

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CRI-2017-085-3023
[2018] NZHC 2609**

THE QUEEN

v

DYLAN NUKU

Hearing: 5 October 2018

Appearances: G J Burston and T G Bain for the Crown
J M Miller and J P Miller for the Defendant

Judgment: 5 October 2018

SENTENCING NOTES OF CULL J

[1] Mr Nuku, while I read my sentencing notes you may sit down and I will ask you to stand again at the end when I formally sentence you. Can you just confirm for me whether you completed the drug and alcohol course?

Mr Nuku: “Yes, Your Honour. I completed it on Friday 28 September.”
Thank you. You may sit down while I read my sentencing notes, Mr Nuku.

[2] Mr Nuku, after pleading guilty, you appear for sentence today in relation to seven charges:

(a) wounding with intent to cause grievous bodily harm;¹

(b) unlawful possession of a firearm;²

¹ Crimes Act 1961, s 188(1). Maximum penalty is 14 years’ imprisonment.

² Arms Act 1983, s 45(1). Maximum penalty is four years’ imprisonment or a fine not exceeding

- (c) intimidation;³
- (d) shoplifting under a value of \$500;⁴
- (e) unlawfully entering a vehicle;⁵
- (f) being unlawfully in an enclosed yard;⁶ and
- (g) breach of release conditions.⁷

[3] In sentencing you today, I will explain:

- (a) your offending;
- (b) your personal circumstances;
- (c) the starting point I have adopted and why;
- (d) the adjustments I have made to this starting point; and
- (e) your final sentence.

Your offending

[4] I want to deal first with your offending. Your offending occurred on four separate occasions.

[5] Between 28 September and 26 October 2017, you breached your prison release conditions, by failing to report to your Probation Officer.

\$5,000, or both.

³ Summary Offences Act 1981, s 21(1)(a). Maximum penalty \$2,000 fine or three months' imprisonment.

⁴ Crimes Act 1961, ss 219 and 223(d). Maximum penalty three months' imprisonment.

⁵ Section 226(2). Maximum penalty two years' imprisonment.

⁶ Summary Offences Act 1981, s 29(1)(b). Maximum penalty \$2,000 fine or three months' imprisonment.

⁷ Sentencing Act 2002, s 96(1). Maximum penalty \$2,000 fine or one year imprisonment.

28 October 2017

[6] On the second occasion, on 28 October 2017, you committed the offences of intimidation and shoplifting. You went to a liquor store with a friend. Once inside, you picked up a box of alcohol and two further bottles of alcohol and attempted to leave the store after making no attempts to pay for them. The victim got in the way and pleaded you to put the alcohol down. You held one of the bottles above your head and told the victim in an aggressive tone that if he didn't move you would smash him. The victim moved out of the way and you ran from the scene with the alcohol. The amount of alcohol that was taken was valued at \$138.96 and reparation is sought for this amount.

7 November 2017

[7] On the third occasion, on 7 November 2017, you committed the offences of unlawfully entering a vehicle and unlawfully being in an enclosed yard. While with three other friends, you got into a car knowing it was stolen. You and your friends were then chased by police and decamped from the vehicle, running onto a property, which led to the charge of being unlawfully in a yard.

18 November 2017

[8] On the last occasion, on 18 November 2017, you committed the most serious offences of wounding with intent to cause grievous bodily harm and unlawful possession of a firearm. Those offences occurred while you were on bail for the previous two sets of Police charges.

[9] You were in central Wellington with a friend and had been drinking and using methamphetamine that evening. At about 8.50 pm you got into the victim's taxi and asked to be driven to Miramar. You did not give an exact address but told the victim you would point the way. Your friend had a short barrelled pistol in her handbag and while driving to Miramar you took this out and held on to it. When the taxi arrived in Miramar, you directed the victim to drive to two different addresses, including 25 Stone Street, which does not exist.

[10] About halfway along Stone Street the victim stopped the taxi and you got out. Your friend attempted to pay the taxi fare with a “Prezzy card” but this form of payment was not accepted. You walked around to the driver’s window, which was open, pointed the pistol at the victim and demanded that he get out of the taxi. The victim refused. You then pulled the trigger and shot the victim in his right shoulder. The victim drove away and sought assistance.

[11] The victim was admitted to Wellington Hospital where he had surgery for the bullet wound. The victim still suffers pain as a result of the injury, has trouble with heavy lifting and continues to receive physiotherapy. He was a taxi driver for almost 15 years. Your offending has stopped him pursuing that occupation and this has caused financial strain to him and his family. He has suffered psychologically as a result of the incident; he has lost his confidence and now feels unsafe living in Wellington. This has ongoing consequences for him.

