IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION) **CR NOS 728-731/19**

POLICE

v

ROIMATA FAARII MOEKAPITI

Counsel: M Williams and M Okotai for the Crown
N George for the Defendant

Sentence: 25 June 2021

SENTENCING NOTES
OF THE HONOURABLE JUSTICE DAME JUDITH POTTER

[11:55:55]

[1] Following trial by jury the defendant Roimata Farii Moekapiti was found guilty and convicted of four charges of assault with intent to injure under s 213 of the Crimes Act 1969.

[2] Each charge represented a single application of force, three strikes to the face or head and one to the stomach of the victim, Aue Vakatini. Each charge carries a maximum penalty of three years imprisonment.

[3] The defendant is before the Court today for sentencing following those convictions.

Background Facts

[4] The offences occurred in the early hours of the morning of 1 September 2019. The defendant and his colleagues, two of them, who were junior police officers, the defendant being the senior officer of that night, were made aware of an incident outside Raro Fried Chicken involving the victim. The victim, Mr Vakatini, was intoxicated and aggressive. The three officers on duty including the defendant were involved in restraining the victim and handcuffing him. The victim continued to be abusive and to struggle and was pushed to the ground and handcuffed behind his back. While the victim was on the ground, the defendant stepped over him and struck him once in the face. His head jerked to the side. This incident was captured on cellphone which was shown in Court to the jury. It gives rise to the first charge.

[5] Mr Vakatini was transported to the police station. On arrival at the police station the defendant escorted the victim out of the police vehicle and up the front steps. The defendant said to the victim, to the effect, "You think I'm like other police officers who will let people like you go?" The defendant then punched the victim with a closed fist in his head area. This was the second assault which gave rise to the second charge. The jury, by its verdict rejected the assertion that the defendant was acting in self-defence after he had been spat on.

[6] Inside the police station the victim was bleeding onto the floor. He was sat down in a chair, still handcuffed. The defendant punched the victim in the jaw. This was the third assault and gave rise to the third charge. While the victim, Mr Vakatini, accepted that he had spat blood, he said this was after he had been assaulted. The defendant claimed he struck the victim after blood had been spat at him, in an act of self-defence. By its verdict, the jury rejected this assertion.

[7] While Mr Vakatini was still on the chair the defendant punched him in the stomach. This was the fourth assault and subject of the fourth charge. The defendant's evidence was that he delivered a soft hit in the stomach simply to release the handcuffs the victim was wearing. By their verdict, the jury rejected this explanation.

[8] The victim, Mr Vakatini, was left in the police station over the weekend without access to any medical treatment. The defendant failed to report on the charge form that the victim had

suffered injuries and failed to refer to these assaults in the formal witness statement or report to his superiors.

Victim Impact Statement

[9] I refer to the victim impact statement made by Mr Vakatini. The victim suffered the following injuries which by the verdicts were all caused by the force inflicted by the defendant. Longitude and abrasion in the middle of the forehead and a few abrasions on the left side of the face. Localised tenderness of the right tempera mandibular joint – just above the jaw – and reduced movement with mild swelling. A small laceration between the lower incisor teeth. Abrasions on the right side of his trunk, both elbows and both knees. A fracture of the mandible – lower jaw, in the middle towards the right – and two hair line fractures of the jaw, midway on the right side. The medical evidence at trial that with a fracture there is a breakage of the bone and with a hair line fracture, there is a breakage but no displacement of the bone. It was agreed in cross-examination that the force used to cause this fracture of the jaw would have been a very powerful punch.

[10] Mr Vakatini stated in evidence that he underwent an operation and his jaw had to be wired closed for six weeks. The dentist who performed this work confirmed in evidence that during this six weeks period only liquids could be consumed, usually through a straw. In his victim impact statement, Mr Vakatini refers to suffering a lot of pain in his jaw, to the discomfort of having metal wires running through his gums and around his teeth, his inability to eat, that he was starving and weak, unable to sleep properly, unable to brush his teeth and clean the inside of his mouth. That he was unable to talk properly and to socialise with other people. He was unable to work for a week following the assaults and was obliged to take other days off work because of the pain he was suffering. The loss of income caused him to struggle to provide for his family.

Probation Report

[11] The probation report records that Mr Moekapiti is aged 27 years and is in a stable relationship with his partner of five years which whom he has two children, aged five and two. He has been a sworn officer of the Cook Islands Police Service for seven years. The report records that Mr Moekapiti continues to deny the charges, maintains his innocence, shows no

remorse and accepts no responsibility for his actions. The defendant repeated to the probation officer his version of events which was essentially consistent with the evidence he gave at the trial. He maintains that he acted in self-defence against Mr Vakatini's violent behaviour. This was clearly rejected by the jury in finding him guilty on all four charges.

