

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 22 of 2021

REX

-v-

DAVID RICHARD JR HOEFT

BEFORE HON. JUSTICE NIU

Counsel : Mrs. 'E. Lui for the Crown.
Mr. S. Tu'utafaiva for the accused.

Plea : Guilty, on 18 March 2021.

Submissions : on 15 April 2021.

Sentencing : 27 May 2021

SENTENCING

Offence

- [1] David Hoeft, you committed the offence of serious causing bodily harm contrary to S.107 (1) (2) & (3) of the Criminal Offences Act when you punched 'Amipeliasi Lauti and split his left eyebrow at Longolongo on 23 November 2020.
- [2] You admitted it and you pleaded guilty to it and you now appear for sentence for that offence.

- [3] What happened was that, according to the summary of facts, you and several other young police recruits were residents in police quarters. One of the recruits was a female with whom you were very close because your family, that is, your parents and her parents were very close friends.
- [4] The summary does not say but this particular evening you learnt that the female recruit had been indecently assaulted by the complainant male recruit. You straight away went and looked for him in his room but he was not there and you went elsewhere, and after a short while, he returned to his room. Not long after that, you returned and found him there sitting on the bed and you punched him just above his left eye and split his left eyebrow.
- [5] He was taken to hospital and his injury was stitched up.
- [6] You cooperated with the police and admitted what you did and you have pleaded guilty to the offence.
- [7] The medical report of the injury stated that there was a superficial laceration to the left eye and that left eye was swollen. It stated that it was a soft tissue injury.

Victim report

- [8] A victim impact report has been made by the Crown counsel. She says that the complainant is 25 years old and that he confirmed that he was a recruit at the time of the assault in November last year. He said the cut to his eye brow was stitched up at the hospital and was given pain killers. He said that he had a bruised eye and which is gone but he now has a scar on his left eyebrow. Counsel confirmed that on the interview.

Your counsel submissions

- [9] Mr. Tu'utafaiva, counsel for you, has informed me that you have gone and apologised to the complainant and that he accepted it. He also informed me that the complainant has been charged with indecent assault upon the female

recruit. He says that despite your present offence, you have not been suspended and that you are still working as a policeman.

[10] Your counsel referred me to three cases, namely,

(a) *R v Poafa* (CR19/2021)

(b) *R v Pohiva* (CR58/2018)

(c) *R v Sima* (CR86/2016),

And submitted that a non-custodial sentence with an order for compensation would be appropriate. He says that you are 22 years old and that you are the eldest of 11 children in the family, and that you had completed form 7 at Liahona High School. He says that you have no previous conviction.

Crown counsel submissions

[11] Ms. Lui for the Crown says that she agrees that your offence is towards the lower end of the scale, and she agrees that there was indecent assault which had caused the assault. She agrees that you be given a non-custodial sentence. She says that an order for compensation of \$1,000 would be appropriate.

Consideration

[12] Serious causing bodily harm is a serious offence because it is punishable with imprisonment of up to 5 years. And although you did not use a weapon such as a knife or stick or stone, your fist did still cause the cut to the victim's eyebrow. Your knuckle could have missed his eyebrow and hit and squashed his eye ball instead so that he would be blind in the left eye altogether, and you would have been guilty of causing grievous bodily harm with imprisonment of up to 10 years.

[13] It is also serious because you did it whilst you were already a police officer, albeit, a newly recruited police officer. And you did it out of anger, such that you concluded that the victim was guilty and proceeded to punish him for an offence for which he had not yet been charged or convicted. All too often police

officers jump to such conclusion and treat the accused person as if he has. You would have been taught that everyone is presumed innocent of any offence until the Court has found that he is guilty of it. If you have reasonable grounds to believe a person has committed an offence, it is your duty to bring him to the Court and charge him with it. You must never treat him, let alone punish him, by beating him or by locking him up, because you think he is guilty. By doing that, you become the offender instead, and you should not be a policeman at all.

[14] But I accept that you are young and that you may make mistakes from which you will learn, such as you have done in the present case. I accept that the Commissioner of Police would have considered that you have the qualities that would make you a good police officer and has accepted that you have acted out of character in this instance because of your close relationship to the female recruit who was indecently assaulted, and that he has decided not to suspend you for it. I accept that you would not have done what you did had not the complainant done what he did to her.

