

POLICE

v

KIMIORA MANUELA

Date: 3 August 2018

Counsel: Ms A Herman for the Crown
Mr N George for the Defendant

SENTENCING NOTES OF DOHERTY J

[9:20:33]

[1] Kimiora Manuela, you were found guilty by a jury following trial on a charge of injuring with intent to cause grievous bodily harm. This is a crime which is recognised as being in the serious violence category. It carries 10 years imprisonment as a maximum sentence.

[2] You raised self-defence in your trial. Your defence was that you were not the aggressor and that you were acting to defend yourself. One of the questions for the jury was whether or not you were acting in self-defence and if you were whether the force that you used was reasonable in the actions that you took.

[3] I am now to sentence you. I was the Judge who sat with the Jury and the law is that I am entitled to make and take my own view of the facts apart from those essential to the findings of guilt which was the Jury's job. So the question that I have to determine in my own assessment was whether or not you were acting in self-defence or not, because if you were and you used unreasonable force that is something less than you going into this being the complete aggressor.

[4] Whichever way the Jury went they did find that you intended to cause this man grievous bodily harm, which as you heard in the trial is really serious harm.

[5] For myself I take the view that you were the aggressor. I heard all of the evidence and I do not think that you were acting in self-defence at all.

[6] I think that a combination of factors of the ongoing bad relationship between you and your brother-in-law in relation to your mother's property, the recent Police visit following an alleged assault against your wife where you took the view that your brother-in-law did not act appropriately and your continuing to confront this man on that day, each time on his own property or the property that he was entitled to be on, means you were the aggressor. This was not a matter of him coming to you. You continually, on your own evidence and that of your wife, went back to him.

[7] So this ongoing animosity which had been, from the evidence, festering away for a long time but which came to a head following the victim's return to Rarotonga late in 2016 and those family issues revolving around the case of your mother-in-law really seem to me to have boiled over on that day where, as I have said earlier, there was an incident between another family member and your wife which required Police intervention.

[8] Your wife had told you that the victim, her brother, had taken the side against your wife and had been disparaging in his comments to her. Thereafter, on your return home your actions were confronting and inflammatory in my view. There were threats by you and admittedly those were returned with abuse by the victim. But in my view you were the aggressor throughout.

[9] On your own evidence you continued to retreat back to your house then come back to his. One occasion you armed yourself with that heavy bar. And ultimately things blew up and you attacked him with it. And I accept his evidence that you attacked his head; that you swung that bar at his head. He was already a vulnerable person. He was suffering from the after effects of treatment for cancer and, as I understand the evidence, that cancer affected his spine and his right leg. He was on crutches at the time. He could not move certainly as quickly as you, and his mobility was certainly compromised.

[10] I also reject your evidence that you were struck first by a punch and of note in that regard, there was medical evidence of an examination of you shortly after the event which showed no injury being observed by the doctor. You rained blows on him, he attempted to fend you off using his crutches and particularly his hands. His hand was struck causing a fracture to a finger and a knuckle and ultimately you struck his right leg.

[11] You demonstrated how you used that pipe, in doing that in a sweeping motion which was aimed at his leg. And you caused a spiral fracture and punctured the skin. He was hospitalized for seven days.

[12] I have had the benefit of a victim impact statement from him which has been collected by either the Police or the Crown. It tells me of the significant effects on him. He concentrates not so much on the physical but the social and the emotional impact that this has had and the setback to his recovery.

[13] And I note that that probably bears out what the doctor said in the original medical report. He said this, "Mr Teariki will require extensive physiotherapy work to improve the strength and power of his leg and hand. And with his pre-existing mobility status this will be a long and arduous process". In fact that has been borne out by actuality.

[14] You have no previous matters before the Court and this does appear to be out of character in the sense your living your life in Rarotonga.

[15] The Probation Service have prepared a report for the Court as well. Significantly that report repeats what you told this Court, that you were acting in self-defence, it was all his fault that it started and not yours. And I cannot see in what is reported by the Probation Service a skerrick of remorse in you.

[16] Your counsel stood here today and said you are now remorseful and you are offering apologies. I suspect that is more because of the situation you find yourself in than reality. Your counsel reiterates that I should take the view that you were acting in self-defence. What you have told the Probation Service goes further than that and shows me that you have little if any remorse, other than for your own predicament.

