

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

CR NO. 217/18

POLICE

v

PHYLLIS KOKAUA

Date: 14 September 2018
Counsel: Ms A Herman for the Crown
Mr M Short for the Defendant

SENTENCING NOTES OF THE HONOURABLE JUSTICE PATRICK KEANE

[9:38:18]

[1] Phyllis Kokaua, you appear for sentence for assaulting your 71 year old sister-in-law, Jane Kora, with intent to injure her, on 25 March 2018 at Tupapa. You pleaded guilty to this offence after your counsel had obtained disclosure.

[2] On the morning of Sunday, 25 March 2018, you waved down Ms Kora outside the Rakahanga Hostel, where you live and work, as she was driving home from church. Then, while she was still seated in her car, you punched her through the open driver's window three times to her face with a closed fist. You grabbed her hair. You were stopped from assaulting her further by your husband, her brother.

[3] Shortly after midday your offence was reported to the police, and Ms Kora was taken to hospital where she was examined in the early afternoon. She was found to have a dark blue bruise under her right eye, and soft swelling 5cm in size in her left frontal area. She was bandaged and given pain relief.

[4] The following day you were interviewed at the police station. You admitted your offence. You said that you were very angry with Ms Kora, because you understood she had been spreading bad rumours about you to other members of your family.

[5] The ultimate physical and emotional effect of your offence on Ms Kora was finally assessed in July 2018, some four months later. Ms Kora then said that the physical effects of your assault on her had lasted two weeks. But, emotionally, she said, she remained highly affected. She no longer felt safe.

[6] According to your presentence report, at age 55 this is your first offence; and it is out of character. You have been married for 34 years. You and your husband have five children. You have been a salesperson at Island Craft for 35 years. For 18 years you have been the caretaker of Rakahanga Hostel, where you are able to assist your people from the outer islands. You describe your life now as a blessing and very rewarding.

[7] Your report also says, however, that you are very strong minded and outspoken. You admitted frankly what you had done. You stood by it. You were very angry with Ms Kora. You accepted that assaulting her was wrong. But you wanted the rumours about you to stop. You attributed those rumours to her. By assaulting her you wanted to make them stop. Your report puts in issue whether you feel any remorse.

Sentencing principles

[8] The maximum sentence for your offence is imprisonment for three years, and two Cook Islands statutes govern what sentence within that maximum your particular offence warrants: the Criminal Procedure Act 1980-81 and the Criminal Justice Act 1967.

[9] In sentencing you, assisted also as I am by the Sentencing Act 2002 (NZ), I must impose on you a sentence which denounces and deters you, holds you accountable for the harm you have done, induces you to accept responsibility, assists you, and recognises the interests of your victim.

[10] In doing so I must take into account equally, moreover, the gravity of your offence, and its seriousness, and take into account as well what is known about the effect of your offence on your victim, Ms Kora.

[11] In the Cook Islands there is no tariff for your offence, assault with intent to injure. I must sentence you, therefore, assisted by the decisions of the New Zealand Court of Appeal, which set tariffs for violent offending there. They divide each category of violent offence into sentencing bands from least to most serious.

[12] The three bands applying to sentence for injuring with intent to injure, a more serious offence than yours attracting a five year maximum, were set by the Court of Appeal (NZ) in the first case relevant to your sentence, *Nuku v R* [2012] NZCA 584, [37]-[38].

[13] There is no equivalent decision relating to your offence, assault with intent to injure, which attracts a three year maximum. However, in *Tamihana v R* [2015] NZCA 169 the Court of Appeal held that the three *Nuku* bands apply analogously. The Court stopped short of fixing the starting points for sentence within each band.

[14] What is important, ultimately, as those two cases say, is the degree to which your offence, assault with intent to injure, was made more serious by the aggravating factors they identify for all such violent offending. And, I have to say, there are such factors aggravating your offence.

[15] Your offence is not, however, as serious as those in *Tamihana*, or in most of the cases it surveys, and for reasons I will come to I find the starting point for your sentence lies towards the top of band one, the least serious band, or on the cusp of band two.

