

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI 2018-044-2957
CRI 2018-044-2649
[2019] NZHC 164**

THE QUEEN

v

BAILEY DESMOND SANDERS

Hearing: 14 December 2018

Appearances: E L Woolley for the Crown
G A Harvey and K-A Stoikoff for Mr Sanders

Date: 15 February 2019

SENTENCING REMARKS OF JAGOSE J

Solicitors:
Meredith Connell, Auckland
Public Defence Service, North Shore City

Introduction

[1] Mr Sanders, you are here for sentencing on two charges: wounding with intent to cause grievous bodily harm,¹ and assault with intent to injure.² You pleaded guilty to both charges.

[2] The wounding with intent charge is your third ‘strike’ offence.³ That means I must impose the maximum term of imprisonment for the offence,⁴ which is 14 years. That is the sentence you will receive today.

[3] I also must order you to serve that sentence without possibility of parole, unless I am satisfied, given your circumstances and that of the offence, such would be “manifestly unjust”.⁵ That is, if a sentence without parole would clearly and convincingly be “grossly disproportionate” to those circumstances.⁶ This really is my only decision today.

[4] I have listened to what counsel have said, both for you and for the Crown. I am not bound by their views, I have to come to my own decision.

Facts

[5] You currently are serving time for first and second ‘strike’ offences: wounding with intent to injure in 2014; and injuring with intent to cause grievous bodily harm in 2016. Your first strike related to an attack with a knife on two people in public, attracting a sentence of two years and eight months’ imprisonment.⁷ Your second strike related to weapon offending - then in prison, in a group assault on another inmate – for which you were sentenced to a further five years’ imprisonment.⁸ Your sentence would have expired in 2024, and you would have been eligible for parole from 2021, two years from now.

¹ Crimes Act 1961, s 188(1).

² Section 193.

³ Sentencing Act 2002, s 86A.

⁴ Section 86D(2).

⁵ Section 86D(3).

⁶ *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [83] and [108(b)].

⁷ *R v Sanders* DC Whangarei CRI-2016-088-000922, 15 June 2016.

⁸ *R v Sanders* [2017] NZDC 9491.

[6] Your offending for sentence today was again committed inside prison walls, this time as an inmate at Paremoremo. The assault with intent to injure occurred on 1 June 2018. You punched an on-duty prison officer in the face. The wounding with intent to cause grievous bodily harm occurred some weeks later, on 21 July 2018. You and another prisoner followed a third prisoner into his cell, where some altercation took place.

[7] The victim ran out of his cell into the hallway, but you followed, armed with a shank-type weapon in your right hand. You struck him in the back of the head with it. After the victim retreated from you, the other prisoner then carried on the attack to the victim's head with a food tray, before prison officers deployed pepper spray to break up the attack. The victim required medical attention for seven wounds to his head and arms, and multiple abrasions. The other prisoner was charged with assault with a weapon, with a maximum term of five years' imprisonment.⁹

Victim impact statement

[8] I have read the victim impact statement of the prison officer. He was shocked by the random nature of your assault on him. He now experiences increased levels of stress at work due to his hypervigilance.

Personal circumstances

—pre-sentence report

[9] Mr Sanders, you were interviewed by a probation officer who prepared a pre-sentence report. You explained you had not been taking prescribed medication at the time of the offending. This medication helps you feel calmer. You now have resumed taking it. You did not elaborate on the circumstances of the offending, or shed any light on the reasoning behind it. You expressed interest in engaging in further learning, but your violent behaviour means a classroom environment presently is unsuitable. You seem to recognise your violence in prison limits the educational opportunities available to you there.

⁹ Crimes Act 1961, s 202C.

[10] The report notes your violent history. Your alcohol and drug usage also began at a young age. You recognise harming others is wrong, and have a certain level of remorse regarding your actions. But this does not prevent you from hurting others when you perceive them to be a threat. You told the report writer you have ‘always been violent’ and referred to your violent upbringing.

