IN THE COURT OF APPEAL OF THE COOK ISLANDS **CA 1/19**
HELD AT RAROTONGA

CROWN

v

RATU SAVENACA VIRIVIRISAI

Coram:	Williams P, Asher JA, White JA
Hearing:	5 November 2019
Appearances:	Ms K Bell and Ms M Okotai for the Crown Mr N George for the Respondent
Judgment:	7 November 2019

JUDGMENT OF THE COURT OF APPEAL

[2.50.44]

A. The appeal is allowed.

B. The sentence of 2 years and 9 months imprisonment on the grievous bodily harm charge is quashed.

C. In its place a sentence of 4 years imprisonment is imposed.

D. The conviction and discharge on the male assaults female charge remains.

Introduction

[1] On 13 March 2019 Mr Ratu Virivirisai was convicted after a jury trial on two charges:

(a) one charge of causing grievous bodily harm to the primary victim ("C") with intention to cause grievous bodily harm (which carries a maximum penalty of 14 years imprisonment);

(b) One charge of male assaults female by a punch to Mr Virivirisai's partner (which carries a maximum penalty of 2 years imprisonment).

[2] Mr Virivirisai was sentenced on 22 March 2019 by the Judge who had presided over the jury trial, Hugh Williams CJ. On the causing grievous bodily harm with intention to cause grievous bodily harm (GBH) conviction he sentenced Mr Virivirisai to imprisonment for 2 years and 9 months. On the charge of male assaults female Mr Virivirisai was convicted and discharged.

[3] The Crown appeals against Mr Virivirisai's sentence on the GBH conviction. There was no appeal by Mr Virivirisai against his convictions. There was also no appeal against a refusal by the Chief Justice to order any reparation, which he regarded as "pointless".

[4] The Crown's ground of appeal was that the sentence was manifestly inadequate, and in particular that the Court did not have appropriate regard to the 14 year maximum penalty for the GBH charge, and that it did not have appropriate regard to the seriousness of the offending.

Background

[5] On 22 April 2018 Mr Virivirisai had been at a kava session with fellow employees and others. His partner had been drinking separately with some women friends. After this they all went to the home of Mr Virivirisai and his partner for alcoholic drinks.

[6] There were various other persons at their home. One of those, the victim C, became very drunk to the point where he either fell asleep or decided to go to lie down on the balcony. It seems that C was sitting or lying next to Mr Virivirisai's partner. Mr Virivirisai thought he saw C touch his partner twice on her thigh.

[7] Mr Virivirisai became incensed and jealous and attacked C. He bashed him several times when he was sitting down, kicked him a few times and then pulled him to his feet. He swept him across the balcony and up against the railing and continued to assault him. At this point C was unresponsive and was doing nothing to defend himself. It seems that others present were crying out to Mr Virivirisai to stop.

[8] At that point Mr Virivirisai picked up C and threw him over the balcony rail. He fell 2.8 metres onto his head on the hard sand below.

[9] It was C's defence at the trial that he did not deliberately throw C over the rail, and that the fall arose because Mr Virivirisai accidently lost his grip on C when the others were calling out, and C accidently fell over the railing. As the Chief Justice observed, the jury by its verdict must have rejected Mr Virivirisai's version of events, and accepted the version of events of the various witnesses who had observed the grabbing of C, and the sweeping motion of Mr Virivirisai throwing C over the railing onto the sand below.

[10] C on hitting the hard sand appears to have lost consciousness. Mr Virivirisai initially did nothing to help him, but after some minutes looked over the railing and saw C lying below. He went down and poured some water on him, and a little later went down and dragged him over to a post to get him to sit up, to avoid the danger that C might vomit and choke to death.

[11] Mr Virivirisai's partner had run away. Mr Virivirisai chased her and punched her. In particular he hit her behind her left ear which left her tender and bruised.