[12] Numerous letters in support of the defendant were presented with the probation report, from members of his wider family and tellingly from his partner who refers to the stress and strain for her and their two children of the defendant being in custody, of the loss of the principal breadwinner for the family and of the absence of a good and loyal partner and father.

[13] I observe that it is an unfortunate and regrettable consequence of criminal offending, that the family of an offender often suffer greatly, sometimes perhaps even more than the offender. The price of the penalty for criminal offending is often widespread and impacts seriously and inevitably on family members.

[14] Other letters of support are from long standing friends, representatives of The Church of Latter Day Saints, colleagues in the Police force and associates from sports organisations and the cultural team of which the defendant was a member. These letters and references refer to many positive qualities of the defendant. They have been read, or extracts from them, by Mr George in making his submissions to the Court today. They were emailed to me and I have read them all.

[15] The probation report notes that Mr Vakatini forgives the defendant but he seeks compensation for his medical bills of $230 and the loss of one week's wages. The defendant has agreed to meet these costs.

[16] The report concludes by noting that the defendant was a sworn police officer at the time of the offending, whose duty it was to protect and serve, a duty in which the defendant failed in seriously assaulting Mr Vakatini.

Aggravating features of the offending

[17] In its approach to sentencing the Court will consider the aggravating and mitigating features of the offending before turning to factor in any aggravating and mitigating features

relating to the offender. The Cook Islands Court of Appeal in the case of *Virivirisai*[1] confirmed that this is the proper approach for sentencing generally.

[18] The Crown's submissions note the following aggravating features of the offending with which there appears to be no issue and with which I substantially agree.

[19] Firstly, harm to the victim. The victim suffered a fracture and two hair line fractures to his jaw. In order to treat the injuries the victim had to undergo a surgical procedure whereby his jaw was wired together for six weeks. This affected his ability to eat properly, his family life and clearly his self-esteem.

[20] Secondly, the vulnerability of the victim. On the four occasions on which the defendant assaulted the victim, the victim was in the defendant's custody and was handcuffed. The victim's hands were handcuffed behind him which limited his ability to protect himself from punches. In the first assault the victim had fallen to the ground and the defendant stepped over him when he struck him to the face – this was the incident captured on video. The victim was defenceless on the ground. The defendant was in a position of power as a police officer and the victim was vulnerable as someone the defendant had arrested. His decision to use violence was an abuse of that power. The defendant also made threats towards the victim.

[21] Thirdly, breach of trust. The defendant was executing his duties as a police officer at the time of the offending. He abused his authority as a police officer by resorting to violence when the victim had already been arrested and restrained. The functions of a police officer include to keep the peace and maintain public safety and these important responsibilities are entrusted to the police by the public. The defendant breached that trust, as instead of ensuring the victim's safety and protection he used significant violence. The defendant failed to make any mention of the assaults, blood spitting or his claimed need to defend himself in his formal statement or report to his supervisors made on the night of these offences. The defendant failed to get any medical treatment for the victim while he was in custody over the weekend. It must have been clear to the defendant that the victim would have required at least some medical attention. The defendant was the senior officer on duty that night from a group of three and

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1 *R v Virivirisai* [2019] CA 1/19, CICA (5 November 2019).

was responsible for setting an example to the two junior officers. He failed to exhibit any measure of control and moral behaviour to the two junior officers.

[22] Fourthly, the scale of the offending. The seriousness of the injuries suffered by the victim are indicative of the gravity of the offending and the level of force used by the defendant. The violence was somewhat prolonged in that the first assault took place after arrest at Raro Fried Chicken; the second while walking into the police station and the third and fourth, while the victim sat in the police station. The victim was bleeding and still handcuffed after the second assault when the defendant punched the victim twice more.

[23] Fifthly, the attack to the head. The defendant on three of the four occasions attacked the victim's head. The injuries suffered by the victim as a result of the punches to the head area were severe and it is fortunate perhaps, that he did not sustain more serious head injuries.

[24] As to mitigating factors of the offending, there are none.

Purposes and Principles of Sentencing

[25] I refer briefly to the purposes and principles of sentencing as set out in the New Zealand Sentencing Act. Relevant to this case are the requirements to hold the defendant accountable for the harm he has done, to promote in him a sense of responsibility and acknowledgment of that harm, to provide for the interests of the victim, to denounce and deter such conduct, and to assist as far as possible in rehabilitation and re-integration of the defendant. The Court is required to take into account the gravity of the offending and its seriousness. The Court must seek consistency in sentencing, take into account the effect of the offending on the victim and then seek to impose the least restrictive sentence available in the circumstances.