[11] The report writer noted the strong connection you have with your ‘Nan’, Janice Sanders. You regret upsetting her, but see yourself unable to change. Aside from that relationship, you see the gang as your family. You are resigned to a life in prison, believing yourself to be ‘too old to change’. You are 23. This perspective has prevented you from engaging in any rehabilitation to address your behaviour. Your relative lack of remorse was noted. You are assessed as posing a very high risk of harm to others.

—*section 27 report*

[12] Mr Sanders, as you have heard, your lawyer has provided me with a cultural background report prepared by Kylee Quince, an Associate Professor and Director of Māori and Pacifica Advancement at Auckland University of Technology.¹⁰ She interviewed you for nearly three hours late last month. Her report provides greater insight into the matters recorded by the probation officer.

[13] Ms Quince records you were raised in a highly dysfunctional environment, marked with volatility and violence from your father, copied by your siblings. You have not been in contact with your mother for years, and have yet to meet your youngest brother due to your incarceration. But parts of your childhood were happy, when you worked on your uncle’s farm. You like being productive.

[14] Your wish to learn has been constrained by your propensity for violence. Your schooling was marked by successive exclusions. You see the trajectory of your life – from welfare intervention, to youth offending, and adult offending, all in a gang context – as normal, natural and inevitable. So too is your strong sense of taha Māori (cultural identity). You are well-versed in your whakapapa, and have had lifelong interactions with your marae communities.

¹⁰ This report was prepared pursuant to s 27 of the Sentencing Act 2002.

[15] But your isolation from the pro-social influences of whanau, hapū and iwi has excluded you from those benefits, and has enabled your inadequate development and your damaging behaviour. You wish to strengthen your taha Māori, and hope to be placed in a Māori focus unit. This requires lowering your security classification. And that requires you to change your ways.

[16] Ms Quince notes your frustration at the lack of redemptive measures available to you in maximum-security prison. Your classification is challenging. You have spent little time outside prison during your adult life, but understand your continuing conduct risks losing even that opportunity. You know you risk becoming institutionalised, unable properly to engage with any partner or children on release. Yet you are not currently able meaningfully to change your conduct, partly because you lack the tools to do so, and partly because you are not motivated to change.

[17] You represent, in Ms Quince's words, "the worst kind of offender in many ways": you have an established pattern of violent offending, and there is little evidence suggesting you have any insight into, or active remorse over, your actions. That is what has been modelled to you by much of your family and your community, and you have yet seen no reason to act otherwise. Ultimately, Ms Quince says a finite and proportionate sentence, served in a facility providing for rehabilitation, will enable you to make the changes you need. But you must want to make those changes.

—*personal circumstances*

[18] Mr Harvey points to your personal circumstances:

- (a) first, the length of time you will serve in prison. Mr Harvey calculates you would not be released until 2038, when you would be 43 years old. He assesses you would be serving the same period of time as someone who committed murder as a third strike (if not sentenced to life imprisonment without parole). He submits, if I find the maximum sentence must be imposed without parole, it should be imposed concurrently with your existing term of imprisonment. This follows the approach suggested in *R v Nuku*. But that still would be your

imprisonment until 2033, when you will be 37 – in either case, likely set in your middle-aged prisoner ways, whatever they may then be;¹¹

- (b) second, he says the possibility of parole would allow you to work toward your goals of being placed in a Māori focus unit, lowering your security classification, and taking steps towards rehabilitation and expressing remorse. He emphasises the significance of these small steps you have indicated you wish to take. He points to the need for a sentence to address rehabilitation and re-integration, as well as deterrence and punishment. He emphasises the alternative at the end of your 14-year sentence is for you simply to be tipped out into the community; and
- (c) lastly, he says 14 years’ imprisonment is far longer than any other sentence you have received to date.¹² You are young, and prison can serve as a “potential incubator for serious violence”, which may consolidate as your learned behaviour until and after your release.¹³

“Manifestly unjust”?

