

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

CR NO. 348/19

POLICE

v

TANGIMETUA TANGIMETUA

Date: 10 September 2019

Appearances: Snr Sgt F Tararo for Prosecution
Mr W Rasmussen for Defendant

SENTENCING NOTES OF THE HONOURABLE JUSTICE PATRICK KEANE

[1:01:31]

[1] Tangimetua Tangimetua, you appear for sentence for a single serious violent offence on 16 May 2019 at Avarua, maiming Rhett Henry with intent to injure him.

[2] The Crown summary, which you do not dispute essentially, says that you and your victim Rhett Henry were that night outside the Rehab nightclub shortly after it closed at midnight. He was outside talking to a young woman. You came out, according to the Crown's summary, and approached him and began to argue with him. He told you to go away in a very direct way. The young woman said goodbye to him and went to leave.

[3] Then, the Crown summary says, you pushed him and punched him once to the head. He fell to the ground on his knees. You grabbed him by the hair with your left hand and punched him two more times in the face with your right fist and you left.

[4] The outcome, the summary says, was that he sustained concussion and a fracture of his right orbit and rupture to his right eye and that, as a direct result of those

injuries, his eye had to be removed in New Zealand. The summary completes by saying that alcohol was a factor in this offending.

[5] As I say, you do not dispute that account essentially. But in your pre-sentence report, as your counsel submits is consistent with your statement, you say that Mr Henry had some responsibility for this incident himself.

[6] You accept that you did approach Mr Henry and the young woman as they were standing outside the nightclub. You agree that Mr Henry told you to go away very directly. You maintain you walked off but that, as you did so, he pulled your t-shirt and kept shoving you. You warned him and after he continued a second and third time, you assaulted him as he contends. It has been your position, I understand, that you did not learn until later how severely you had injured him.

[7] In short, you admit the essential offence but you deny the context within which it occurred in the way that I described. That does not in itself mean that I have an insecure basis on which to sentence you and I will now proceed to do so.

Victim impact statement

[8] I have a victim impact statement from Mrs Henry, Rhett Henry's mother. He has felt unable to make a victim impact statement. She has made an extensive one, describing the effect that the injury to her son's eye had on him and on the family.

[9] He underwent an operation in Auckland on 18 May. His eye proved unable to be saved and it was removed on 31 May. Then for the next seven weeks, his wound had to be dressed by his family. This was extremely painful for him and highly distressing to them. And, because he was in New Zealand and they were here and he had lost the ability to work and their work was interrupted, and there was travel between (the two places), losses and expenses accumulated. The Crown says they total \$14,000.

[10] Mrs Henry also speaks about the lasting effect on her son. He was active and engaged here in the Cook Islands, before the offence. He is now in a state of

depression, grieving, as a result of the loss of his eye and the effect that will have on him.

Pre-sentence report

[11] Your pre-sentence report is, as it relates to you, is highly favourable. You are aged 26. You had returned to the Cook Islands for your father's funeral. Your partner and your two young children aged 5 and 2 remain in Australia where you live.

[12] As a result of your offence, it appears your relationship will not now continue. But that apart you have been here without family support, and without work until the last week or so, and you have relied to a significant degree on the goodwill of your landlady.

[13] You have no previous convictions that have been disclosed. You accept and are remorseful for your assault on Rhett Henry subject to the way you have described it evolving. You have offered reparation. But that is largely symbolic of your remorse. You do not have any present means to make it.

Sentencing principles

[14] In sentencing you, I take account of the principles which always apply on sentence and which both Crown counsel and your own have identified to me.

[15] Essentially what I must do is impose a sentence on you which protects the community, holds you accountable for your offending and deters others. I must also, to the extent that I can, impose a sentence which enables you to rehabilitate and reintegrate with your family as soon as that may be practical.

[16] In your case however, the balance to be struck derives from the seriousness of your offending and the maximum sentences capable of being imposed.

[17] Maiming with intent to injure attracts, here in the Cook Islands, a maximum sentence of 7 years imprisonment. It is the same offence as that created by s 188(2) of the Crimes Act 1961 (New Zealand). And I rely on two guideline judgments of the

Court of Appeal of New Zealand, subject to a qualification which I will come to shortly.

[18] The first is *R v. Taueki*. There the Court of Appeal of New Zealand set guidelines for offences involving the infliction of grievous bodily harm, a more serious category of offending than the offence for which you appear, attracting a 14 year maximum.

[19] The Court set starting points for sentence in three bands. Band one: 3 to 6 years. Band two: 5 to 10 years. Band three: 9 to 14 years. And, which of those bands is to apply, the Court said, will depend on the presence or absence of identified aggravating features. They include (i) pre-meditation; (ii) serious injury; (iii) use of a weapon; (iv) attacks to the head.

[20] In *R v. Nuku* [2012], NZCA 584, the second decision of the New Zealand Court of Appeal to which I wish to refer, the Court working by analogy set equivalent bands for what is your offence, wounding with intent to injure. In Band one, *Nuku*, the least serious band, a sentence short of imprisonment can apply. In Band two, a starting point up to 3 years imprisonment. In Band three, a starting point between 2 to 7 years imprisonment.

