

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

**JP APPEAL NO. 7/13
(CR 296/13)**

POLICE

v

EDOUARD ANGUNA

Hearing: 11 September 2013
Appearances: Ms M Henry for the Police
Mr N George for the Defendant
Judgment: 11 September 2013

JUDGMENT OF WESTON CJ

Appeal

[1] Mr Anguna was charged under s 214(b) of the Crimes Act that he assaulted a female being his former partner. He pleaded guilty to that charge and appeared before a Justice of the Peace on 18 July 2013 for sentencing. I have a transcript of that hearing. He was discharged without conviction. This is an appeal from that.

The JP decision

[2] On his sentencing before the JP, the Police Summary of Facts was read out. That summary includes the following:

“Sometime between 3 and 4 am the victim was hugging a friend when the defendant approached and kicked her on her thighs. The defendant then grabbed her on her left arm when he was eventually pushed away. The defendant again grabbed the victim on her left hand and shoved her onto the

fence, then the defendant walked away. The defendant then came back and punched her on the left side of her face. The defendant, when questioned, refused to make a statement nor any explanations but admitted to slapping the victim on the left side of her face.”

[3] Mr George then made submissions to the JP in relation to the Summary of Facts and endeavoured to downplay them. He had not sought a formal disputed facts hearing and in submissions before me today said he accepted that the Police summary is accurate but that the language used by the Police in that summary is exaggerated and more dramatic than his client believes to be the case. Mr George then went on, in his submissions to the JP, to submit that the defendant was upset to see her out at the party, and then later on he talked about her in terms that she was neglecting their child.

[4] All of those submissions then led on to the JP making a decision in the following terms:

“Guilty plea entered through counsel George, first appearance by defendant. An assault charge is a very serious charge and carries a maximum charge of 2 years. In this case however given the circumstances of the situation whereby an infant of 2 months old is the core issue of the event the Court has decided that the defendant be discharged without conviction.”

[5] The reference to the 2 month old baby being the core issue of the event is somewhat cryptic but is I hope partially explained by the submissions that Mr George made on the topic in which I have referred to above. I will come back to it below.

[6] Today Mr George accepted that it can never be justification for a father to punch a mother on the assumption that the mother should be at home looking after a baby (which appear to lie at the heart of the decision as above). It seems to me that that must fundamentally be correct and those reasons given by the JP are with respect not appropriate reasons. Nevertheless, that of itself does not answer this appeal and I now turn to the submissions made by the Crown.

Crown Submissions

[7] The Crown submitted that the discharge without conviction under s 112 of the Code of Civil Procedure Act was manifestly inadequate. Ms Henry referred me to s 107 of the New Zealand Sentencing Act which provides:

“The Court must not discharge an offender without conviction unless the Court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.”

[8] As I understand it, that codified the existing common law and Ms Henry submitted to that effect. She said that the Court was required to engage in a three-step process. First, it must identify the gravity of the offence. Secondly, it must identify the direct and indirect consequences of a conviction and third, it must determine whether the direct and indirect consequences would be out of all proportion to the gravity of the offending.

[9] During the course of her submissions Ms Henry referred to various other sentencing decisions and she gave me a schedule of those. She referred to the decision of *R v Samuel Morris*, a decision of Grice J, who noted that cases of domestic abuse cannot be tolerated.

[10] Ms Henry then reviewed the facts of this case. In paragraph 14 of her submissions she said:

“It is difficult in these circumstances to understand why a Court accepts a man can kick his partner on her thighs, shove her onto a fence, and punch her on the face simply because he believes she should be at home with a child. This is the signal that this sentence sends to the community.”

[11] She submitted that, in order to take proper account of this Court’s obligations to deter and to denounce the relevant conduct, it was appropriate that the appeal should be allowed.

Respondent’s Submissions

[12] I now turn to Mr George’s submissions. He started by addressing the expression “direct and indirect consequences of a conviction”. He submitted that this included not only the consequences to the defendant but in this case also the

consequences to the complainant. He handed to me a letter from the complainant which was in support of the defendant. She asked the Court to be lenient on him so that he could continue to support their daughter. In that letter she said:

“In this day and age we do make mistakes, and so we have both agreed to give our daughter Savannah a family orientated life as much as possible. I would not like our daughter to feel that her little family is falling apart because of our mistake.”

