

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

**CR NO'S 517/18, 310/18
& 516/18**

POLICE

v

**HEWETT NAPA
&
NGATEINAKORE KATU**

Date: 21 September 2018
Counsel: Ms A Herman for the Crown
Mr N George for the Defendants

SENTENCING NOTES OF THE HONOURABLE JUSTICE PATRICK KEANE

[10:00:11]

[1] Hewett Napa and Ine Katu, you appear for sentence for assaulting Karika Tokotini on 9 May 2017 with intent to injure him. Hewett Napa you are for sentence also for a prior assault on Danny Poulter on 9 May 2017.

[2] Originally you were charged jointly with causing grievous bodily harm to Tokotini with intent to injure and you were for trial last week. On the first day of your proposed trial the Crown substituted the charge on which you presently appear for sentence, as to Tokotini.

[3] Today I have given the Crown leave formally to withdraw the more serious charges against you. You pleaded immediately to the fresh charge and the Crown accepts that you are entitled to full benefit for having done so.

[4] You differ from the Crown's statement of facts as to the context in which you decided to assault Tokotini. And Mr Napa, you dispute the Crown's statement that you assaulted Manavaroa. These differences do not put in question your culpability. They go to context only. Any issue as to Manavaroa is irrelevant. Neither of you is charged with any assault on him.

Offences

[5] According to the summary you began drinking together at 5pm after work on 8 May 2017. You then went to the Hula Bar, where you continued to drink, and after that to the Raro Fried Chicken takeaway to get something to eat.

[6] It is not absolutely clear when you got to the takeaway. The summary says your assault on Poulter and the later assault on Tokotini took place between 1am and 1.30am. But you recall arriving earlier and, therefore, the assaults happening earlier. The precise timing is not finally important. What is important is what happened.

[7] At the takeaway while you were waiting for food, you say, you saw Poulter come off his bike at the nearby roundabout. You went out, helped him off his bike and parked it. You took him to your table in the takeaway. You gave his keys to the takeaway staff.

[8] You say that he was abusive, especially to you Mr Napa. You had to calm him down. He was affected by alcohol. Ultimately Mr Napa you became frustrated with him. According to the Crown summary that was when you assaulted him. You punched him four times to the left eye with a closed fist.

[9] You described what you did as "light jabs". Each time he abused you, you jabbed him. Your counsel, also contends that the assault was not serious. What is clear on the evidence is that he suffered bruises around his left eye and a small cut over his left eyebrow. I sentence you on that basis.

[10] According to the summary that was when two others in the takeaway, Tokotini and a man called Manavaroa intervened. You both say that they must have done so

believing that bruises and scratches that Poulter had from coming off his motorcycle were the result of your assault. That was not correct.

[11] Then the summary says, quite briefly, that Tokotini and Manavaroa chased you off. You say that does not reflect what actually happened. There was then, you say, an altercation in which you were set upon by as many as eight bystanders, and that you were both assaulted before you got away.

[12] Mr Napa, you say that you were assaulted by Sonny Tamarangi. He first swung at you and you ducked. Then those with him held you while he punched you fully to the face, to your nose. You then left, you say, threatened by a widening group and near the Empire Theatre Tokotini hit you, Mr Katu, felling you.

[13] The Crown summary is silent as to that. What it says, and you do not dispute, is that you retrieved Mr Katu's motorbike and you went to Mr Napa's home. You collected two pinchbars, returned to the takeaway, and went after Manavaroa and Tokotini, who were at the barbecue table.

[14] Mr Napa you are described as assaulting Tokotini by hitting him three times with your pinchbar, putting him to the ground. You do not dispute that. Mr Katu you are described as hitting Manavaroa three times with yours, after which you ran away. You dispute that and there is no charge relating to any such assault. You do accept that you joined Mr Napa in assaulting Tokotini with the pinchbars.

[15] As a result of your joint assault on Tokotini he suffered the following injuries: a 3cm x 2cm laceration to the back of his skull. A tear at the midpoint of his right earlobe. Small abrasions to his left elbow and soft tissue injury. As well he received 12 stitches at the midpoint of his skull.

[16] Tokotini was examined at Rarotonga Hospital at 3.30am. The treating doctor, in her certificate, describes his injuries but not the stitching. She records that he said that he fell to his right side as a result of your assault. He is not sure whether he lost consciousness. He did say that after the assault he returned to his cousins' and resumed drinking. His pain scale was 4/10.

