

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

**JP APPEAL NO. 9/2013  
(CR NO. 472/2013)**

IN THE MATTER of Section 214(b) of the Crimes Act and  
Section 131 of the Criminal Procedure  
Act 1980-81

BETWEEN **FA'A FOU AMATE** of Samoa  
Appellant

AND **COOK ISLANDS POLICE**  
Respondent

Hearing: 28 November 2013

Counsel: Mr Rasmussen for the Appellant  
Mr Manavaroa for the Respondent

Judgment: 28 November 2013

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**JUDGMENT OF GRICE J**

(Appeal against Sentence of Justice of the Peace made 8<sup>th</sup> November 2013)

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[1] This is an appeal against a sentence delivered on 8<sup>th</sup> November 2013 of 12 months probation with the first two months to be served on community service. The Appellant had pleaded guilty on 24<sup>th</sup> October 2013 to a charge of assault on a female (s 214(b) of the Crimes Act). That offence carries a maximum term of imprisonment of 2 years.

Background

[2] I have received helpful submissions from both parties to assist me dealing with this at short notice.

[3] The Appellant is a Samoan national. He is aged 24 years and arrived in Rarotonga on 26<sup>th</sup> July 2013. He is a rugby union player playing at Samoan national

level and was brought to Rarotonga as a sponsored rugby player for the Takuvaine Rugby Club. In accordance with a sponsorship by the rugby club his expenses including accommodation, travel, food and spending money as well as an allowance per game were covered. The team did well.

[4] In the course of some celebrations after a win on the evening of 14<sup>th</sup> September an incident occurred with a young woman resulting in the charge referred to above.

[5] The Appellant was due to go home to Samoa as he had been selected to play for a Samoan national team again. He says his mother is also unwell and she is presently in hospital in Samoa. He says his host family is now finding it hard to keep him, the club no longer pays him or looks after him and he is unemployed. The club has indicated it would pay a fine. This evidence is set out in an affidavit by the Appellant.

[6] Counsel for the Appellant submits that the charge arose out of an assault which occurred after the Appellant and others had been drinking. The Appellant says it was in self defence. The complainant says it was unprovoked. Either way it is common ground that the Appellant received injuries but the extent of them is unclear, there being no medical certificate.

[7] In a Probation report filed at the time of the sentencing, the Probation Officer refers to the complainant being taken to the hospital the following day by the Cook Islands Police and having a painful jaw as well as bruising and swelling following the assault.

[8] Counsel submits that the Appellant is a first offender.

### The Sentence

[9] The Appellant pleaded guilty to the charge. His counsel Mr Rasmussen submitted to the Justice of the Peace ("JP") that a fine would be appropriate. The JP carefully considered the options and records in her decision:

“In sentencing you today I have taken into account the following mitigating factors:

1. early guilty plea
2. first appearance
3. acknowledgement and acceptance of full responsibility of the offending
4. showed remorse
5. co-operated with the authorities.

While it is recognised that there were a number of mitigating factors nevertheless it is a serious charge fuelled by alcohol. In pleading guilty you are admitting to have assaulted the victim. This kind of offending must be denounced and the sentencing must reflect the Court’s intention to send a clear message to the public that this kind of behaviour will not be tolerated.

Therefore you are convicted and placed on 12 months probation service including two months community service.”

[10] Mr Rasmussen in his submissions indicated that he objected to the JP about the sentence and the JP indicated that there was a letter from the Ministry of Justice written by the Chief Probation Office to an airline ticket sale outlet not to sell any ticket to the Appellant so he could not leave the Cook Islands, in any event. Mr Rasmussen says the Appellant did in fact have a return ticket purchased by the club, but nevertheless he had surrendered his passport so even if he wanted to he could not leave the country. Mr Rasmussen says this letter, a copy of which is on the Court file, was irrelevant. There is no other material on the file to indicate how this letter was used by the JP.

[11] Counsel submits that the sentence should be quashed and substituted with a fine. He makes that submission on the grounds that the JP did not properly take into account the implications of ordering 12 months probation for the Appellant. These implications he says include:

- the visa and immigration requirements of the Appellant. His permit expired on 4<sup>th</sup> November 2013, the same date that his return ticket would have taken him back to Samoa
- undue hardship on the family caring for Mr Amate

- the Appellant is unemployed and has no family here
- there are expenses on his sponsor and the family who are accommodating and looking after the Appellant.
- the provisions of the Entry and Departure Act of the Cook Islands provide where foreigners are convicted in the Cook Islands they are to be sent out of the country.
- the rugby season has now ended and therefore his permit to be in the Cook Islands has expired. He is an over-stayer and this has implications concerning employment.
- the Appellant's mother is ill and in hospital and on humanitarian grounds he should be allowed to return to Samoa.