[13] I raised with Mr George what was meant by the reference to “our mistake”? In response to that he checked with the complainant and she advised that she felt that she was partly to blame because she was at the party at which she was hit by her former partner. I want to make it quite clear that I do not see that there is any blame to be attached to her. Whether or not she feels she has made a mistake, there is no possible basis for any argument that the defendant was justified in hitting her because she was at the party. It may be that as the mother of a young baby she should be spending time with the baby. That is not a matter for me to judge or to assess. For all I know she may have made appropriate arrangements for its care at the time she was at the party. I do not know how long she was at the party. It is simply not appropriate that I should be running some moral ruler over her conduct. The short point is that the defendant hit her and he should not have done that.

[14] Nevertheless, I do need to take account of consequences, both direct and indirect, and in my view there may be circumstances in which that would include the consequences of a conviction to family members of a defendant. I come back to that shortly.

[15] Mr George then went on to challenge the facts set out in the Police summary. As I have already noted, that challenge, in the end, was a challenge to the characterisation of those facts rather than the facts themselves. Irrespective of how you put it, though, it seems to me that the assault was reasonably significant. It was not one act but several – it involved kicking, shoving and then hitting her around her left eye. While the consequences of that do not seem to have been significant, there was some minor swelling around her eye, the fact that there were at least three parts to the attack is something that needs to be brought to account.

[16] Mr George then went on to argue that it was important that JPs have a discretion about the s 112 power to discharge without conviction. It seems to be clear they do have that discretion. As I have already said, though, the reasoning for the discharge without conviction was inappropriate. It can never be a good explanation to justify an assault that somehow the mother is deficient and deserves a beating. It has little if any relevance to a decision to discharge without conviction in relation to an offence of this sort.

[17] Mr George then argued that the cultural dimensions of this case must be brought to account. By that I think he meant that there was an expectation in the Cook Islands that the mother would be responsible for the baby and should not be out partying. I am reluctant to take account of that because I think it is simply another way of dressing up the argument that I have already addressed above. It cannot be a justification for an assault and therefore I am reluctant to see it used to support a discharge without conviction. Equally, I am not prepared to accept that the mother in some way caused or justified these actions. The fact of the matter is they occurred and they should not have.

[18] Mr George then addressed the question of the consequences of a conviction. He said that the defendant would lose his job. I put it to him that that seemed an odd state of affairs because surely the key factor was that the defendant had already pleaded guilty to an assault charge. I could not understand how it then mattered how the Court approached that. Once the defendant had pleaded guilty to an assault charge that surely would be the cause of employment problems if they were to emerge. Mr George did not accept that. He said that any conviction and sentence would probably have fatal consequences for the defendant's job prospects with the Ministry.

[19] I asked Ms Henry about this. She was not able to throw any light on the issue. She was not aware of any rule or practice that applied in the case of Probation employees when it came to dealing with these sort of things.

The Probation Service

[20] I now want to say something about the role of the Probation Service in this. The defendant is a Probation officer. That is an important role and part of the law enforcement machinery in this country. It is broadly similar to that of a Police officer who comes before the Court charged with offences having pleaded guilty to them. I understand from Ms Henry that there is a particular code of conduct for Police and I am not endeavouring to set out any general statement of the law in relation to the Police. However, for a Probation officer, high standards of personal conduct are also required and a Probation officer who breaches the law needs to understand that the Courts will regard that seriously. They are not necessarily in a different position to other citizens but they must expect any submissions by way of mitigation to be carefully scrutinized.

[21] In this case, the Chief Probation Officer wrote a letter of reference which was before the JP. I understand that the Commissioner of Police takes the view that in similar circumstances he does not provide references. I commend that thought to the Probation Service. I understand there are no protocols or guidelines that deal with these fortunately rare circumstances where a member of the Probation Service is before the Court. Nevertheless, I think great care needs to be taken with the provision of such materials to the Court. Otherwise it might be suggested that the Probation Service is trying to pressure the Court.

Decision

[22] Having set out those matters I now address the three factors referred to by Ms Henry which I accept guide my decision today. As she has said, and I accept, my job on appeal is to decide whether the decision of the JP was manifestly inadequate and in order to do this I review the three steps.

[23] First of all I address the gravity of the offence. As I have already said, this offence comprised several components. While the complainant was not permanently or significantly damaged as a result of the assault there is no doubt that domestic violence of the sort that occurred here is regarded as being serious. Therefore while the assault itself is at the lower end of the scale I regard this as significant offending.