Hewett Napa

[17] Mr Napa, you are aged 23 and you have no complicating previous convictions.

[18] You and your partner have been in a stable relationship since 2012. You have two sons – a 6 year old who was initially living with your parents when you returned from Australia and a 1 year old living with you. You are now living with your parents because of your offence. In the last three or so months you have worked for McConnell Dowell where you are well regarded. I have a related reference.

[19] Your partner is in shock. In the years you have been together you have never shown any tendency to violence. She regards your offence as completely out of character. If you are sentenced to imprisonment she is naturally concerned about her ability to support the children on a part time income.

[20] Your report says, as to the offence itself, that after what first took place at the takeaway, you were in a state of complete frustration. You had started by attempting to help Poulter and that led to the fracas in which you were assaulted. You wanted revenge. You would benefit from supervision addressing an issue you had on this night, certainly, with alcohol.

Ngateinakore Katu

[21] Mr Katu, at age 34, you also appear for the first time for any offence.

[22] You have been living in Australia for 12 years. You have three children by three mothers. When your last relationship of 7-8 years foundered, you returned to the Islands to gather your life together. You have not seen your children in the last six months. You are unable to have access to your passport. For the last four months you have been working as a tour guide in a snorkelling business and you are very well regarded and trusted by your employer.

[23] You too felt burned when your attempt to help Poulter ended as it did. Your report says, I think accurately, that your offending resulted from you being heavily intoxicated, stupid, angry and frustrated.

[24] It too recommends a sentence which combines imprisonment with supervision. You have already been receiving counselling and your counsellor who has just met you describes the benefit you should obtain for it continuing.

Sentencing Principles

[25] The maximum sentence for your offence under the Crimes Act 1969 is imprisonment for 3 years. And two Cook Islands statutes govern what sentence within that maximum your particular offence warrants – the Criminal Procedure 1980-81 and the Criminal Justice Act 1967.

[26] In sentencing you I am also assisted 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 yet also assists you and recognises the interests of your victims to the extent that is possible.

[27] In doing so I must take into account equally the gravity of your offending and its seriousness, and take into account as well what is known about the effect of your offence on your victims.

[28] 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 New Zealand Court of Appeal, which sets tariffs for violent offending there. They divide each category of violent offence into sentencing bands from the least to the most serious.

[29] The three bands applying to sentence for wounding with intent to injure, and related offences, a more serious range of offences than yours, with maxima extending from 5 to 7 years was set by the Court of Appeal (NZ) in the first case relevant to a sentence *Nuku v R*.

[30] There is no equivalent New Zealand decision relating to your offence, assault with intent to injure which attracts a 3 year maximum. However in *Tamihana v R*, the Court of Appeal held that the three *Nuku* bands apply analogously. The Court stopped short of fixing the starting points for each offence within each band.

[31] To sentence you, what I must first do is set out the rationale for those bands because your counsel differ as to where within the bands you lie; and then set your offending against the only reliable benchmark I have, which is *Tamihana* itself.

[32] In *Tamihana* the Court of Appeal said, at paragraph 18, of the *Nuku* bands:

Band 1 applies where there are few aggravating features. The level of violence is relatively low or the sentencing judge considers that the offender's culpability is at a level that might have been better reflected in a less serious charge. In such cases the Court acknowledged that a sentence of less than imprisonment could be appropriate. In Band 2 cases a starting point of up to 3 years imprisonment will be appropriate where three or fewer aggravating features are present. Band 3 offending will require a starting point of 2 years and it will apply where three or more aggravating features are present and the combination of those features is particularly serious.

[33] In that summary, the Court was speaking of the starting points for the more serious categories of offending with intent to injure. The precise figures do not apply in your case. The Court of Appeal in *Tamihana* did not attempt to replicate the bands. The Court did find in *Tamihana*'s own case that there were aggravating features which placed him in Band 2.

[34] *Tamihana* and an associate were in a bar in the early hours of the morning. *Tamihana*'s associate argued with the victim. He punched the victim in the face, who fell to the ground, and kicked the victim on the ground. *Tamihana*'s assault was a single kick to the victim's head. As a result the victim suffered bruising and grazes to his face.