Your personal circumstances

[12] Now, I want to turn to your personal circumstances. Your personal circumstances have been contained in some detail in the psychiatric reports that have been made available to the Court, and I take notice of those.

[13] You are 27 years of age. You have come from a very disadvantaged background – you were born in prison.

[14] You have a number of previous convictions, including for injuring with intent to injure committed in 2016 and a conviction for the same offence you are charged with now, wounding with intent to cause grievous bodily harm, committed in 2009. You have previously served sentences of imprisonment.

[15] You were diagnosed with paranoid schizophrenia in 2015. You have been treated by mental health services on and off since then. Your paranoid psychosis was triggered by heavy drug and alcohol use, including methamphetamine use. The medication you have received while you are in a custodial or hospital environment has lessened your delusional beliefs, although these are still present from time to time.

Starting point

[16] I turn then to the starting point. I am treating the charge of wounding with intent to cause grievous bodily harm as the lead offence for the purposes of this sentencing. This is the most serious charge.

[17] In sentencing you on this charge, I am guided by the leading decision of the Court of Appeal.⁸ That Court recognised that any offence of this type involves very serious offending, yet the range of conduct which can amount to an offence of causing grievous bodily harm can vary substantially in seriousness.⁹

[18] I assess your offending as being at the upper end of band two of that decision.¹⁰ The primary aggravating factors of your alleged offending are:¹¹

- (a) *Use of a weapon*: this is a serious aggravating factor as you used a short barrelled pistol, which is a lethal weapon.
- (b) *Serious injury*: although the victim's injuries were not life-threatening, they have caused long-term damage, both mental and physical, to the victim, as is evident from his victim impact statement. This factor is present to a moderate degree.
- (c) *Vulnerability of victim*: although the victim was not particularly vulnerable because of his age or mental incapacity, the Court of Appeal has previously recognised that taxi drivers are vulnerable by nature of their occupation and are at risk of violence.¹² This factor is therefore present to a lesser degree.
- (d) *Premeditation*: it is not clear whether your offending was premeditated at the outset. The Crown submits it was premeditated as you took

⁸ *R v Taueki* [2005] 3 NZLR 372 (CA).

⁹ At [26].

¹⁰ I note that the upper end of band two (five to 10 years' imprisonment) and the lower end of band three (nine to 14 years' imprisonment) overlap. See *Taueki*, above n 8, at [34].

¹¹ At [31].

¹² *R v Mako* [2000] 2 NZLR 170 (CA) at [57]; and *R v Manoharan* CA287/98, 15 October 1998 at 7.

deliberate steps in directing the victim to drive to an isolated location, removing the firearm from your friend's bag to hide it on your person while the victim drove you to Miramar and holding on to it. Your counsel, Mr Miller, submits that because of your mental health and the unreasonableness of the decision to shoot a taxi driver over a \$45 ride it is difficult to be sure of your level of planning or your thought processes at the time of the shooting. The summary of facts indicates you had knowledge of the weapon and an intention to, at the very least, threatened to use it. Weighing these submissions, and the summary of facts, I consider this factor falls to be considered as an aggravating factor to a moderate degree.

[19] The Crown also argues that two other aggravating factors are present. In relation to these factors, I make the following observations:

- (a) *Extreme violence*: shooting an individual from close range has previously been categorised by judges as “extreme violence”.¹³ However, I have already taken into account your use of a lethal weapon as a serious aggravating factor and to consider this again would be double-counting. Further, your alleged offending was not prolonged or gratuitous as discussed by the Court of Appeal when it looked at similar or more serious cases.¹⁴
- (b) *Facilitation of a crime*: although it appears that you aimed the gun at the victim in order to get him out of the car, perhaps with the intention of stealing the car, this is not clear. Your friend got out of the car soon after you and before the victim was shot, so there does not appear to have been a clear plan or intention to steal the car. Evidently, no further crime did take place. There is insufficient evidence for me to consider this an aggravating factor in these circumstances.

¹³ *R v Duncan* [2012] NZHC 1814 at [19].

¹⁴ *Taueki*, above n 8, at [31(a)].

[20] In my assessment, your offending in relation to this charge warrants a starting point of nine years' imprisonment. I have reached this conclusion after considering carefully other cases of this type of offending,¹⁵ some of which are more serious than your offending,¹⁶ and some of which are less serious.¹⁷ I note you committed this offending while on bail for the Police charges. I consider this starting point adequately reflects the gravity of your offending.

