

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**IN THE DISTRICT COURT  
AT MANUKAU**

**I TE KŌTI-Ā-ROHE  
KI MANUKAU**

**CRI-2019-092-005077  
[2020] NZDC 630**

**NEW ZEALAND POLICE  
DEPARTMENT OF CORRECTIONS**  
Prosecutor

v

**PATRICK STEWART UPU**  
Defendant

Hearing: 16 January 2020

Appearances: J Tai for the Prosecutor New Zealand Police  
M Griffin for the Prosecutor Department of Corrections  
J Green for the Defendant

Judgment: 16 January 2020

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**NOTES OF JUDGE S PATEL ON SENTENCING**

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[1] Mr Upu, you face sentence having pleaded guilty to a number of charges. I will go through those with you now.

[2] Firstly, from 13 July 2018, a charge of male assaults female, the victim being [victim 1], your former partner. From 23 September 2018, a charge under the Crimes Act 1961 of assault, the victim being [victim 2], a charge of breach of intensive supervision, the dates being between 18 and 29 August 2018, from 15 August and 25 October 2018, two charges of failing to answer District Court bail and finally the most serious charges, three charges arising from 12 May 2019, injuring [victim 1] with intent to cause her grievous bodily harm. That carries a maximum penalty of 10 years’

imprisonment, a charge of assaulting [victim 1] with intent to injure her. That charge carrying a maximum penalty of three years' imprisonment and finally, possession of a knife in a public place without reasonable excuse, a charge carrying a maximum penalty of three months' imprisonment. So those are the charges that you appear for sentence on.

[3] The facts that I sentence you on are those that are contained in the agreed summaries of fact and I will need to go through those now.

[4] On the male assaults female charge on 13 July 2018 at about 12.00 am, [victim 1] was with you at [location deleted]. You became intoxicated and yelled at her to leave. She made her way towards the door. As she did so, you grabbed her by the jacket and pushed her out. There was a verbal argument between the two of you. You started punching her in the face with your fist, that happened a number of times. She left and as a result of the punches, she received cuts and soreness to her face. In explanation, you said, "I asked her to leave but she wouldn't. She smashed my window, so I left my house and walked to the park down the road where I waited for four hours before coming home to sleep."

[5] The common assault charge is from 23 September 2018. On that day at about 3.30 in the afternoon, [victim 2] and his daughter, that is [victim 1], were involved in an argument. You did not like how [victim 2] was talking to [victim 1]. You intervened. You and [victim 2] engaged in a verbal argument and you became angry. You pushed [victim 2] to the ground and he landed flat on his back. You sat on him, pinned [victim 2] to the ground and punched him a number of times with a fist to the side of his face. As a result of that, he suffered bruising and swelling to the right side of his face. In explanation, you said that you pushed him to the face because he did not like the way that [victim 2] was talking to [victim 1] and that has been exemplified by the submissions that have been made by Mr Green that you acted in a protective manner because you did not agree with the way that [victim 2] was speaking to [victim 1].

[6] The third set of charges is from 12 May 2019. [Victim 1] was at [location deleted]. She heard her name being called from behind. She turned to see you running

towards her and you asked her to come for a walk. She agreed to that. Out of sight of the public, you pushed [victim 1]'s head into a brick wall with your hand. The force of that caused [victim 1] to fall to the ground. While on the ground, you kicked [victim 1] in the head a number of times. You punched her in the face repeatedly causing two of her teeth to chip and her mouth began to bleed. It was also swollen. You then took a hammer from your shoulder bag and hit [victim 1] a number of times in her back, in the hamstring area, on her left leg and the knee area on the right leg. The police were called and you were arrested. On searching you, a hammer and a knife were found in your shoulder bag.

[7] The injuries [victim 1] suffered were two chipped teeth and extensive swelling to her face, and I have seen photographs that indicate damage to the two front teeth of the person in the photograph which I assume to be [victim 1].

[8] So those are the facts that I sentence on. I also have victim impact statements. Firstly, from [victim 2] dated 23 September 2018. He says he is 58 years of age and he sustained bruising and a lump to the right side of her face as a result of being punched and [victim 2] was upset as to why you punched him. He also said, "I hope he knows what he did was wrong."