[17] Mr George also asks me to take into account the fact of your standing with others in the community and the Probation Service provided some references from others about you. And I have to say that this does appear to be something of an aberration. It seems that your conduct in the community is far different from your conduct in the context of that family dysfunction. That is what you were not able to handle and that is what has got you here today.

[18] The aggravating features of your offending are the use of a heavy iron pipe. The fact that you armed yourself with that, you took that into the fray, it was not as though it just happened to be there and you picked it up, you took it.

[19] There is the injury which was a significant injury to the main bone of this man's leg. And when one looks at the x-rays it is not just a break, there are significant impact, results which have been referred to as that spiral fracture of the tibia. You hit a leg that you knew was part of his cancer problem.

[20] He was vulnerable. He was on crutches. He was a cancer sufferer and you knew that he was debilitated by his attempts to get over that. And significantly you directed attack at his head which he was able to fend that off by using a hand which ended up injured as well with another fracture.

[21] The Crown have referred me to a number of cases both in the Cook Islands and in New Zealand. In the Cook Islands there is no tariff or leading case which gives guidance to this Court on how serious violence ought to be dealt with. I suspect that is because serious violence until recently does not appear to have been too prevalent in this country.

[22] The New Zealand cases set out degrees of response from the Courts, depending upon degrees of violence. And if there are a number of aggravating features that makes it worse because one of the principles of sentencing is that "the worst crimes get the longest times."

[23] I have to assess really where your offending is on any scale. As I said at the outset, 10 years imprisonment is an indication from this community through its Parliament that it views serious violence as a serious matter deserving serious attention by the Courts because ultimately this is where the Parliament's intention comes to bear.

[24] The New Zealand cases of *R v. Nuku* and *R v. Taueki* give an indication that this degree of offending in the New Zealand context ought to be in the 3 to 5 year imprisonment starting point. This is not the case for this Court to go into a total assessment of whether there should be a carryover of the *Nuku* and *Taueki* principles to sentencing in the Cook Islands.

[25] But when I weigh up your behaviour and your culpability in terms of a 10 year maximum, this has to be in a range which is probably in the lower half of that but in the moderate category, so somewhere between 3 and 5 years imprisonment as a starting point.

[26] In mitigation you have never been trouble before, at least in this country. And as I have said you are of otherwise good character. I already discounted your offer of remorse and contrition. Remorse and contrition come in many forms. Sometimes in a recognition and an admission earlier on that you have done wrong and you want to be held accountable for it. It is called a guilty plea.

[27] And this Court recognises the worth of that, both for the State and for the community. The State in not having to go to the expense of trial and the community, particularly the victims and witnesses, who do not have to go through trauma, coming along to give evidence and thinking about all of that for some time between the action and trial.

[28] You are now showing your remorse or offering it through a willingness to make reparation. And you offered a sum of some \$5000 in total, both to the victim himself and to charities. This Court has no jurisdiction to award such payments for anything other really than out of pocket expenses.

[29] Your offer is just that. You did not pay the money before you came here. You may be hedging your bets. But it is also a principle of sentencing that such offers ought to be taken into account. And I accept from Mr George that you have the ability to make those payments.

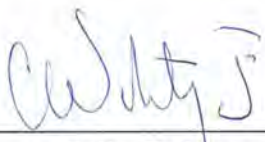
[30] I cannot order that they be made. I am not asking you to make them but I am going to take into account the fact that you have offered to make it.

[31] So where do I start and where do I finish? With those aggravating features, I think that the starting point is at least 3 years imprisonment and that is where I intend to start.

[32] You cannot get any credit for a guilty plea because you did not make one. You went to trial. This Court regularly extends one-third of a discount for a guilty plea at the first opportunity. If you had pleaded guilty that would have saved you 12 months to begin with.

[33] The mitigating features which are your willingness through counsel if I accept, to make good and your previous good character mean a discount from the 3 years starting point of nine months – six months for your previous character and three months for your willingness to make good even though that has not transpired.

[34] You will therefore serve a maximum sentence of 2 years and 3 months imprisonment.



Colin Doherty, J