[12] Mr Rasmussen submits that the principles of sentencing require that the sentencing be fair and that the present sentence is “unfair, unreasonable and unnecessarily problematic in light of the circumstances”. He also submits that rehabilitation is another principle of sentencing to take into account and presumably forcing the Appellant to stay in the Cook Islands for 12 months probation will militate against this rehabilitation. This time would be better spent back in Samoa with his family and employment. He was formerly employed as an electrician but before he came to the Cook Islands he was working as a designer for the family business called “Nika Designs”. If he does not go back he will also be unable to play for the Samoan national team.

### Principles

[13] Section 76 of the Judicature Act 1980-81 provides for a general right appeal from determinations of any proceedings, civil or criminal or land by a Justice sitting alone from Justices of the Peace or from any party not satisfied with a decision.

[14] Section 80 provides that on any appeal from the Justices the Judge may “affirm, reverse or vary the judgment appealed from, or may make such order in

respect of the appeal, and may award such costs as he thinks fit to or against any parties to the appeal.”

[15] Subsection (2) provides:

“80(2) Without limiting the general powers conferred by subsection (1) of this section, the Judge –

...

(b) On any appeal against sentence, if he thinks that a different sentence should have been passed, shall either quash the sentence passed and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as he thinks ought to have been passed, or vary, within the limits warranted in law, the sentence or any part of it or any condition imposed in it, and in any other case he shall dismiss the appeal.

[16] The principles surrounding the appeal against a discretion are well settled. The Appellate Court will not interfere with the lower Court’s exercise of discretion unless it is clearly satisfied that it acted on a wrong principle. It will not substitute its discretion merely because the Appellate Court might have exercised it in a different way if they had been setting at first instance.

[17] However, the circumstances surrounding this appeal are unusual in that the imposition of 12 months probation has substantial repercussions on the Appellant, his ability to earn a living, to associate with family and friends and also may have implications under the immigration laws of the Cook Islands.

[18] The JP rightly commented that in sentencing on this charge there must be denunciation and “the sentencing must reflect the Court’s intention to send a clear message to the public that this kind of behaviour will not be tolerated.” However the repercussions of a 12 months probation sentence on this particular Appellant are far more severe than they would be on a Cook Islands resident. In the circumstances I am of the view that those factors were not properly taken into account when the JP exercised her discretion in sentencing. I am of the view that the principles were correctly expressed by her about the need to denounce this kind of behaviour but that can be achieved in different ways, less restrictive in this case. If the Appellant had been a Cook Island resident my view would have been quite different and I would not have interfered with the sentence.

[19] However, in all the circumstances and given the effect of 12 months probation on this particular Defendant, the Cook Islands community having to accommodate and care for him and the fact that he will be of uncertain immigration status leads me to the conclusion that the sentence should be quashed and substituted with a fine. However, the behaviour of the Appellant must be denounced. A message is required that this will not be tolerated in the Cook Islands. I note that the rugby club will pay a fine and Mr Rasmussen tells me that the Appellant will be required to repay this so he will not escape liability on that score and I note that a representative of the club is in the Court and will be making a note of that.

[20] In addition, this will enable him to carry out what he needs to do to leave the country as soon as possible.

[21] The Crown filed a written submission and indicated it had no objection to the appeal being allowed and candidly indicated that in the circumstances thought it was appropriate that a substitute sentence be imposed, given the hardship for the Defendant in this particular occasion.

[22] So now I must turn to the sentence in substitution of the existing sentence imposed by the JP.

[23] In reaching my decision I recognise the need to denounce the behaviour. It is not acceptable and as I have said in the usual situation I would have left the sentence as it was.

[24] The message needs to be that this behaviour will be that the Defendant will be held accountable for this type of behaviour, that other people must hear this and hopefully be deterred from similar sort of offending, and the community's denunciation must be expressed. I did consider substituting a short period of community service but that gives rise to the same problems that it will keep the Defendant in the Cook Islands in circumstances which create substantial hardship for the Defendant and also for his hosts.

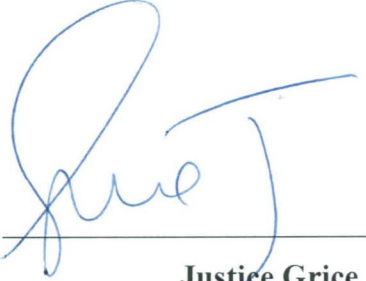
[25] Therefore, the best option for sentence here is a fine. I cannot control who pays this fine but I certainly sent a message about the Defendant needing to be held

accountable and that fine should express the seriousness for which these types of offences are considered in the Cook Islands.

[26] Therefore, I:

- (a) make an Order quashing the sentence of the Justice of the Peace dated 8<sup>th</sup> November 2013;
- (b) impose a fine of \$700 and I make the direction that payment be made immediately;
- (c) \$30 Court costs.

(Note: Leave to apply to vary payment of fine.)



Justice Grice