[9] I have two victim statements from [victim 1], the first dated January 2018. It is said that her face was sore from you punching her and she has also said that she was punched with full swings as if she was fighting a male. She is very upset that this has happened and she says that she wanted it to stop. The second victim impact report is dated 12 May 2019 where [victim 1] says that she is scared of you after what happened on 12 May, and that she did not feel safe anymore.

[10] So that is the background in terms of the impact on the victims of your offending.

[11] I turn now to the purposes and principles of Sentencing Act 2002. The purposes include holding you accountable for the harm done to the victims, to promote in you a sense of responsibility, to denounce your conduct, to deter you and other

people from resorting to violence, and also to pass the sentence that aids in your rehabilitation.

[12] The principles including the gravity of the offending and my also being consistent with other cases. I must also impose the least restrictive outcome that is appropriate in the circumstances.

[13] I am required to set a starting point of sentence and that is done by reference to the lead charges, the most serious charge, in this case that is injuring with intent to cause grievous bodily harm. As I said earlier, that carries a maximum penalty of 10 years' imprisonment.

[14] The tariff case here is *R v Taueki* as identified by paragraph 9 of that case where that says that s 189(1) which is a charge of injuring with intent to cause grievous bodily harm applies to other offences involving serious violence with appropriate adaptations to reflect the seriousness of the offence and the maximum penalty.<sup>1</sup>

[15] The calculation of the starting point falls into one of the bands that have been set out in the *Taueki* case and the extent to which the offending discloses particular aggravating features.

[16] In this case I consider the aggravating features are that there was extreme violence. The violence against [victim 1] involved her head being pushed against the brick wall, her head being kicked, punching to her head and attacking her with a hammer to her body. I also note that the offending was unprovoked.

[17] The attack involved one to the head, it involved the use of a weapon which is lethal in nature. This was fortunate that no more extensive injuries were accused to [victim 1]. Another aggravating feature is that this was violence within a family violence context and [victim 1] was vulnerable. There is a definite size disparity between you and her. Her injuries, fortunately, were limited to chipped teeth and swelling to the face.

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<sup>1</sup> *R v Taueki* [2005] 3 NZLR 372 (CA).

[18] To avoid double counting, I consider that there are two to three aggravating features and this falls within band 2 of *Taueki*. What *Taueki* says is there ought to be a starting point of between five and 10 years' imprisonment. However, adjustment needs to be made for the lower maximum penalty of the charge that you are facing. I also take into consideration what the Court of Appeal said, that the bands and the starting points need to be used flexibly to properly reflect the individual culpability of an offender that is inherent in the offending.

[19] What is also of assistance from the *Taueki* case is paragraph 37(b) where the Court of Appeal indicated –

A domestic assault by an offender on his or her spouse or partner or former spouse or partner which is impulsive does not involve the use of a weapon and does not cause lasting injuries, but where the victim is probably classified as vulnerable may require a starting point in the region of four years. Where a weapon is used with no lasting injuries, a starting point of five years or more might be expected.

[20] As I said, there needs to be some adjustment for the lower maximum penalty in this case.

[21] I have had reference to the decision of *R v Abbott*. That also involved a charge of injuring with intent to cause grievous bodily harm.<sup>2</sup> In that case, a starting point of four and a half years was adopted, but I consider that the offending in that case was less serious given in this case that you used a hammer. The starting point that I adopt for the offending from 12 May 2019 is one of four and a half years' imprisonment.

[22] I now turn to the uplifts, the increases for the remaining offences. Firstly, the male assaults female charge that the aggravating features there are that was in a family violence context that involved an attack to the head, multiple punches which resulted in cuts and soreness to the face of [victim 1]. As a standalone charge if I was dealing with that charge on its own, a starting point of around six months' imprisonment would be warranted.

[23] I then turn to the assault charge involving [victim 2]. That also involved an attack to the head, multiple punches which resulted in bruising and swelling to the

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<sup>2</sup> *R v Abbott* (2013) page 62, HC.

face. As a standalone again, I consider again as a standalone charge, I consider that a four month starting point would have been quite justified.

[24] However, on the basis of totality, I consider that there ought to be a six month uplift for those two charges and the remaining charges of the possession of a knife, breach of intensive supervision, and the two charges of failing to answer District Court bail. So that brings me to an overall starting point of 60 months' imprisonment which is five years' imprisonment.