Totality of your offending

[21] I turn, then, to the totality of your offending. I need to consider whether this starting point adequately reflects the totality of your offending.¹⁸

[22] As I have already considered your use of a weapon in assessing your culpability for the lead offence, I do not impose a separate uplift to recognise the charge of unlawful possession of a firearm.

[23] In relation to the other five offences you face, I consider it is appropriate to impose an uplift to recognise this offending.¹⁹ The charge of intimidation was relatively serious as you threatened to assault the victim with a bottle. However, the value of goods you shoplifted was small and the charges of unlawfully entering a vehicle and being in a yard were minor. I uplift the starting point by three months' imprisonment to reflect the totality of your offending. I consider the breach of release conditions charge as part of the "wash-up" of charges.

[24] This would bring the adjusted starting point to nine years and three months' imprisonment. In my view, this adequately reflects your culpability for all of your offending.

¹⁵ *R v Konui* [2008] NZCA 401.

¹⁶ *Fane v R* [2015] NZCA 561; *Duncan*, above n 13; and *Huata v R* [2013] NZCA 470.

¹⁷ *R v Te Hei* [2016] NZHC 1538; and *R v Barnes* DC Palmerston North CRI-2009-054-368, 18 June 2009

¹⁸ Sentencing Act 2002, s 85.

¹⁹ Imposing a modest uplift on a starting point to reflect other less serious charges is an accepted approach to sentencing, see for example *R v Evans* [2017] NZDC 21170. Guidance for comparing the seriousness of Mr Nuku's offending for the four Police charges with other cases was sought with reference to *Kara-Newcombe v Police* [2018] NZHC 25 and the cases discussed by Collins J at [9]–[13] of that decision.

Adjustments to the starting point

Previous convictions

[25] I now turn to the adjustments that should be made to the starting point.

[26] First is your previous convictions. I have previously described your earlier relevant offending. You are establishing a pattern of committing serious violent offences. Both the Crown and your defence counsel acknowledge that a further uplift is appropriate to recognise this.

[27] While I must resist punishing you again for your previous offending, the seriousness and relevance of your two previous instances of violent offending make it appropriate to increase your sentence. That increase shall be another three months' imprisonment.

Mental impairment

[28] I turn, then, to the consideration of mental impairment. I acknowledge that you have a mental impairment, namely paranoid schizophrenia. This has caused you to feel paranoid, delusional and act as though other people were going to harm you and sabotage your life. You also have severe alcohol and drug use disorders and were using these substances heavily during the periods you committed the offending.²⁰

[29] I have received updated reports about your condition and circumstances from Dr Judson, a psychiatrist, Mr Duncan, an alcohol and drug clinician, and a pre-sentence report from the Department of Corrections. Dr Judson concluded that it is difficult to evaluate your mental state, with any certainty, leading up to and at the time of the offence. Although your paranoia increased markedly during this period, he remarks that it seems unlikely your offending occurred directly as a result of your paranoid beliefs. To the extent that your mental impairment contributed to your offending, it was overshadowed by the effects of your drug use. You have

²⁰ I note that s 9(3) of the Sentencing Act 2002 dictates that I cannot take into account by way of mitigation the fact that Mr Nuku was, at the time of committing the offences, affected by his voluntary consumption of drugs and alcohol.

acknowledged, quite properly, that you had been smoking methamphetamine and cannabis, and drinking alcohol that night.

[30] Both Drs Judson and Duncan observe that your condition has improved markedly since you have been in prison, as you have remained free of drugs and alcohol and are on regular antipsychotic medication and treatment.

[31] I have considered the Crown and your Counsel's submissions on whether your mental impairment justifies a discount to your sentence. The Court of Appeal has confirmed that mental impairment can only act as a mitigating factor where:²¹

- (a) there is evidence of its causative impact on a defendant's culpability; or
- (b) mental illness would make a particular sentence more severe; or
- (c) there is a serious risk of imprisonment having a significant adverse effect on a defendant's mental health.

[32] I consider I am unable to give you a discrete discount for your impairment on this basis. There is no clear evidence that your mental impairment had a causative impact on your culpability. The reports observe that you have a tendency to exaggerate features of your illness and your account is inconsistent with the facts of your offending. Further, it appears that imprisonment has so far had a positive impact on you, rather than negative. Imprisonment has allowed you to have stable access to treatment and medication, and I urge Corrections to continue that.

Other mitigating factors

[33] I want to turn now to other mitigating factors. You have, however, expressed a desire to engage in rehabilitation and treatment, particularly in addressing your alcohol and drug issues. I acknowledge that you have already taken positive steps in accessing rehabilitation whilst in prison on remand.