[12] C was in due course taken to hospital in Rarotonga. He was diagnosed as having a spinal cord injury. At that point the effect of the injury was to render him a

quadriplegic, unable to move any part of his body below his neck, apart from the ability to make minor movement with his right leg.

[13] C was transported urgently to Fiji where he remained in hospital for five weeks. For the first three of those weeks he was unable to stand. Fortunately he has regained considerable feeling below his neck, and is now able to walk.

[14] There is a victim impact report. C suffers from numbness in both his arms and legs, pain in the bottom of his neck and the bottom of his spine area and buttocks, as well as pain in the chest, left arm, torso and left leg. His left arm is still weak (he is left-handed). We note it must have been shocking for him to have little feeling below his neck for those first weeks.

[15] C has fortunately been able to return to normal work as a qualified mechanic. However it is clear that at the time of sentencing he was still suffering from pain, numbness, and some incapacity. It is not clear what the future prognosis is, and indeed that may not be known at this stage. However clearly the injuries have been severe with long-lasting effects. He is also responsible for a debt of approximately $50,000 for his flight to and treatment in Fiji, a most severe financial burden.

[16] In an admirable gesture C has written a letter to the Court, consistent with his remarks to the probation officer, expressing his forgiveness of Mr Virivirisai.

The Sentencing Decision

[17] The Chief Justice first summarised the relevant facts which we have outlined, and no issue has been taken with that summary. There was initially some question of reparation, but in the end the Judge put that to one side as there was no evidence that any order to pay reparation could be met.

[18] The Chief Justice traversed the leading New Zealand case relating to sentencing for causing grievous bodily harm offending, *R v Taueki.*[1] The New Zealand section for GBH offending is the same as in the Cook Islands, and also

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[1] *R v Taueki* [2005] 3 NZLR 372.

carries a 14 year penalty. That case sets out sentencing bands, and aggravating and mitigating factors. For GBH sentencing in New Zealand band one is 3-6 years imprisonment, band two is 5-10 years imprisonment, and band three is 9-14 years. The Chief Justice also referred to the New Zealand decision of *Nuku v R*,[2] a decision relating to sentencing for injuring with intent to injure, which is a lesser crime with a maximum term of only 7 years imprisonment. The bands are correspondingly lower.

[19] Having considered the New Zealand authorities, the Chief Justice stated:

> [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.

[20] Having considered the bands and evaluated the seriousness of the offending, the Judge determined that the offending was "borderline band one and band two", and the starting point should be 2 ½ years imprisonment.[3] He then considered aggravating features and increased the starting point to 3 to 3 ¼ years imprisonment.[4]

[21] The Judge noted Mr Virivirisai's drunkenness, and C's touching of Mr Virivirisai's partner. He said that these were mitigating factors which reduced the sentence.[5] Weighing all the factors, the end sentence imposed was, as we have stated, 2 years 9 months imprisonment.

Outline of submissions

[22] In general terms it is the submission of the Crown that the Chief Justice erred in his approach to sentencing. It is submitted that he failed to take into account the fact that the maximum sentence for GBH offending is 14 years imprisonment. The

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2 *Nuku v R* [2012] NZCA 584.
3 At [47] and [48].
4 At [49].
5 At [50].

Judge did not correctly apply the relevant New Zealand authorities. The sentencing bands he applied in reaching a starting point were too low. The Crown relied on the recent decision of the Court of Appeal of *R v Goodwin*,[6] which had been critical of the sentence approach taken in this sentencing. The Crown is recorded by the Chief Justice as having submitted that the offending fell between bands one and two in *Taueki*.[7] Before us the Crown submitted that the offending was towards the top of band two.

[23] The Crown also submitted that the Judge erred in taking into account provocation and drunkenness as mitigating factors. It was submitted that the end sentence should have been 4 to 4 ½ years imprisonment.

