic designer and musician who has contributed impressively to his community and church;

b) The appellant is a responsible parent to 2 young daughters; and

c) The appellant is a loyal and protective friend.

[28] Keane J accepted that, against that background (and in light of the appellant's submissions on sentence), the appellant was entitled to discounts from his primary offending. In that regard, the sentence for the lead offending was reduced by 1 year (to 7 years' imprisonment). For the offence of injuring with intent, the appellant was sentenced concurrently to 2 years' imprisonment. As for wounding Mr Epati recklessly, the appellant was sentenced concurrently to 18 months' imprisonment.

*Appellant's submissions*

[29] Leading counsel for the appellant focused on the offence of wounding with intent to cause grievous bodily harm. Counsel submitted that a much lower starting point was justified in respect of this offending on the ground that the appellant was "clearly acting at the outset in self-defence". Counsel acknowledged however that "Mr Ataera sustained significant and serious wounds".

[30] Counsel referred to a variety of cases in support of the imposition of a lower starting point. He emphasised that there should be consistency in the Court's approach to sentencing in similar cases.

[31] Mr Wiles submitted that Keane J erred in applying the tariff guidelines in *R v Taueki* and *Nuku v R* when fixing the appropriate starting point.

*The Crown's submissions*

[32] For the Crown, it was submitted that *R v Taueki* and *Nuku v R* provided useful sentencing guidance for convictions involving grievous bodily harm offending and for injuring with intent respectively.

[33] The Solicitor-General acknowledged that Keane J sentenced the appellant on the basis of the facts as he had found them to be, including recognition that the appellant's initial intention was to act in self-defence.

[34] The Solicitor-General submitted that the comparable authorities referred to in the written submissions of the appellant did not provide much assistance to the Court because only 1 out of the 7 cases (namely, *Police v Anthony Kakino* CR 11/2005, High Court, 15 June 2007) concerned offending for which the maximum sentence was 14 years' imprisonment. *Police v Nicholas* CR No 251/18, High Court, 1 August 2018 and *Crown v Labaibure* CR No 521/15, High Court, 25 November 2016 concerned offending for which the maximum sentence was 10 years' imprisonment while *Police v Mahia* CR No 355/18, High Court, 3 August 2018; *Crown v Katuke* CR No 600-607/17, High Court, 12 May 2017; *Crown v Katuke* CR 598/16, 12 May 2017 and *Police v Maxwell* CR 384/17, High Court, 7 December 2017 related to offending carrying maximum sentences of 5 or 7 years' imprisonment.

[35] In summary, the Solicitor-General submitted that a starting point of 7 years' imprisonment was appropriate, and it was appropriate for Keane J to uplift the starting point to 8 years' imprisonment to take account of the other two offences. The final sentence imposed was reduced to 7 years' imprisonment to take account of the mitigating factors personal to the appellant and the time spent on remand.

*The Court's analysis*

[36] The careful sentencing remarks of Keane J incline us to the view that the sentence imposed may have been appropriate in a New Zealand context- albeit rather at the upper limits. Particularly when His Honour found that the appellant had acted in self-defence which had been negated as a defence because the appellant "went too far" despite his initial intent to defend himself and his friend. The prime question for this Court is whether the sentence was appropriate in the Cook Islands, given the several statements by sentencing High Court judges that New Zealand sentencing precedents do not necessarily apply in the Cook Islands.

[37] For example, Paterson J, sitting in the High Court, in *Police v Kakino* (11/2005, 15 June 2007) noted at [14] that New Zealand tariffs did not apply in the Cook Islands. Potter J in *Crown v Katuke* (600-601/16, 253/17 12 May 2017) noted at [20] that the New Zealand case of *R v Taueki* could only be a guideline, albeit a helpful one.

[38] The notion that sentences in the Cook Islands should be lower than sentences for comparable offending in New Zealand was highlighted in the most recent case of sentencing for assault causing grievous bodily harm, *Police v Virivirisai* (277/18, 597/18, 22 March 2019). There, Hugh Williams CJ imposed a sentence of 2 years and 9 months' imprisonment after conviction by a jury. The defendant in that case, whilst drunk and thinking that the victim had made an indecent approach to his partner, bashed the victim who was asleep and intoxicated on a balcony. After further assaults on the unresponsive victim, the defendant threw him off the balcony where, after a fall of 2.8 metres, he landed head-first on hard sand. He was by that stage unconscious. The defendant initially did nothing to help the victim, but, eventually, he poured water over him and dragged him to sit against a post to stop him from choking from vomit. The victim suffered a spinal cord injury and was initially rendered quadriplegic. He was flown to Fiji for treatment at considerable cost to himself. Fortunately,

the victim made a good recovery (although he still suffers from numbness and pain).