[35] For that offence the Court of Appeal reduced the 18 month starting point taken on sentence to 12 months but did so recognising three aggravating factors. First the kick to the head. Second that there were two offenders. And third, that the victim was vulnerable when *Tamihana* kicked him – he was lying defenceless on the ground. The Court set against that the absence of extreme violence, a one off unpremeditated attack and an absence of serious injury without any use of weapons.

Crown and defence submissions

[36] The Crown contends, in your case, that is more serious offending than in *Tamihana* and identifies five aggravating factors.

[37] First, you planned and premeditated your offence because you went and got the pinch bars. Second, you both used pinch bars as weapons. Third, your assault involved attacks to the head area. Fourth, the victim was vulnerable because on the ground, when initially attacked, the attacks continued. Fifth, the injuries included the laceration to his head area, which required 12 stitches, but also the wider head injuries.

[38] The Crown accepts that you are otherwise a good character and that you are entitled to the full benefit of your guilty plea. But on that combination of factors relating to the offence itself, contends that you lie within Band 3 *Nuku* and that you must be sentenced to imprisonment whether or not supervision is imposed.

[39] Your counsel contends by contrast that your offending lies within Band 1. He contends firstly that the fact that you collected and used the pinchbars is not a serious aggravating feature. A pinchbar, he contends, is to be contrasted with a firearm or a knife or a bottle – all of which are more obvious weapons.

[40] Secondly he contends that the injuries Tokotini sustained were ultimately insignificant and that is the most important factor on sentence. He was not disfigured, he suffered no fractures, he did not lose consciousness.

[41] He also invites me to set your offending within the context of what happened before, as to which he contends the police enquiry is largely silent. You were yourselves assaulted after you attempted to help Poulter.

[42] He points to your good character until this offending. He accepts that your offending may have resulted from an excess of alcohol but that can be addressed by counselling. He argues that your responsibility to your wider family, your children, wives, your partners, all justify a sentence short of imprisonment.

Conclusion

[43] I accept that your ultimate assault on Tokotini had a background, which is not fully expressed in the statement of facts on which I am to sentence you. I accept that you may well have set out to help Poulter who proved to be very ungrateful.

[44] I accept that you may, Mr Napa, have then responded out of frustration by assaulting Poulter. But there can be no justification for that. It became the catalyst for all that followed. But what then happened I accept, assumed a dynamic of its own and you too, together, may have suffered assault.

[45] All of that said, you then made a fateful decision. You did not go to the police and complain about the assaults on you. You went to get the pinchbars. Pinchbars can be significant weapons. These were full-scale and capable of inflicting serious injury. You returned to where you yourselves have been assaulted and set upon Tokotini.

[46] Your assault, together, on him had all the aggravating features the Crown speaks of. You could have done him much more serious injury than he suffered. Any blow to the head with a pinch bar is capable of causing a skull fracture. A king hit without a pinch bar can cause unconsciousness or death. So the use of that weapon was serious.

[47] Very fortunately he did not suffer any lasting injury to his head. But the fact that you used a weapon to his head remains the most aggravating feature I have to consider on your sentence. And the fact that you offended against him together is also serious.

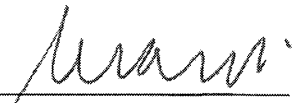
[48] I accept the Crown's submission that your offending lies within Band 3 and that imprisonment must be imposed on you. I accept also that, against the only point of reference I have, *Tamihana*, a starting point in excess of 12 months is called for. It could 18 months. It could be higher. It could be 2 years.

[49] At the same time I consider that your offence, a first offence for each of you, is explained by the amount of alcohol you had been drinking and I take into account that until this point you had never offended and that this was completely out of character. You have wider responsibilities which cannot be ignored.

[50] I intend therefore to accept the recommendation in the presentence reports, which the Crown accepts are open to me in principle. In the sentence I impose on you, I also take into account that the duration of your sentence ultimately will be the length on your total combined sentence.

[51] For the assault with intent to injure Tokotini I sentence you to 9 months imprisonment to be followed by supervision for 9 months on the terms recommended. You are to abstain from the purchase and consumption of alcohol. You are not to enter any licensed premises without the approval of the Probation Service. You are to attend counselling as directed by the Probation Service. You are not to leave the Cook Islands without the approval of the High Court.

[52] As to the assault charge, Mr Napa, you are convicted of that offence. It was relatively minor. I sentence you concurrently to imprisonment for 2 months. Your total sentence remains that for your assault on Tokotini.



Patrick Keane, J