[24] In response Mr George, for Mr Virivirisai, submitted that the bands applied by the Chief Justice were within the range, and that the starting point fixed by the Judge was in all the circumstances fair. He explained the particular sentencing environment of the Cook Islands. He stated that on the facts of the case it was appropriate to treat provocation as a mitigating factor, and further that the Judge was correct to apply a discount for intoxication.

The approach to the sentencing

[25] As we have indicated, since the sentencing by the Chief Justice the Court of Appeal has delivered its judgment in *Goodwin v R*.[8] That judgment set out guidelines for sentencing persons convicted of GBH offending carrying a maximum penalty of 14 years imprisonment. The Court fully reviewed the decisions of *R v Taueki* and *Nuku v R* and a number of High Court authorities. It considered in detail the sentencing in this case, and the Chief Justice's summary of the appropriate levels, and stated:

> [51] The Chief Justice suggested a tariff which we consider was on the lenient side. We rule that, using the *Taueki* and *Nuku* categorisations, Band One should attract 1 to 3 years' imprisonment, Band Two, 3 to 5 years' imprisonment and Band Three, 5 years'

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6 *R v Goodwin* [2018] CKHC 21, CRs 93/2018, 136-137/2018 (23 November 2018) Keane, J.
7 At [40].
8 *Goodwin v R* [2019] CA 11/2018, CICA, (3 May 2019) Williams P, Barker JA, Paterson JA.

> imprisonment and upwards. Applying the bands in an evaluative way, as counselled by *Taueki*, the appellant's offending must come into Band 3 when the serious life-threatening injuries to the principal victim are taken into account plus the fact that two other victims were knifed, despite self-defence having been found by Keane J to have been initially justified, albeit exceeded.

[26] The effect of the decision in *Goodwin* is to confirm a sentencing regime for GBH offending in the Cook Islands which is considerably more lenient than in New Zealand.

[27] As we have said, Mr George for Mr Virivirisai supported the Chief Justice's approach, which involved lower bands. He submitted to us that in approaching sentencing, the Court should bear in mind the fact that the people of the Cook Islands by and large adhere to the Christian faith and are regular churchgoers. They practise forgiveness. This is a small connected community where people look after each other more than in larger communities, and those who have done wrong may be less likely to do so again. Forgiveness is fundamental to the community.

[28] In general terms we accept this. It was recognised in *Goodwin* that the virtue of forgiveness frequently manifests itself in Cook Islands cases.[9] Indeed it is a feature of many of the violent offending cases which were cited to us, that the victims have forgiven the defendant who has inflicted violence on them.

[29] We respectfully adopt the *Goodwin* approach as quoted at [25] to sentencing for GBH offending. As this Court did in that case, we conclude that the bands applied by the Chief Justice were too low. The bands that we apply in reconsidering the sentence are those set out in *Goodwin*.

[30] We also record that we do not agree with the Chief Justice's reliance on *Nuku v R* in the context of GBH sentencing. That case modified the *R v Taueki* bands for the much less serious offence of injuring with intent, and the *Nuku* bands are of no help in GBH sentencing.

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[9] At [44]-[48].

[31] Before we leave the general approach to sentencing for violent offending, we note that in the earlier sentencing decision of *Police v Nicholas*[10] referred to in *R v Goodwin* it was observed in relation to the one-third deduction for a guilty plea, that there were a number of reasons why a different approach in the Cook Islands to that of New Zealand was appropriate. The Judge there referred to the cost of trials in bringing people to justice being higher in the Cook Islands than in New Zealand.[11] He observed further that the conditions of imprisonment are perhaps more extreme in the Cook Islands than they are in New Zealand.

[32] We would not wish it to be thought that in this judgment we are endorsing those remarks. We accept the Crown's observation that there was no factual basis for making such assumptions about the costs of bringing offenders before the Court, or the conditions of the prisons. Indeed, the assumptions made seem to us to be contestable. However, consistent with what we have said earlier, we do agree with other remarks made in that decision to the effect that the culture of the Cook Islands is different from that of New Zealand, in that in this country and the people are more forgiving.