[39] The Chief Justice in his sentencing remarks stated, inter alia:

> [27] The Crown recommends that you be sent to jail. They point to the normal principles of sentencing and to a case called *R v Taueki* – a New Zealand Court of Appeal decision to which I will refer in a moment – to suggest that your offending was between bands one and two in that decision. There was a significant level of violence which could have been fatal. Mr Vero suffered significant injuries and has had considerable cost as a result of your actions. Even if I were to regard your actions as provoked their effect on the victim was still very considerable. He was vulnerable in that he was unresisting. Any question of drunkenness should largely be put to one side.
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> [28] Mr George submitted, correctly, that there should be no arithmetical translation of the *Taueki* decision to the Cook Islands. In fact that position is preserved by the Constitution. He points out, also correctly, that this was not planned criminal conduct and points to your evidence that you only intended to scare the victim but lost your grip.
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> …
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> [32] In the search for the appropriate sentence to impose upon you, I need to take into account the gravity of the offending and its seriousness. Those factors are evidenced by the maximum sentence of 14 years for conviction under s 208(1) of the Crimes Act 1969. I need also to take into account the effect on the victim and do what I can to provide reparation or to meet his interests. I also need to impose a sentence which is the least restrictive outcome. But you need to be held accountable for the harm done to the victim and to the community at large as a result of your actions. A sense of responsibility needs to be promoted in you and, of course, the sentence needs to denounce your conduct and deter others from engaging in similar activity.

[40] He then discussed the classification of violent offending set out in *Taueki* and the later New Zealand Court of Appeal case in *R v Nuku* (at [33]–[41]). He considered as useful the compendium of aggravating and mitigating factors found in those authorities. He later said:

> [44] As I have said, we cannot simply translate the sentencing levels in *Taueki* and *Nuku* to the Cook Islands but the bands and the listing of the aggravating and mitigating features are helpful.
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> [45] Your offending, as I have said, comes on the border between bands one and two and, having reached that view, in all the circumstances and on the facts in the case, it seems to me that, in the Cook Islands, a non-custodial sentence would, almost always, be inappropriate. Therefore, the starting point has to be consideration of the imposition of a term of imprisonment.
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> [46] For the reasons mentioned, there is considerable violence, there are serious injuries, there is long-lasting and enduring damage to a vulnerable victim. And whilst there may have been some provocation it should be regarded as slight.
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> [47] It seems to me that, although generalisations are always perilous in this area because of the necessity to impose sentences that are appropriate to individual circumstances, GBH offending in the Cook Islands in band one should have a starting point spanning probably from an unlikely non-custodial sentence to imprisonment for about 1½ to 2 years; band two starting points should be in the range of imprisonment from 1½ to 2 years to about 3 to 3½ years; and band three starting points would run from 3 to 3½ to probably 5 or 6 years or in very bad cases more than that.
>
> [48] Your offending is borderline band one and two, so, as I said, a non-custodial sentence is not appropriate whether one begins with *Taueki* or *Nuku* or one looks at the circumstances of this offending alone.

> [49] In my view, the starting point for imprisoning you is about 2½ years' imprisonment. There are the aggravating features mentioned: the bashing, the sweeping across of an unresponsive victim, the carelessness and intention in throwing him over the balcony and, to a lesser degree, the lack of compassion for a time. That suggests that the 2½ year starting point should be increased to about 3 to 3¼ years.
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> [50] But there are mitigating features – the drunkenness, although that is of little consequence in sentencing and the imagined slight by Mr Vero. Those reduce the sentence.

[41] He imposed a sentence of 2 years and 9 months' imprisonment but said that reparation orders would be pointless (although the victim had incurred almost $50,000 of expenses mainly because of his evacuation to Fiji for which he had to borrow from his employer).

[42] The Chief Justice provided no reasons as to why the New Zealand sentencing levels ought not to be translated to the Cook Islands – apart from the reference to the Constitution. Violent behaviour in the Cook Islands is unfortunately not uncommon, just as it is not uncommon in New Zealand.

[43] We note that the maximum penalties for the various gradations of violent offending are the same in the Cook Islands as they are in New Zealand and that this Court has not had the occasion to date to issue a "tariff judgment" for serious assault sentencing. We have indicated undue leniency in rape sentencing in *R v Katuke* (108/07, 13 April 2007) and for cannabis sentencing in *Police v Watcher* [2018] CKHC 8. Some of the High Court sentences supplied by counsel in this appeal might well have been candidates for a Crown appeal against a lenient sentence.