Authorities

[26] There is no tariff judgment for this type of offending in the Cook Islands. All authorities referred to in Crown counsel's submissions are New Zealand cases. No cases with a corresponding factual situation were referred to the Court.

[27] The Crown referred to *Nuku*[2] where the New Zealand Court of Appeal adapted the sentencing bands set out in the New Zealand Court of Appeal judgment in *Taueki*, that case relating to grievous bodily harm offending with a maximum penalty of 14 years. The *Taueki* bands were adapted in *Nuku* for the less violent offence of injuring with intent to injure which carries a maximum penalty of 10 years imprisonment. The Court noted that the *Taueki* bands for grievous bodily harm offending are not applicable to the lower level offending.

[28] In *Tamihana*[3], the New Zealand Court of Appeal held the principles in *Nuku* were applicable for offending under s 193 of the New Zealand Crimes Act 1961 for which there is is a maximum penalty of three years imprisonment. The corresponding offence in the Cook Islands is assault with intent to injure under s 213 of the Crimes Act 1969, the provision under which the defendant was charged and convicted. This offence also carries a maximum penalty of three years imprisonment. But as the New Zealand High Court has held, in *Merrill v. Police*[4] and *Howes v. Police*[5], in such cases the *Nuku* principles and bands must be adapted to reflect the lesser maximum penalty of three years imprisonment under s 193, correspondingly s 213 in the Cook Islands.

[29] There is an important overlay to this descending scale of banding, articulated by the Cook Islands Court of Appeal in the case of *Goodwin v R*[6]. Mr Williams referred to *Goodwin* in oral submissions this morning. In that case the Court adjusted downwards the starting point for grievous bodily harm offending defined in *Taueki*[7] to reflect the more lenient sentencing regime that applies in the Cook Islands. The Cook Islands Court of Appeal said in the case of *Virivirisai*[8]:

> [26] The effect of the decision in *Goodwin* is to confirm a sentencing regime for grievous bodily harm offending in the Cook Islands which is considerably more lenient that in New Zealand.
>
> [27] … Forgiveness is fundamental to the community.

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2 *Nuku v R* [2012], NZCA 584.
3 *Tamihana v R* [2015], NZCA at [16].
4 *Merrill v New Zealand Police* [2016], NZHC 2140.
5 *Howes v New Zealand Police* [2019], NZHC 1841.
6 *Goodwin v R* [2019] CKCA 1; CA 11/2018 (3 May 2019).
7 *R v Taueki* [2005] 3 NZLR 372.
8 At [26]-[28].

> [28] In general terms we accept this. It was recognised in *Goodwin* that the virtue of forgiveness frequently manifests itself in Cook Islands cases. 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.

And so in this case, Mr Vakatini has offered forgiveness to the defendant.

[30] The same overlay needs logically to be taken into account whenever sentencing bands for violent offending provided for guidance in New Zealand are transposed to the Cook Islands. So the sentencing bands provided for guidance in *Nuku* need to be adapted for the lesser maximum penalty of three years imprisonment under s 213 and for what, for the sake of convenience, I shall call "the Cook Islands overlay".

[31] The *Nuku* bands provided for guidance in sentencing for the offence of injuring with intent to injure are:

a) Band 1 – 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. In such a case, a sentence of less than imprisonment can be appropriate.

b) Band 2 – a starting point of up to three years of imprisonment will be appropriate when there are three or fewer of the aggravating factors listed at paragraph [31] of *Taueki* present.

c) Band 3 – 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 factors 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 would generally require a starting point within Band 3 even if there are few other aggravating factors.

[32] As I have stated, the starting points in these bands relate to the more serious crime of injury with intent, with maximum sentences in New Zealand of five to seven years and they need to be adapted for lower level offending.

[33] Following the approach endorsed in the case of *Nuku*, I turn to consider the band within which the offending in this case falls. I am satisfied Band 3 applies, where three or more of the aggravating features set out in *Taueki* are present and the combination of those features is particularly serious.

[34] I identify those aggravating features as: First, the extent of the violence. While the violence was not entirely unprovoked – Mr Vakatini was drunk, aggressive and resistant – he had been arrested and handcuffed and was completely under the control of the three constables. There was an element of gratuitous and prolonged violence in the four assaults that followed.