²¹ *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 at [47] and [50]; and *E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [70].

[34] You have completed a literacy course, with commendation from your tutor. You have undertaken, at your express request, an alcohol and drug treatment programme. I commend you on taking these steps and having the courage at the last hearing, to ask for time to complete the remand programme you had commenced, and you appear today having done so. I really commend you for those steps.

[35] These steps also demonstrate that you are taking responsibility for your past offending. This should assist you in addressing the causes of your offending, with a view to changing your behaviour and lifestyle in the future. And in turn, this fulfils two important purposes of sentencing: promoting a sense of responsibility in you for your offending and assisting you to rehabilitate and reintegrate into society on your release.²²

[36] To recognise this, I am giving you a discrete discount of two months' imprisonment. That brings me to nine years four months' imprisonment.

[37] I am encouraging you to access further treatment and rehabilitation during your sentence, in the hope that this will allow you to successfully reintegrate into society upon your release. I also urge Corrections to ensure that your medication is continued and your mental state is monitored. Any available treatment and rehabilitation courses are to be a priority for your attendance during your sentence.

[38] Ultimately, it will be for the Parole Board to assess your risk and whether your engagement in treatment has proved helpful. As your Probation officer notes, special conditions will be set by the Parole Board. I also make an order that Dr Judson and Mr Duncan's reports be released to the Department of Corrections, as requested, for the purpose of implementing their treatment recommendations during your sentence.

Guilty plea

[39] I come now to your guilty plea. This also includes a reference to the letter that you have provided to the Court this morning. You are entitled to a 25 per cent discount for your guilty plea. Your plea was made well in advance of the scheduled trial and

²² Sentencing Act 2002, s 7(1)(b) and (h).

has saved this Court time and resources, and more importantly, avoided the need for the victim of this offending to give evidence.²³ In light of your mental impairment, you were also entitled to a hearing to determine your fitness to stand trial, which had caused some of the delays up to the point of your guilty plea.

[40] Today you have expressed genuine remorse for your actions and, reading your letter, that is evident to me. You have recognised the harm of your actions that have caused to the victim, his family and society. A full guilty plea discount also recognises this.

[41] That produces a final sentence of seven years' imprisonment.

Overall assessment

[42] In my assessment, the purposes and principles of the Sentencing Act 2002 are achieved by imposing this sentence. This sentence will:²⁴

- (a) hold you accountable for the harm you did, particularly to the taxi driver and the staff member at the liquor store;
- (b) continue to promote a sense of responsibility for your offending;
- (c) denounce your conduct;
- (d) protect the community;
- (e) assist in your rehabilitation and reintegration;
- (f) take into account the gravity of all of your offending and your culpability; and
- (g) be the least restrictive outcome that is appropriate in the circumstances.

²³ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [45] and [74]–[77].

²⁴ Sections 7 and 8.

Minimum period of imprisonment

[43] I turn, then, to the Crown's request for a minimum period of imprisonment. I do not consider it is appropriate to impose a minimum period of imprisonment in your case.²⁵ Although you are assessed as being at high risk of offending and a high risk of harm, the offending-related factors are your mental health issues, substance abuse and propensity for violence.

[44] You have indicated to the Probation Officer that you would like to change your lifestyle, especially your illicit drug use, acknowledging the challenges you face in doing so. In undertaking the courses you have now completed, it demonstrates to me your willingness to engage in appropriate treatment and courses. It also recognises, as you said to the Probation Officer, your "high risk situation and triggers" and how you wish to manage those and be given the tools to do so.

[45] Addressing those triggers will be a factor relevant to your release date.

Final sentence

[46] Mr Nuku, I am going to ask you now to please stand.

- (a) On the charge of wounding with intent to cause grievous bodily harm, you are sentenced to seven years' imprisonment.
- (b) On the charge of unlawful possession of a firearm, you are sentenced to 18 months' imprisonment.
- (c) On the charge of intimidation, you are sentenced to three months' imprisonment.
- (d) On the charge of shoplifting, you are sentenced to one month imprisonment.

²⁵ Sentencing Act 2002, s 86.

- (e) On the charge of unlawfully entering a vehicle, you are sentenced to three months' imprisonment.
- (f) On the charge on unlawfully being in a yard, you are convicted and discharged.
- (g) On the charge of breaching release conditions, you are convicted and discharged.

[47] All sentences are to be served concurrently. This means the time you will be serving in prison for all your offences will run together.

[48] Your effective end sentence is seven years' imprisonment.

[49] You are also ordered to pay \$45 for the lost taxi fare and a further \$138.96 for the stolen alcohol.

Cull J