IN THE HIGH COURT OF THE COOK ISLANDS **CR NO's 277/18**
HELD AT RAROTONGA **597/18**
(CRIMINAL DIVISION)

POLICE

v

RATU SAVENACA VIRIVIRISAI

Hearing dates: 11-13 March 2019

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

Sentence: 22 March 2019

SENTENCING NOTES OF HUGH WILLIAMS, CJ

[9:39:00]

[1] Ratu Savenaca Virivirisai, you were found guilty by a jury on 13 March this year on one account of causing grievous bodily harm to Etati Vero with intention to cause that grievous bodily harm, and one count of male assaults female, a punch to your partner.

[2] The lead offence is undoubtedly causing grievous bodily harm on which you are liable to a maximum sentence of 14 years imprisonment.

[3] The facts are that on 22 April 2018 you were drinking at the port, a kava session with fellow employees and others, and your partner was drinking separately with some women friends. She and the others, after the club closed, went to your

home for what is called ‘afters’, a custom which seems to lead quite often to the criminal courts.

[4] She went and got you after the kava party and you two went home and the party continued with, at times up to five people present, sitting or standing on the narrow balcony of your accommodation. It is about 1.7 metres wide.

[5] All of you were in varying stages of intoxication and, more relevantly to the question of sentencing, Etati Vero was very drunk to the point where he either fell asleep or decided to go to sleep and not participate any further in the party.

[6] At some stage during proceedings you thought you saw Etati make an indecent approach to your partner by touching her on the thigh, perhaps twice. He was unable to remember anything of this incident following your throwing him off the balcony.

[7] Whether in fact it occurred is largely immaterial because it seems clear that, imagined or not, you thought the incident had occurred and you were provoked and so jealous that you attacked him.

[8] You bashed him several times when he was sitting down, kicked him a few times and then pulled him to his feet, swept him across the balcony up against the railing and continued to assault him. At that point he was completely unresponsive and did nothing to defend himself.

[9] According to all the witnesses, other than yourself, you threw him over the rail. He fell 2.8 metres onto the hard sand below.

[10] You said you were bashing him while holding him against the rail, became distracted by yelling from the others present, lost your grip and he accidently fell over the railing but the jury, by its verdict, must have rejected your version of events and accepted the version of events very graphically demonstrated here in Court by the various witnesses of your grabbing him by the T-shirt and the trousers, sweeping him across the balcony and throwing him over the railing.

[11] Mr George is correct in his submissions in the sense that a number of those present were in varying stages of intoxication and their recollection may have been marred as a result. But Suluweti Vakau, who lives in the neighbouring unit, had been roused by the noise of the people in your property, got up and said that she stood watching what was going on at your property for some considerable time.

[12] She had been asleep, so had nothing to drink and although, as Mr George said, there may have been contractions in her evidence, it was cogent evidence which obviously influenced the jury in its verdict. She too supported the others, including your partner – however reluctantly – in saying that you simply picked him up, swept him across the balcony and threw him over the rail.

[13] He fell about 2.85 metres on to his head, on to the hard-packed sand below, and was either knocked out or lost apparent consciousness from his injuries.

[14] Initially you did nothing to help him. But then you looked over the railing, saw him lying there, poured some water on him and a little later went down and dragged him over to sit him up against a post, against the possibility that he might vomit and choke to death.

[15] Your partner ran away. You chased her and punched or assaulted her by bashing her behind the ear, where she was left tender and bruised when the medical staff saw her.

[16] To the Police and in evidence you gave varying stories of what happened, but the nub of the matter is that the jury accepted that you intentionally threw Mr Vero over the railing with the intention of causing him grievous bodily harm and grievous bodily harm resulted.

[17] The male assaults female matter can be dealt with very quickly. It seems clear that you and your partner were reconciled within days of this event. She wrote several letters to the Police and to the Court trying to have the assault charge against you withdrawn. There seems nothing to doubt the fact that you have been reconciled since.

[18] In terms of the scale of assaults that come before the Courts, this was relatively modest and the appropriate sentence on the male assaults female charge, set against the sentence to be imposed on the major charge, is simply one of convicted and discharged.

[19] Turning to the effect of your actions on Etati Vero, he was taken to hospital here in Rarotonga where a spinal cord injury was diagnosed, and at that point he was almost entirely quadriplegic and unable to move any part of his body below his neck, apart from a minor capacity to move his right leg.

