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THE SUPREME COURT OF

THE NORTHERN TERRITORY

SCC 20817212

THE QUEEN

and

TE TUHI PURU WESTRUPP

(Sentence)

OLSSON AJ

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON FRIDAY 30 OCTOBER 2009

Transcribed by:
Merrill Legal Solutions

HIS HONOUR: Te Tuhi Puru Westrupp, you have been found guilty by a unanimous verdict of a jury of the crime of having on 22 June 2008 at Darwin unlawfully caused serious harm to Andrew Bruce Blain.

I have already recorded a conviction against you in respect of that offence.

You should appreciate that the offence of which you have been convicted is very serious and it attracts a maximum sentence of imprisonment for 14 years.

In the course of my summing up to the jury, I traversed the relevant facts in considerable detail. I will therefore confine myself to the essential highlights of the factual evidence in my findings in relation to it for present purposes.

In the early hours of 22 June 2008 both you and your victim, Andrew Blain, were present at the Lost Arc Nightclub in Mitchell Street. You had each progressed there after having first been elsewhere with two separate groups of people. The two of you were unknown to one another.

You had initially attended a buck's party at Parap and then moved on to the Lost Arc some time after midnight on 21 June 2008. Having first attended a barbeque, Mr Blain met a group of his associates at the Fox and moved on to the Lost Arc at about midnight. He was celebrating his then imminent departure on an army promotion course.

It is fair to say that by the time of the occurrence of the incident constituting the offence, both you and Mr Blain had consumed a substantial quantity of alcohol, albeit over a fairly extended period. You each admit in effect that you had been drinking steadily all night and were intoxicated to some degree although it was asserted that neither of you were grossly affected. That summation is lent support by some of the witnesses. I consider that the evidence establishes that each of you must have been intoxicated to a substantial degree although neither of you presented as being grossly drunk.

At a time that seems to have been between 2 and 2.30 am on 22 June 2008, Mr Blain was making his way through the crowded room from the area of the bar to the dance floor to join his partner, Belinda, who was in the latter location. He was carrying a drink in his left hand and his partner's handbag was over his right shoulder. You were standing adjacent to an elevated table near the entrance door, drinking with some members of your group.

It is clear that in weaving his way through the crowd, Mr Blain somehow bumped into you. The evidence renders it abundantly clear that although the contact was not insubstantial and may to some extent have momentally rendered you off-balance, it was accidental and unintended. However, no doubt at least in part due to your state of intoxication, this contact, to employ your own expression, 'pissed you off'. I am satisfied that initially you quite forcefully pushed Mr Blain away from you essentially from behind but probably

at something of an angle. What then followed was the subject of a good deal of debate at the trial. However it is clear that Mr Blain turned around and faced you from a short distance away. I pause to make the point that you are a relatively tall, well-built man who has had a substantial history as a rugby player and coach. Mr Blain is somewhat shorter than you and of relatively slight build.

Whilst Mr Blain may have made some movement toward you, I take the jury verdict to indicate that it considered that there was no substantial evidence that he overtly indicated an intention to commit any serious assault on you. That is certainly the view that I take notwithstanding the evidence given by the witness, Caruso. His evidence does not sit comfortably with that of other witnesses and I certainly disregard the evidence of the witness, Schwalger, as being totally unreliable and very much in discord with that of other witnesses. It is my conclusion that Mr Blain did no more than seek to regain his equilibrium and ascertain why he had been forcefully pushed and by whom. It would be verging on the ludicrous to accept that he somehow instantly launched himself at you in a manner suggesting that he was about to attempt a physical attack of some substance.

It is apparent to me that the jury took the view that because the initial bumping had caused you to become, as you put it, 'pissed off' with Mr Blain, when he turned around a short distance in front of you, you gratuitously punched him in the face with a glass in your punching hand. The suggestion at trial that somehow Mr Blain raised his hand with his glass in it in front of his face when you punched him and that this gave rise to the injuries both to his face and your right hand is at odds with your own and virtually all other evidence. There is simply no basis for concluding that he ever raised his hands at any relevant time.