[25] I then turn to your personal circumstances in terms of aggravating features. You have a large number of convictions for violent relating offending. More recently from September 2014, you were convicted of charges of assault with a weapon and male assaults female. More lately from March 2018, you were convicted of male assaults female and threatening behaviour. I consider there needs to be a three month uplift, so that brings me to 60 months' imprisonment. Some of this offending was whilst you were on bail and subject to a sentence of intensive supervision, most notably, the final set of offending on 12 May 2019. I consider that requires a two month uplift, so that brings me to 65 months' imprisonment.

[26] I turn to the pre-sentence report. You are 42 years of age. The factors identified as contributing to your offending is said by the writer to be an attitude of self-entitlement, poor anger management and propensity for violence. It is said that it is important that you attend an appropriate programme that will allow you to handle conflict and how to recognise the triggers for your violence and provide you with sufficient coping mechanisms, and I agree with that.

[27] I have a cultural report by Leah Busby dated 13 January 2020 and it goes into consider detail of your background and I can summarise that background as an unhappy background. You were born in New Zealand at the age of two years until the age of 12 you were raised by your paternal grandparents in Samoa. While you were raised by your grandparents, you were the victim of severe physical abuse by your grandparents and other family members. In one incident you were seriously injured following being attacked with a machete by an uncle. Your caregivers sought not to seek professional medical help but attempted to treat you by way of traditional healing

methods. Your mother travelled to New Zealand to retrieve you so you could receive the proper medical care in New Zealand. That signalled your return to New Zealand, however, things for you did not improve. You were subject to both physical and sexual abuse at the hands of your stepfather. You received some schooling in New Zealand, but because of the way you were treated in the family home, at the age of 15 you left home and you never returned to the family home, and yet since there you have seen very little of your family members. You lived on the streets for a number of years and from time to time you have been engaged in employment. You are the father of eight children and the report-writer says that you are remorseful for the offending for which you are being sentenced today, and you are willing to do programmes to address your issues.

[28] What the writer of the report submits is that there are a number of factors that are in your background that are causative of your offending, and therefore ought to moderate your culpability. Firstly, that you were subject of extreme family violence, that because you left home because of the unhappy upbringing, that you had limited access to education, you suffered homelessness and an almost complete disconnection from your whānau and positive role models.

[29] I consider that there is a direct link or direct nexus in what is stated in the cultural report that moderates your culpability. The most serious offences that I am dealing with today are violence related offending. As I said, you were subjected to violence throughout your childhood and I can infer that the violence that you were subjected to is a learned behaviour. It is no surprise that you have reacted in in many instances to challenging or conflictual situations by the use of violence. You were also isolated from positive whānau and your abuse and disconnection from your whānau have impaired your life choices.

[30] I consider that there ought to be a 25 percent discount on the material that I have received in the cultural report. I calculate that at 16 months. So the running total comes down to 49 months.

[31] You entered pleas of guilty at an early opportunity and I consider there ought to be an additional 25 percent discount because of that Mr Upu, and I calculate that to be 12 months' imprisonment.

[32] So the final sentence will be one of 37 months' imprisonment, that is a sentence of three years' one month imprisonment.

[33] So I am going to go through each of the individual sentences with you now. What you need to bear in mind is that I have adopted 37 months on the most serious charge. All of the other sentences of imprisonment are concurrent, so they all run together. Hopefully, before you are released you will be able to undertake rehabilitative programmes and you really need to put a lot of effort into those so that there is not a repeat of the pattern that has been repeating itself for quite some time now Mr Upu because it is no good for you and it is no good for other members of the community that come into contact with you.

[34] So I am going to go through all of the charges now. On the charge of injuring with intent to cause grievous bodily harm, you are convicted and sentenced to a term of imprisonment of 37 months.

[35] On the charge of assault with intent to injure, a term of imprisonment of 12 months. Leave to apply for home detention is declined.

[36] On the charge of assaulting [victim 2], a term of imprisonment of four months. Leave to apply for home detention is declined.

[37] On the charge of male assaults female on [victim 1], a term of imprisonment of six months. Leave to apply for home detention is declined.

[38] On the charge of possession of a knife without lawful excuse, you are convicted and discharged and there is an order for destruction of the knife.



[39] On each of the remaining charges, that is the two charges of failing to answer District Court bail and breaching your sentences of supervision, you are convicted and discharged.

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Judge S Patel  
District Court Judge

Date of authentication: 23/01/2020

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