[20] The x-rays which were produced in evidence were themselves graphic and when the doctors gave evidence and knew Mr Vero had recovered to a considerable degree and in fact was able to work, they said that they thought he was extremely fortunate to have made a recovery as considerable as that.

[21] Mr Vero was "medevac'd" to Fiji where he remained in hospital for five weeks. He was unable to stand for three of those. He still has numbness and pain. He was told he might never walk again, advice that, fortunately, has not been borne out.

[22] Fortunately too, he is a very determined young man and has made remarkable efforts of rehabilitation supported by his family. He is now back here in Rarotonga, barely able to function as a mechanic, but able to work for the same employer as previously.

[23] The episode has cost him a considerable amount of money. In the victim impact report there is a notation that he has lost wages for sixteen weeks, about $6,600 in total. There was a medical and nurse required to escort him to Fiji, another $600. And the return flight cost $42,000 because according to the report, New Zealand does not accept Fijian citizens as referrals from Rarotonga, so the only way the flight was able to take place was because Mr Vero's employer was prepared to meet the cost in the first instance, and Mr Vero has been paying him back ever since. But, no doubt, against that expenditure, there will be a long way to go.

[24] The probation report mentions your relationship with your partner of a couple of years which seems to be reasonably stable. She is very supportive of you. You have been employed by Cook Islands Towage for several years and Mr George has produced some testimonials from persons there to say that you are a good employee and they support you.

[25] It appears from the Probation report and from Mr George's submissions that you still dispute the version of the facts which the jury obviously accepted. That is not a factor in your favour on sentencing.

[26] You are very regretful, naturally, finding yourself in this position, and are prepared, as Mr George emphasized, to contribute some money towards meeting Mr Vero's costs resulting from your actions.

[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*[1] – 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.

[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.

[29] For the reasons he has repeated at this hearing he urged me to discount Ms Vakau's evidence and to commence the way I approach sentencing by looking at a non-custodial sentence.

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[1] [2005] 3 NZLR 372; (2005) 21 CRNZ 769

[30] Initially he said you were offering up to $10,000 in reparation but increased that by $15,000 this morning, not by a lump sum but by payments by instalments.

[31] He also emphasized that you have abstained from alcohol since this incident.

[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.

[33] In *Taueki*, still the leading New Zealand authority on sentencing for offences such as this, the New Zealand Court of Appeal divided such offending into three bands.

[34] Band 1, for them, was offending involving violence at the lower end of the sort of violent offending that grievous bodily harm covers. Their suggestion was, in New Zealand, that a Court should look at a starting point of between 3 to 6 years imprisonment against the New Zealand maximum, the same as in the Cook Islands, of 14 years.

[35] Band 2 was the appropriate band for offending which covered two or three of their aggravating features to which I will refer in a moment, and drew a starting point in New Zealand of 5 - 10 years imprisonment.

[36] And Band 3 encompasses serious offending with a number of the aggravating features. The starting point in New Zealand was 9 years' imprisonment up to the maximum of 14 years, but we can put that to one side in this case because your offending could not be described in those terms.

[37] Whilst *Taueki* has been reconsidered in New Zealand in cases such as *Nuku v R*[2], it still remains useful for approaching sentencing in the Cook Islands for offending such as this because of the way it focuses on considering sentencing in various bands and also because the *Taueki* decision contains a list of the aggravating and mitigating features which commonly arise in grievous bodily harm offending.

[38] The aggravating features listed are a very useful compendium for sentencing in the Cook Islands. Aggravating features are those making matters worse than the normal run of cases and, as relevant to this case, include extreme violence - although this could not justifiably be characterised as extreme - serious injury - and undoubtedly Mr Vero suffered seriously from your actions - and attacking the head. Here you punched him probably more about the body than the head, but it is a factor to be taken into account. Then there was Mr Vero's vulnerability: a drunk man, soporific if not asleep, attacked without warning and thrown, as the jury found, over the balcony onto the sand below.

[39] Amongst the mitigating factors – those reducing the seriousness of the sentencing – there may have been some provocation in what you thought you saw Mr Vero do as far as your partner is concerned, but, as mentioned, it really does not matter much whether it occurred or not: you thought it occurred and that led you to act as you did.