[24] The second factor is to address the direct and indirect consequences of a conviction. The most direct consequence appears to be that the defendant's job will be under threat. Indeed the letter from the Chief Probation Officer says that the charge against him will have a negative impact on his future. It is not clear to me whether that distinguishes between the fact that the defendant pleaded guilty on the one hand or whether he is convicted on the other. As I have already said, that seems to me to be a distinction without a meaning.

[25] I accept that there must be some consequences for the defendant's job if he is convicted. It is impossible for me to determine these. Equally, I can say this. If the defendant is convicted it does not seem to me that automatically he should lose his job. While it is a matter for the Ministry to assess, it seems to me that this was very much a one-off event that occurred in the passion of a particular moment. While the assault cannot be excused for those reasons it would be appropriate in assessing job prospects to take that into account. It is very unlikely that this sort of assault would have occurred in other circumstances.

[26] While there may be other consequences that would arise including upset on the part of the complainant, it seems to me they are not overwhelmingly significant in this case. It is the job prospects that are the main ones to think about here.

[27] The third factor is to determine whether the direct and indirect consequences of a conviction would be out of proportion to the gravity. I have already made my assessment of the gravity. I think it is significant offending. I think there is a real risk that if the defendant is discharged without conviction that there would be a disproportionality. My job is to balance the gravity of the offence against the consequences that there is a conviction. As I have said, the main consequence is the exposure of the defendant to job loss. However, when I balance that against the gravity of the offending I believe that the sentence imposed by the Justice of the Peace was manifestly inadequate. I allow the appeal.

[28] I also note that if the defendant is not convicted there is a real risk of a perception that in some way the Probation Service looks after its own. That, of itself, is not a factor in my decision. It cannot be. I specifically refer to this to make that clear.

Sentence

[29] Having come to that conclusion I now need to sentence the defendant. Ms Henry directly submitted that that was what I should do if the appeal were upheld. I asked Mr George for his response to that. He strongly urged that that issue should not arise because the sentence of the JP was appropriate. However, after some pushing by me, he accepted that if I came to a contrary view, and upheld the appeal, then I would need to undertake the sentencing.

[30] I have already addressed the facts above. I do not repeat them here. I take them into account. I take account of the fact that the defendant was a first offender and that he has a serious and responsible job. I accept that the events that led to the charge were one-off and arose out of the passion of the moment. As I have said that passion was misplaced and misguided and there can be no excuse for hitting anyone. Nevertheless they are relevant because they do support a submission that this was a one-off event highly unlikely to occur.

[31] I also take account of the fact that the complainant now supports the defendant. That is an issue that this Court frequently grapples with. On the one hand a complainant has been assaulted and on the other they are usually under strong emotional pressure to support the person who has assaulted them. These issues are almost impossible to resolve and whatever the Court does it is criticised for either being too lenient or too harsh. There is no one-size-fits-all in these. All that can be done is the Court weighs all of the factors and tries to make the best decision that it can.

[32] In these circumstances I believe that the matter is appropriately addressed by a term of probation of 12 months.

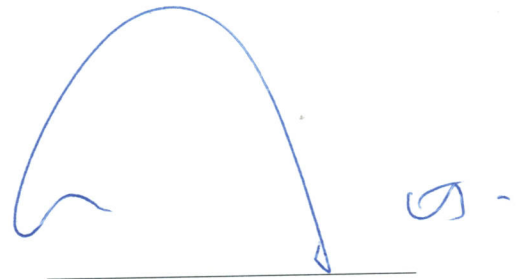
[33] I have given serious consideration to whether there should be a period of community service. The Crown seeks a term of 6 months. I believe that there should be some term of community service but that 6 months is excessive. My inclination is to order a term of community service of 2 months.

Result

[34] So what will happen is that I uphold the appeal and in place of the discharge without conviction I enter a conviction. The defendant is sentenced to 12 months probation with the first 2 months of that to be served on community service.

[35] I do not direct any particular terms of probation. I am not aware of any particular circumstances that need to be addressed in any order for probation but leave it to the Probation Service to address any terms that may be necessary in this case if there are such.

[36] I understand that Court costs of \$30 have already been ordered so unless there is any issue about that, that order continues to stand and the defendant must pay \$30 Court costs.



Tom Weston
Chief Justice