Crown and defence submissions

[16] The Crown, having identified the aggravating and mitigating factors to which I am going to come shortly, contends that your sentence lies properly within the range between a sentence of probation, combined with community work, and a short sentence of imprisonment.

[17] To put that another way, the Crown contends that my starting point should be a short sentence of imprisonment, taking into account the aggravating features to which I will come shortly, but that the mitigating factors, to which I will come also, may justify a lesser and more remedial sentence.

[18] Your counsel contends that the sentencing purposes and principles I have identified, and the aggravating and mitigating factors, call for a sentence within the community, which balances the need to denounce your offence and deter you, but encourages you not to reoffend and healing within your family.

[19] In his submissions your counsel reminds me of the positions of responsibility you have held at the Duty Free store and at the Rakahanga Hostel for so many years, and that you are a leader of your community and a church elder.

[20] He also says, in contrast to your presentence report, that you deeply regret your loss of control. He confirms that you assaulted your sister-in-law because of rumours attributed to her about you which took a toll on you. They undermined your reputation.

[21] In 2016 he says there was an attempt within your church to bring these rumours to a halt at a meeting with a pastor and I have a letter from the pastor confirming that to be so. The rumours did not stop however and that is why you offended. He does not suggest you were justified. But he wishes me to understand, and the community also, that it resulted from a lengthy period of distress in your life.

[22] He has supplied me with a series of letters from people who know you in the community in your various capacities and speak very well of you. They too confirm that your offence was entirely out of character. Finally he says that, had you been allowed, you would have approached Ms Kora and apologised to her. But that was impossible before sentence.

[23] Against the background of those submissions I return to the aggravating and mitigating factors in a more general way.

Aggravating and mitigating factors

[24] The first factor, which to my mind may aggravate your offence, is not one the Crown identifies. It is that your offence may have been premeditated. You were outside the hostel when Ms Kora drove past on her way home from church. It may be that she did so every or most Sundays, and that you were waiting for her.

[25] If that is so, you may also have been waiting there intending to assault her and that would seriously aggravate your offence. But as I have said, the Crown does not contend that you were there deliberately. Nor is there any evidence as to how predictably Ms Kora drove past each Sunday or any Sunday. I put that aggravating factor to one side.

[26] The first aggravating factor the Crown does advance is that you assaulted Ms Kora, knowing her to be vulnerable because of her age, 71 years, and you assaulted her when she was highly vulnerable, seated in her car unable to protect or defend herself. That is a very real factor.

[27] The second aggravating factor the Crown advances is that your assault on Ms Kora was to her head; and assaults to the head are regarded very seriously because they can result in very serious injury, whether or not that is intended. That too is a very real factor.

[28] The third aggravating factor the Crown advances is also very real. Your assault on Ms Kora was significant in itself. You punched her three times to the head with a closed fist. You took hold of her hair. You threatened her. You might have assaulted her more severely had your husband not stopped you.

[29] As against those aggravating factors there are those that stand to your credit, as your counsel has emphasised to me in his very complete submission, which I accept fully as well. In short, as he says, at age 55 you appear for the first time in this Court for an offence of any description, and it is out of character with every other aspect of your life.

[30] There is also the mitigating factor, the second your counsel identifies which the Crown accepts, and that is you entered an early plea. That not merely made a trial unnecessary. It spared Ms Kora the ordeal of anticipating trial, and having to give evidence against you. I also accept that your plea is consistent with your remorse.

Conclusion

[31] Ms Kokaua, as your counsel himself says, you present a predicament on sentence. You assaulted your elderly sister-in-law, vulnerable because of her age and more so because she was trapped in her car, with full intent and force. It is very fortunate that she was not more seriously injured. She remains traumatised. That could well justify a short sentence of imprisonment.

[32] As against that you have offended for the first time and your offence was so completely out of character that a lesser sentence is justifiable. A remedial sentence in the community, combining community work and supervision, might also encourage you not to offend again, and benefit your sister-in-law, by leading to some level of reconciliation within your wider family.

[33] I convict you of your offence (in case you have not already been convicted). I sentence you to 6 months community work, and 12 months supervision, the two sentences to run in tandem, beginning on the same date.



Patrick Keane, J