[40] I accept as correct Ms Herman's submission that your offending should be characterized as within the descriptions of Band one to two in *Taueki* but it is perfectly correct that we cannot simply translate *Taueki* sentences to the Cook Islands.

[41] I also need to take into account that *Taueki* has been modified by the New Zealand Court of Appeal in *Nuku* where the following appears. (In the sentencing notes the relevant passages from *Nuku* will be set out but because the sentencing needs to be done in your presence and there are a number of members of the public present I will read out the gist of paragraphs 29-32).

[2] [2012] NZCA 584; CA 113/2102

"[29] As stated in *Taueki*, GBH offences involve very serious offending. This is because an offender will only be convicted if he or she has acted with an intention of inflicting really serious harm on the victim, and has actually caused harm of that gravity or has wounded, maimed or disfigured the victim. This may have consequences for one of the aggravating factors identified in *Taueki*; that is, the seriousness of injury to the victim.

[30] The Court in *Taueki* rejected a submission that the assessment of criminality should focus on the conduct of the attacker and not on the consequences for the victim. While accepting that it can sometimes be a matter of luck how bad the resulting injuries are, the Court said that in the case of GBH offences where the intent is to cause serious harm, if in fact such harm is caused then the offender should face the consequences of his or actions. This reasoning may not apply to the same degree to offences where the intent is to cause only injury, as the resulting level of harm to the victim may be greater than what the offender contemplated.

[31] There is another aspect of *Taueki* that does not sit easily with offences where the intent is merely to cause injury. This is the comment that, as noted in *Taueki*, almost all GBH offences will involve a high degree of criminality and significant injury to the victim.

…

[34] We prefer an approach where aggravating and mitigating factors of the offending are built into the banding decision, rather than considered afterwards as the approach in *Harris* would suggest.

…

[37] We consider therefore that we should replace *Harris* with the following guidance, applicable to offending [under ss 189(2), 188(2) and 191(2)] where the offending involves intent to injure. We see this judgment as providing guidance on how *Taueki* can be adapted to apply to the lesser charges, rather than being a guideline judgment in its own right.

[38] The following bands apply:

(a) Band one: where there are few aggravating features, the level of violence is relatively low and the sentencing judge considers the offender's culpability to be at a level that might have been better reflected in a less serious charge, a sentence of less than imprisonment can be appropriate.

> (b) Band two: a starting point of up to three years' imprisonment will be appropriate where three or fewer of the aggravating factors listed at [31] of *Taueki* are present.
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> (c) Band three: a starting point of two years up to the statutory maximum (either five or seven years, depending on the offence) will apply where three or more of the aggravating features are set out in *Taueki* are present and the combination of those features is particularly serious. The presence of a high level of or prolonged violence is an aggravating factor of such gravity that it will generally require a starting point within band three, even if there are few other aggravating features.
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> …
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> [40] We have taken the approach of having overlapping bands, as in *Taueki*, to maintain a degree of flexibility and to recognise that sentencing is an evaluative exercise, rather than a formulaic one.
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> [41] The aggravating factors set out at [31] of *Taueki* will be applicable. We note in particular the comment in *Taueki* that the extent of the violence will have an obvious impact on the level of criminality. … Also applicable to cases covered by this judgment are the comments in *Taueki* concerning mitigating factors and those factors that do not reduce the seriousness of offending."

[42] Now, as mentioned to Ms Herman, s 208, the section under which you are charged, is at approximately the mid-point of severity of assault offences as they apply in the Cook Islands. And it must be acknowledged that the charge on which you have been convicted is probably one of the lesser offences under s 208 since the others involve wounding, maiming or the like.

[43] But your offending is still serious. It is still causing grievous bodily harm with intent to cause such harm and it still has the maximum possible sentence of 14 years.

[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.

[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.

[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.

[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* and *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.

[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.

[51] You went to trial, as is your right, so you get no discount for a plea and your previous offending is minimal and in a different area.

[52] In the circumstances, weighing all those factors one up against the other, in my view the appropriate sentence to impose on you for this conviction is imprisonment for 2 years and 9 months. You will be sentenced to that.

[53] In the circumstances any consideration of reparation is pointless.

[54] Stand down.

Hugh Williams, CJ