[15] I therefore consider that your case is not the same as the case of **Pohiva** (CR58/18) where Pohiva, a relatively new police officer of 21 years of age, punched another person and fractured his jaw. He was ordered to pay compensation of \$1,000 to that person and was placed on probation for 12 months. Nor is your case the same as that of **Sima** (CR86/16) where the accused and another person punched another person and loosened his teeth. He was ordered to pay \$200 compensation and to serve 40 hours community service.

[16] Nothing was said in those cases about whether any apology had been made, but in your case, I accept that you have done the right thing by having gone and apologised to the complainant. I therefore do not think that I should make any order for compensation. I would leave it to him to make his claim for compensation if he wants to.

[17] I consider that in the circumstances of this case, and I agree with both counsel that your case is towards the lower end of the scale, it would be appropriated that an order be made under S.201 of the Criminal Offences Act. That section provides as follows:

“201. Release on adjournment

- (1) In any case where the Court –
- (a) is satisfied that a person is guilty of an offence;
 - (b) is of opinion having regard to the character, antecedents, age, health or mental condition of the person charged or to the trivial nature of the offence or to the extenuating circumstances under which the offence was committed, that it should make an order under this section,

the Court may, instead of convicting the person adjourn the proceedings for a period of up to 3 years and release the offender upon the offender giving an undertaking to comply with the conditions applying under subsection (2), and any further conditions imposed by the court.

- (2) An undertaking under subsection (1) shall have conditions that –
- (a) that the offender shall appear before the court if called on to do so during the period of the adjournment, and if the court so specifies, at the time to which the further hearing is adjourned;'
 - (b) that the offender is of good behaviour during the period of the adjournment; and
 - (c) that the offender observes any special conditions imposed by the court.

- (3) A court may make an order for restitution or compensation in addition to making an order under this section.
- (4) An offender who has given an undertaking under subsection (1) may be called upon to appear before the court –
 - (a) by order of the court;
 - (b) by notice issued by a court officer on the authority of the court.
- (5) If at the time to which the further hearing of a proceeding is adjourned the court is satisfied that the offender has observed the conditions of the undertaking, it shall discharge the offender without any further hearing of the proceeding.”

[18] I consider that there are extenuating circumstances, as I have described above. I consider that the circumstances by which you came to commit this offence were unusual and even exceptional because of your personal relationship to the victim of the indecent assault. I do not think that the assault you committed is of the normal run of the ~~mill~~ assaults which come before the Court. It would be unjust, in my view, if some differentiation is not made.

[19] Under S.201, you may be released upon your undertaking that you be of good behavior for a period of up to 3 years and that if you comply with that undertaking, you will be discharged without conviction and without any further proceeding.

Orders

[20] I therefore make the following orders.

- (a) These proceedings are adjourned for a period of 1 year from today, namely, until **9:00 am 26 May 2022**.

- (b) You will sign the undertaking which is attached hereto that you will be of good behavior during the period of adjournment of 1 year and you will retain a copy of it.
- (c) If you will have observed the undertaking by the end of that 1 year, you will be discharged without conviction without any further hearing of these proceeding.



A handwritten signature in blue ink, appearing to read "Niu J", is written over the seal.

Niu J

J U D G E

Nuku'alofa: 27 May 2021

CRIMINAL OFFENCES ACT

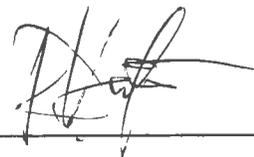
(Section 201)

UNDERTAKING

I, **David Richard Jr. Hoeft**, hereby undertake that:

1. I shall appear before this Court if I am called upon to do so during the period of 1 year from today, and in any event, I shall attend this Court at **9:00 am 26 May 2022**, when this case shall again be called.
2. I shall be of good behavior, namely, that I shall not commit any offence of any kind during this period of 1 year.
3. I will observe and comply with any special condition which this Court may see fit to impose during this period of 1 year.

Dated at Nuku'alofa, this 27th day of May 2021.



David Richard Jr. Hoeft