Appropriate starting point

[33] *R v Taueki* is a leading New Zealand decision not only for setting out the New Zealand approach to GBH offending, but also for setting out an approach to sentencing in general.

[34] On the approach to sentencing it was stated in that case[12] that in sentencing it is necessary to first consider the features of the offending itself, and the particular aggravating and mitigating aspects of that offending, to fix the starting point. This initial fixing of the starting point is carried out without reference to mitigating and aggravating features personal to the offender. It is focussed on the actions involved in the offending.

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10 *Police v Nicholas* CR 251/18, (1 August 2018), Doherty, J.
11 At para [25].
12 At para [8].

[35] Once the starting point has been fixed, there is then the second stage of sentencing. This is where the mitigating and aggravating features relating to the offender personally are applied to the starting point already fixed for the offending, to reach an end outcome. This is where matters such as a guilty plea or past good community works (mitigating), and a bad previous record of similar offending (aggravating) are taken into account.

[36] The Crown in its submissions observed that this approach to sentencing was now widely adopted in the Cook Islands. We agree that it provides a useful framework.

[37] We also received submissions on the purposes and principles of sentencing. The question arose as to the relevance of sections 7, 8 and 9 of the Sentencing Act 2002 (NZ), which set out the purposes and principles of sentencing, and aggravating and mitigating factors, in New Zealand.

[38] There is no dispute that as a result of the application of Article 46 of the Constitution of the Cook Islands none of the provisions of the New Zealand Sentencing Act applies directly in the Cook Islands. At the same time, however, as both counsel accepted, to the extent that sections 7, 8 and 9 codify the common law, these New Zealand provisions continue to provide useful checklists for trial court Judges in the Cook Islands.

The starting point in this sentencing

[39] The Chief Justice first fixed the starting point by reference to the offending. As we have set out, in fixing the appropriate starting point the Chief Justice accepted the (then) Crown submission that the offending was borderline band 1 and 2, applying the bands as he assessed them.

[40] We first consider the gravity of the offending generally. By any standards this was a very serious assault. It involved the application of a considerable amount of force. There was deliberate intention to throw C off the balcony and onto the ground. The risk of some injury was certain, and the risk of severe injury from such

an action was very high indeed. C was drunk and sleepy, and unable to properly protect himself.

[41] There were therefore at least three significant aggravating factors in this offending. There was extreme violence, there was serious injury, and all this to a vulnerable victim who was lying on the floor of the balcony, who was drunk and asleep or sleepy.

[42] We agree with the Crown submission that with three such aggravating factors such offending fell into the higher part of band 2 of the *Taueki* bands as modified for the Cook Islands by the *Goodwin* decision. Band 2 of *Goodwin* sets a range of 3 to 5 years imprisonment.

Provocation

[43] We next consider the issue of whether provocation should have been treated by the Chief Justice as a mitigating factor relating to the offending. He considered that it was.[13]

[44] It was said in *Taueki* that provocation may justify a lower starting point. We recognise that provocation can be a mitigating factor in sentencing in the Cook Islands. However we agree with what was said in *R v Taueki*. It is not sufficient for a defendant to claim to have been incensed by the actions of the victim. The sentencing Judge "... will need to satisfied that there was serious provocation which was an operative cause of the violence inflicted by the offender, and which remained an operative cause throughout the commission of the offence".[14]

[45] Here Mr Virivirisai may have felt some anger at the actions of C. Indeed Mr George referred us to a part of his evidence where the following exchange occurred:

> Q. And that was unacceptable to you, wasn't it?
> A. Yes.

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13 At para [50].
14 At para [32](a) of *R v Taueki*.

Q. It made you angry?
A. Was quite not happy about it.
Q. So it made you angry?
A. I was upset about it.
Q. Made you jealous, did it?
A. I was upset about it.