[21] The critical distinction between offences involving grievous bodily harm and those involving injury is that in the former, the intent may be inferred from the injury. Whereas in the latter, the injury may not be a safe basis for inferring the intent. The injury may be greater than was intended. And that has been a live issue this morning.

[22] Recently, in *Goodwin v. R*, the Court of Appeal of the Cook Islands reviewed the *Taueki* bands relating to grievous bodily harm offences. The Court held that those bands, set in New Zealand, are too severe to apply in the Cook Islands. What the Court did was to reduce by half the maxima for the first two less serious bands.

[23] Then, as to the third band, Band 3, the most serious band, which now begins after the Court's review at 5 years and ends with the statutory maximum of 14 years, the Court held that equivalent restraint was called for. That was the illustrated by the

Court's decision on the appeal. The Court reduced the lead sentence from 7 years to 5 years.

[24] That case, as I say, relates to a much more serious category of offending than your offence and the Court said nothing about the *Nuku* bands which apply in your case. But, as the Crown accepts, the *Goodwin* approach is called for, and requires that larger account be given to the personal circumstances of the offender.

Crown submissions

[25] The Crown contends that while the first blow that you struck may have been impulsive, the second and third blows were not, and all three of them were fuelled by alcohol.

[26] Your first punch, the Crown accepts might well have been impulsive, but that reduced Mr Henry to his knees. The second two, when he was on his knees, were more deliberate because you took him by the hair and punched him. Aggravating your offence, also very obviously, is the extreme injury he suffered. As the Crown says you literally maimed him. You deprived him of the use of an eye.

[27] The Crown has referred me to two decisions of this Court. Neither is in point. They relate to different offences or they involve less serious injuries. At most they illustrate the reality that you must be sentenced for your offence with its own singular characteristics.

[28] Ultimately the Crown submits you sit within band 2 of *Nuku*, which attracts a maximum starting point of 3 years and the Crown contends that you should be sentenced, from a starting point, before any reductions are made, towards the top of that band.

[29] The Crown acknowledges that you are entitled to a one-third discount for your plea and that your personal circumstances on the *Goodwin* principle will also have a bearing.

Defence submissions

[30] Your counsel has emphasised to me in his submission how you came to assault Mr Henry.

[31] Mr Henry's account, as set out in the Crown submissions, was that you set upon him after he told you very clearly to go away and that he did nothing else. You say he actually did. He not merely told you to go away, he began to grab your shirt and he did that a number of times after you warned him off. That was when you assaulted him.

[32] Your counsel submits that this explains why you acted on the instant. It also shows that you acted without thinking about what you intended to do.

[33] He does not deny the reality of the three punches which you have admitted to but he has pointed to the fact that the injury that Mr Henry suffered as a result of the three blows could be attributable to your sheer strength. You are a steel-fixer, you are very strong, and any blow of yours is likely to be unusually strong. And that, he submits, is just the reality.

[34] He has pointed out to me that you have no previous convictions, and that you have family in Australia that you are anxious to return to. But you accept the reality that your offence is so serious that you do face a term of imprisonment here.

[35] You offered, he also says, reparation of perhaps \$2000. But you do not have that in your hands now. That is something you would hope to be able to pay later. (In the absence of an immediate ability, I cannot take it into account on sentence.)

Conclusion

[36] Your charged offence, maiming with intent to injure, does not assert that you intended to maim. If that had been your asserted intention you would have been charged with intending to inflict grievous bodily harm.

[37] Your intent was to punch. Your intent was to injure. It was not to deprive Rhett Henry of his eye. That said, it is a serious violent offence as I said at the beginning. And while you may differ from him as to how you came to punch him, that is ultimately secondary.

[38] He may say that you punched him without warning after he told you to go away. You may say, as you do, that it was only when he pulled your t-shirt three times that you punched him. You may even say, as you do, that you think that he may have thrown a punch at you as you were walking away, a punch you did not see. Whichever account is preferred and I take account of yours on sentence to give you that full benefit, it cannot begin to justify your offence.

[39] You have said yourself in your pre-sentence report that you could have walked away. But, of course, you did not. And while your first punch could be considered a reflex punch and in that sense impulsive, the next two could not be. And the cumulative effect of those three punches to the head had to be and was extreme.

[40] The result is then that your offence does have the aggravating features that place it in band 2 of *Nuku* towards the upper end. It was an attack to the head. There was serious injury. And while it was not a fully pre-meditated attack, it was an attack sustained past the point of reflex. The second and third blows were deliberate.

[41] I agree then with the Crown's submission as to where you sit for sentence as a starting point. I also, as I have said already, accept that this is out of character and that your remorse is real. But you cannot of course, make reparation, even with the best will in the world, and it would be idle to hold that out to the family.

[42] Against that background, I take a starting point for your offence in band 2 *Nuku* of 2 years, 8 months. I reduce that by 10 months to give you full benefit for your plea and I reduce it again by 6 months to take account of your personal circumstances, your otherwise good character, and your distance from your family in Australia.

[43] You are sentenced to 1 year and 4 months imprisonment.

A handwritten signature in blue ink, appearing to read "Patrick Keane, J.", is written above a horizontal line.

Patrick Keane, J