Whether you deliberately set out to strike Mr Blain with a glass and inflict serious harm on him with it may be a moot point, but the jury verdict with which I once again agree implies that you must have at least realised that you were holding a glass at the time and necessarily foreseen the obvious danger in striking a blow with it in your hand of inflicting serious harm on your victim. The jury verdict is not susceptible of any other logical interpretation.

The jury has, unsurprisingly, implicitly rejected the existence of any relevant element of defensive conduct on your part. The evidence compellingly indicates that your actions were clearly of an aggressive and not of a defensive nature.

It is also plain that the blow that you struck was quite forceful. This was testified to by certain of the witnesses. Their evidence is reinforced both by the breakage of the glass and the nature and extent of the lacerations both to Mr Blain and yourself coupled with the bone damage referred to in the medical evidence, all of which injuries fall to be considered in the light of the views expressed by Drs Mahendrarajah and Delaney.

It is common ground that the whole incident from start to finish occupied a very brief space of time. I accept that the blow struck by you was not a carefully thought and premeditated action on your part. Rather, it was the product of a spontaneous, angry, aggressive response that was clearly at least in part a result of disinhibition caused by your state of intoxication. It was a total over-reaction to a not-to-be-unexpected form of contact in a noisy, crowded nightclub.

Your assault on Mr Blain so injured his left eyeball that the remains of that eyeball had to be eviscerated and replaced by a prosthesis. Fortunately, the extensive lacerations to Mr Blain's face have now healed without gross obvious disfigurement. On the other hand, it remains obvious that he has suffered a serious injury to the left eye, particularly when he is not wearing his prosthesis and several scars are still visible on his face.

The victim impact statement subscribed to by Mr Blain reveals that the injuries sustained by him have had a devastating affect. He is an aircraft technician in the Australian Defence Force, having trained and worked in that field in the last ten years. This was to have been his permanent career with appropriate promotional opportunities. His medical status has now been substantially downgraded and on present indications, he will be medically discharged as of 1 February 2012. It is only because persons with his skills are said to be in short supply that he is not being discharged more or less immediately. When his discharge occurs, his future employment prospects are uncertain. What is clear is that he will need regular eye checks and prosthesis changes in the future and his social life has become restricted to some degree. Unsurprisingly, he is self-conscious in public, must be careful with regard his remaining eye and his daily activities and finds that his prosthesis becomes uncomfortable if he wears it at all times. He can no longer safely engage in contact sports and for a time he was without a drivers licence.

I now turn to your personal circumstances. You are upwards of 45 years of age and were born in Gisborne in New Zealand. You were one of 9 children and grew up in the context of a happy, supportive family. You completed your schooling to the equivalent of Year 12 and were a good student. You also excelled in virtually all forms of school sporting activity and later represented your district in both rugby and cricket.

You come from a well known and highly respected Maori family who have made an important contribution to the advancement of the Maori people in New Zealand. I am told that your father held one form of employment for a very large number of years. Your mother qualified as a secondary teacher and has held a number of responsible positions in New Zealand. She was awarded the Order of Merit in that country in 2007 and I note that she and one of your siblings have attended the trial to support you.

You have had various forms of employment since leaving school and have always had a good work ethic. In 1993 you accepted an offer to come to Australia and play rugby for the Darwin Dragons. You have lived in Darwin

ever since and have obtained permanent residency status in Australia. I accept that you have made an outstanding contribution to the Darwin Dragons since 1993, both as a player and in a voluntary coaching role at various levels. You have also made significant wider contributions to the Darwin community in cultural, sporting and teaching roles.

You are in a relationship with your present partner in which you have undertaken a parenting role in relation to her four children. You have two children of an earlier relationship and maintain contact with both them and their mother.

Since coming to Australia, you have undertaken more or less continuous employment of different types. You were eventually appointed a prison officer at the Berrimah Correctional Centre in 2003 and as of 22 June 2008, held the promotional position of first class prison officer.

In the course of submissions as to sentence, character evidence was given by the current president of the Northern Territory Prison Officers Association. He testified that you are highly respected as a prison officer, exercised a calming affect on the prisoners, were never unduly aggressive and that you displayed leadership qualities. It was said that your personal relationships with staff and prisoners alike were outstanding.