[46] We are prepared to accept that C's actions may have angered Mr Virivirisai and that this might provide some limited excuse for his initial assault on C where he pushed him and punched him. However, it was Mr George's estimation, which we accept, that the whole process of assault would have taken about a minute. Given that time lapse, we cannot agree that the initial touching of Mr Virivirisai's partner could be seen as an operative cause of a process of assault lasting a minute, culminating in the deliberate act of Mr Virivirisai lifting up C and throwing him off the balcony. We do not accept that the relatively minor initial provocation, if it can be called that, can be regarded as an operative cause of the throwing.

[47] It can be further observed that Mr Virivirisai's action of throwing C off the balcony was so disproportionate to any perceived insult or slight, a minute earlier, as to render it irrelevant as a mitigating factor.

[48] We therefore put provocation to one side, and accept the Crown's submission in this Court that the appropriate starting point is at the higher end of band 2, at 4 to 4 ½ years imprisonment. Given that this is a Crown appeal we fix the starting point at 4 years imprisonment. We note that such a starting point is close to 50 percent less than the equivalent starting point if the bands of *Taueki* were applied, where band 2 was set at 5 to 10 years imprisonment.

Intoxication

[49] We now turn to the mitigating factors relating to Mr Virivirisai personally. In the High Court Mr Virivirisai's drunkenness was treated as such a mitigating factor.

[50] It is to be noted that in New Zealand, section 9(3) of the Sentencing Act provides specifically that a court must not take the voluntary consumption or use of

alcohol into account by way of mitigation in sentencing. However, the Crown has rightly not relied on this section. As we have already noted, the New Zealand Sentencing Act does not apply in the Cook Islands. The relevance or otherwise of intoxication as a sentencing factor is therefore to be determined at common law where, depending on the facts of the particular case, it may be an aggravating, mitigating or neutral factor. In most cases, however, it is likely to be neutral and therefore irrelevant.[15]

[51] There is no relevant Cook Islands authority on intoxication in sentencing, of which we have been made aware. Apart from the sentencing in this case, we have not been shown by either counsel any decision where intoxication has been taken into account as a mitigating factor. However, we have been referred to two cases where the High Court has expressly refused to take intoxication into account as a mitigating factor where there has been violent offending[16].

[52] In this case Mr Virivirisai was a mature adult. We are unable to speculate on the degree to which his actions were affected by alcohol. There was certainly no plea made on his behalf based on drunkenness. In our view no such plea could have succeeded. C was a 37 year old man who chose to get drunk. This was not one of those unusual cases where intoxication could be regarded as either mitigating or aggravating. In our view his intoxication was irrelevant.

[53] Therefore we see no basis for any discount on the basis of intoxication.

Conclusion

[54] The starting point in this case was set at a mark that was too low. Given the gravity of the offending, it should have been 4 years imprisonment. There was no basis for a deduction for provocation.

[55] As to personal mitigating factors, the only point raised was intoxication, and for the reasons given we regard Mr Virivirisai's intoxication as a neutral factor.

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15 *Lin v Public Prosecutor* [2008] SGHC 146. We thank Crown counsel for bringing this case to our attention.

Intoxication has not been raised as an aggravating factor. There is therefore no adjustment for personal circumstances.

[56] We conclude that the sentence of 2 years and 9 months imprisonment was manifestly inadequate. The sentence should have been 4 years imprisonment.

Result

[57] The appeal against sentence is allowed.

[58] The sentence imposed upon Mr Virivirisai by the Chief Justice on the charge of causing grievous bodily harm to C with intention to cause that grievous bodily harm is quashed. In its place a sentence of 4 years imprisonment is imposed.

[59] The conviction and discharge on the charge of male assaults female remains.

David Williams, P Raynor Asher, JA Douglas White, JA

[16] *Police v Robinson* CRs 934/12 & 177/13, (6 December 2013) Grice, J, para [13]; *Police v Maxwell* CRs 384/17 & 452/17, (7 December 2017) Grice, J, para [20].