[35] Secondly, serious injury was inflicted. Mr Vakatini suffered a fractured jaw which required complex surgery.

[36] Thirdly, attacking the head. Three of the assaults were to Mr Vakatini's head. Only the fourth, the punch to the stomach avoided the potentially serious consequences of attacks to the head.

[37] Fourth, vulnerability of the victim. Mr Vakatini was at all relevant times handcuffed behind his back. He was under the control of the three police officers. He had no effective means to resist the blows or to protect himself from the assaults by the defendant.

[38] Fifth, there is the additional important aggravating feature in this case. The defendant was a sworn police officer, the senior officer on duty that night, who abused his authority and breached the trust the public place and must be able to place in the police.

[39] I refer to the relevant observations of the New Zealand Court of Appeal in *Taueki* about provocation. The Court noted[9] that where the offender has been provoked a lower starting point may be justified. But, the Court said, it is not enough simply to claim to have been incensed by the actions of the victim or another, rather the sentencing Judge will need to be 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.

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9 At [32].

[40] Mr Moekapiti was no doubt frustrated, as the probation report assesses, and indeed incensed by the aggressive, un-cooperative, drunken behaviour of Mr Vakatini. But I reject that any provocation Mr Vakatini may have been able to offer was the operative cause of the offending. The defendant and his fellow Constables were in control and had the upper hand throughout.

[41] I next turn to adapt the starting point in Band 3 of *Nuku* to reflect the lower level offence under s 213, assault with intent to injure, and also the Cook Islands overlay as I have described it above. I consider a starting point of 15 to 18 months up to the statutory maximum of three years to be appropriate.

Crown Submissions

[42] The Crown's submissions referred to several one punch New Zealand cases, particularly *Graham v. Police*[10], where starting points of 18 months were upheld. The Crown urged a starting point of at least three years imprisonment, taking into account the lower maximum sentence of three years imprisonment for s 213 offending, the number of assaults, the timeframe of the assaults and the aggravating features previously set out. The Crown made no reference in its written submissions to what I have described above as the Cook Islands overlay but Mr Williams addressed this aspect briefly in submissions this morning.

[43] In a further memorandum dated 22 June the Crown submitted it was open to the Court to use cumulative sentences on the four charges to reach, and I quote "an end starting point of three years imprisonment". The Crown did not elaborate on this submission. I do not consider cumulative sentences to be appropriate in this case. The four assaults involved a continuum of offending by the defendant against the victim's person arising out of the same initial event, namely the arrest of Mr Vakatini for assaulting the defendant.

Defence Submissions

[44] In written submissions Mr George reiterated the defendant's version of events as given in evidence and repeated by the defendant to the probation officer. Clearly, by its unanimous

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10 *Graham v Police* [2014], NZHC 2112.

guilty verdicts on all four counts, the jury rejected the defendant's evidence and his version of events.

[45] Mr George also sought to make something of the fact that charges against Mr Vakatini were withdrawn. That is a matter of prosecutorial discretion and plays no part in this sentencing.

[46] Counsel also referred to what I have described above as the Cook Islands overlay and that it is inappropriate to lock in the New Zealand strict tariff system in sentencing. As I have stated, with that I agree.

[47] Mr George sought a non-custodial sentence of three months' imprisonment followed by probation, or alternatively a short prison sentence followed by probation.

Sentencing

[48] I take as the lead charge, the third charge of assault with intent to injure, the punch to the victim's jaw which resulted in a fractured jaw. I take a starting point of 24 months, two years imprisonment. To take account of the three further separate assault charges, there will be added a further six months giving an end sentence on the lead charge of 30 months or two years and six months' imprisonment.

[49] Finally, I turn to consider whether there are aggravating or mitigating features of the offender which should be taken into account. Mr Moekapiti is a first offender with many testimonials to his previous good character. He elected to go to trial as was his right but there can be no discount for guilty pleas. His continued denial of any wrongdoing, notwithstanding the unanimous guilty verdicts of the jury on all four counts, his lack of accountability and remorse, and his gross breach of duty as a sworn officer of the Cook Islands Police Service leave me in doubt that any discount at all is justified. But recognising Mr Moekapiti's previous

blameless record and good character and that he is a young man with two young children I allow a discount of one month.

[50] Please stand Mr Moekapiti. The sentence imposed on the lead charge is two years, five months' imprisonment. On each of the other three charges, the sentence is six months' imprisonment to be served concurrently.

[51] There will be an order for reparation. A total of $680, comprising $230 for hospital expenses and $450 for lost wages.

[52] That is the sentence. You may stand down.

Judith Potter, J