[44] The only judicial reason for imposing lesser sentences in the Cook Islands cases to which we are informed is found in the sentencing remarks of

Doherty J in *Police v Nicholas* (251/18, 1 August 2018) where, in the context of discussing a discount for a guilty plea, he said at [24] and [25]:

> [24] In New Zealand the guiding case for the discount for a guilty plea is a case called the *R v Hessell*. And the highest Court in New Zealand, the Supreme Court, on appeal changed the approach of the Court of Appeal which said there for a first-up guilty plea there ought to be a reduction of one third of the sentence. And the Supreme Court said that is too much, it should be no more than a quarter of the sentence. As far as I am aware there is no decision on that approach by the Court of Appeal of the Cook Islands. It may well have agreed with sentences where a quarter was deducted but there has been no discussion about it and tariff guidance to this Court.
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> [25] I think that the Cook Islands is slightly different to New Zealand and that a one third deduction is appropriate. For number of reasons the cost of trials and bringing people to justice is high in this country. Frankly, the conditions of imprisonment are perhaps more extreme than they are in New Zealand. And the culture of this country is different. I think this country is more, the people are perhaps more forgiving. And for that reason I think that a third deduction is an appropriate start, or appropriate for those who plead guilty at the first opportunity; to give an incentive, to get the matter dealt with, without being too much inconvenience to victims, to witnesses and to the State.

[45] Doherty J referred also to art 46 of the Constitution which reads as follows:

> **[New Zealand Parliament not to legislate for the Cook Islands**
>
> **46** Except as provided by Act of the Parliament of the Cook Islands, no Act, and no provision of any Act, of the Parliament of New Zealand passed after the commencement of this Article shall extend or be deemed to extend to the Cook Islands as part of the law of the Cook Islands.]
>
> As to the continuation in force of Acts of the Parliament of New Zealand that, pursuant to the original Article 46, were in force in

> the Cook Islands immediately before the date of the commencement of the Constitution Amendment (No 9) Act 1980-81 (CI) and of regulations made by the Governor-General in Council that, pursuant to the original Article 88, were in force immediately before that date, see s 22 of that Act, post.

[46] Article 46 may have been what the Chief Justice was referring to in *Police v Virivirisai* referred to earlier.

[47] Whilst it is difficult in principle to say that two jurisdictions with identical penalties for serious violent offending should have sentencing regimes distinguished by levels of leniency, we consider that there are some grounds for such differentiation and an argument for making the Cook Islands regime slightly more lenient. Consistency is one of the reasons for allowing the sentence appeal and reducing the period of imprisonment.

[48] The considerations noted by Doherty J in *Police v Nicholas* at [24] and [25] are relevant. Indeed, the virtue of forgiveness has manifested itself in this case in the generous attitude of one of the victims. The Constitution makes it clear that the Cook Islands is not blindly to follow New Zealand precedent and indeed, this Court has not done so. We say little about the prison regime in the Cook Islands other than to note the views of a highly experienced judge in criminal matters (Doherty J) and to observe that the penal system in the Cook Islands cannot possibly offer the same opportunities for rehabilitation and training of prisoners and better accommodation and facilities for them as compared to those offered by a larger and wealthier country with a much bigger population and taxation base.

[49] We consider too that Keane J did not take full account of the fact that the defence of self-defence was initially justified but was negated by the appellant's over-active subsequent conduct. Had there been no initial justification for self-defence in the appellant's overall conduct, then the sentence might have been even higher. We wonder too whether Keane J

placed sufficient weight on the appellant's good character, employment record and genuine remorse. Clearly, his young family will suffer from any lengthy prison term.

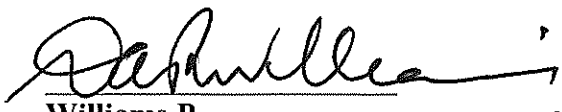
[50] So, we have come to the view that, mindful of the seriousness of the offending and the need for a deterrent penalty against criminal knife use, nevertheless the sentence must be reduced.

[51] The Chief Justice suggested a tariff which we consider was on the lenient side. We rule that, using the *Taueki* and *Nuku* categorisations, Band One should attract 1 to 3 years' imprisonment, Band Two, 3 to 5 years' imprisonment and Band 3, 5 years' imprisonment and upwards. Applying the bands in an evaluative way, as counselled by *Taueki*, the appellant's offending must come into Band 3 when the serious life-threatening injuries to the principal victim are taken into account plus the fact that two other victims were knifed, despite self-defence having been found by Keane J to have been initially justified, albeit exceeded.

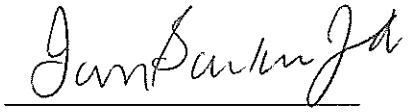
[52] For all of the above reasons, the appeal against sentence is allowed. The sentence imposed upon the appellant by Keane J on 18 November 2018 on the charge of wounding with intent to cause grievous bodily harm is hereby quashed and, in its place, a sentence of 5 years' imprisonment is imposed. The sentences on the other two charges remain and all three sentences are to be served concurrently, commencing from the date of hearing of the appeal on 3 April 2019.

[53] We have taken into account the periods in custody already served by the appellant prior to the hearing of the appeal. We note that with a 5-year sentence, he may be considered for parole at the half-way point of this sentence. If he had been sentenced to less than 5 years' imprisonment, he would not have been considered for parole until he had served two-thirds of the sentence. These calculations and derived from an agreed memorandum from both counsel supplied to the Court after hearing in

response to a request from the Court for elucidation of current parole practice in the Cook Islands.



**Williams P**



**Barker JA**

**Paterson JA**