I have received a very large number of written character references all of which I have read with care. Without exception, they speak of you in glowing terms and attest that the present offence is very much out of character. I note that many of the persons concerned took time to attend the submissions as to sentence to demonstrate their continuing support of and regard for you.

I am told that you normally do not drink to excess and that when you do drink you do not usually become aggressive.

I do not doubt that you have been appalled by the outcome of the relevant incident and very much regret what has occurred. I bear in mind that such outcome is not only a tragedy for Mr Blain, but it has also necessarily had a devastating impact on both you and your family group.

You have been on suspension without pay pending your trial and will lose your career as a prison officer. I am told that you will inevitably also lose your house because of inability to meet mortgage payments.

Your counsel has asked me to bear in mind that what occurred on the night of 22 June 2008 was in no sense a sustained attack but on the contrary was at worst no more than a momentary, spontaneous and angry over-reaction to what had been an unfortunate initial impact between Mr Blain and yourself. That had, he said, given rise to an unintended, dreadful end result. He urged upon me that, to use the words of Crocket and Hampel JJ in Boxtel's case,

> It is of great importance not to allow the effects of an unintended catastrophe resulting from the commission of an offence to unduly swamp all other sentencing considerations, particularly when arriving at the fixation of a non-parole period. It was said that emotion must not be allowed to overcome reason.

I agree that the sentencing process must be approached on a balanced basis that adequately takes into account all of the relevant concepts expressed in s 5 of the Sentencing Act, some of which are not always easy to reconcile with one another in particular cases. On the other hand, however it came about the offence of which you have been convicted is inherently serious as is evidenced by the maximum penalty stipulated in respect of it.

Indeed, as this Court has pointed out, offences of violence fuelled by intoxication have become all too prevalent in or associated with certain venues in Mitchell Street where so-called glassing incidents are by no means unique. Indeed, the trial that was listed before me to follow your trial was also in relation to such an occurrence. Such offences carry a high degree of the risk of infliction of grave injury as, in fact, occurred in this case. That in itself is an important aspect to be borne in mind.

The continuing occurrence of violence offences involving infliction of serious harm is of considerable concern to the community and it cannot be condoned or tolerated whatever may have been the circumstances leading up to them. The factor of general deterrence therefore looms as a very important consideration in the sentencing process.

As against the aspects to which I have referred, I must particularly take into account that first, the offence was the result of a spontaneous, intemperate, dangerous reaction but was not premeditated. It did not involve a lengthy sustained attack. There is no evidence that you were an habitual substance abuser at the time. You were a person of prior exemplary character and the evidence indicates a situation of genuine remorse on your part and there is little prospect of future offending conduct and you have already paid a very high price for your conduct in terms of your career, career prospects and the impact on your domestic situation. In short, there are significant mitigating factors present in this case that do not typically exist in relation to most offences of this generic type that do come before the Court.

Bearing in mind the inherent gravity of the offending, it is inevitable that I impose a substantial custodial head sentence in this matter. In doing so, you are of course not entitled to any discount for plea. You are not to be penalised for exercising your right to proceed to trial however. It is simply that you are not entitled to any reduction of what is a proper sentence as would be the case of a person who had entered a plea to the offence.

Bearing in mind all countervailing considerations, I am constrained to impose a sentence of imprisonment for four years to run from 9 October 2009. Having regard to the very substantial mitigatory factors that I have identified and the fact that I consider that rehabilitation is not a major issue, I propose to

conditionally suspend that sentence after service of one year and three months to run from that date. There will be an operational period of two years in respect of the suspension. You should understand that if you are convicted of an offence punishable by imprisonment within that period, you will be brought back before the Court to be dealt with under the Sentencing Act and you may have the balance of the sentence that I have imposed restored as well as being dealt with for any further offence.

The suspension will be subject to the following conditions:

1. that during the period of operation of the suspension, you be subject to supervision by Community Corrections and comply with all reasonable directions of that service including directions as to residence, employment and participation in rehabilitation programs and services; and

2. that during such period you particularly participate in assessment, counselling and/or treatment as directed by a probation and parole officer in particular to address alcohol use, anger management and violent behaviour.