[19] In assessing whether a third strike sentence without parole would be ‘manifestly unjust’, the sentence which would otherwise have been imposed is relevant.¹⁴ Also relevant is your understanding of your earlier warnings, your culpability for your offending, and whether you are likely to re-offend.¹⁵ This is an intensely factual inquiry.¹⁶

Discussion

[20] Yours is serious offending of its type, Mr Sanders. Its immediate circumstances do not provide me with any basis to think your sentence without parole would be

¹¹ *R v Nuku* [2018] NZHC 2510.

¹² Downs J considered this factor in *R v Pomee* [2018] NZHC 2891; there, he held it would be manifestly unjust to impose the maximum 14-year sentence without parole for the third-strike offences of aggravated robbery and kidnapping.

¹³ *R v Nuku*, above n 11, at [37].

¹⁴ *R v Harrison*, above n 6, at [108(d)].

¹⁵ At [108(e)].

¹⁶ At [108(f)].

‘manifestly unjust’. It is an escalating continuation of your first and second strike conduct, of serious assaults with a weapon, in which you are the aggressor, seemingly with little or no provocation. Without needing to be overly analytical, it would have merited a starting point in ‘band three’ of the guideline Court of Appeal decision, starting at nine years’ imprisonment,¹⁷ and higher by reason of your victim’s vulnerability as a fellow prisoner, and your bringing to the affray a prohibited weapon.

[21] Your offending also is consistent with your extensive criminal history, your record noting some 46 previous convictions, despite your relative youth. Those priors include several violent offences – including injuring with intent, various counts of assault with a weapon, and multiple other forms of assault. You also have assaulted a prison officer before. But you pleaded guilty here. And youth has more materiality in contemplating long sentences. After adjustments, you could have expected an end sentence of at least seven years’ imprisonment, and a likely minimum period of at least 50 per cent. Such would have been consistent with other cases involving similar offending.¹⁸

[22] Your offending is increasing in seriousness and frequency. You have acquired your three strike offences in less than four years. Their warnings did not work, but there is no suggestion you did not understand them. The circumstances of your current offending are at the higher end of the scale for offending of this type, unlike other cases where a finding of manifest injustice has been found.¹⁹ And your pre-sentence report assesses you as having a very high risk of re-offending, and presenting very high risk of harm to others.

[23] Those circumstances offer me nothing by which to think your sentence without parole may be ‘manifestly unjust’. The case for maintaining your eligibility for parole must be clear and convincing, although not necessarily rare and exceptional, to justify a finding of manifest injustice.²⁰

¹⁷ *R v Taueki* [2005] 3 NZLR 372, (2005) 21 CRNZ 769.

¹⁸ *R v Te Hei* [2017] NZHC 1744; *R v Nuku* [2016] NZHC 254; and *R v Wereta* [2015] NZHC 2683.

¹⁹ Counsel referred to *R v Fitzgerald* [2018] NZHC 1015 and *R v Campbell* [2016] NZHC 2817. As stated by Collins J in *R v Waitokia* [2018] NZHC 2146 at [21], these ‘third strike’ cases concerned indecent assaults that would otherwise not have attracted sentences of imprisonment at all.

²⁰ *R v Harrison*, above n 6, at [108(b)].

[24] While rehabilitation and reintegration are important purposes behind sentencing, so too is holding you accountable, and protecting others from you. Your offending follows a similar pattern. It is not decreasing in frequency. You would have faced a substantial term of imprisonment in any event. The ‘third strike’ regime is designed to provide harsh sentences for repeat violent offenders who have not heeded previous warnings.²¹ You pose a high risk of violent re-offending, even within prison. The need for community protection, both inside and outside, is high.

[25] A fourteen-year sentence *is* disproportionate with other non-third strike serious violent offending. That is the point of the third strike regime. You would have been sentenced to a far longer term than you previously had experienced, even without that regime. I recognise having no prospect of parole may dissuade you from engaging in rehabilitative steps to address your behaviour.²² And I acknowledge your lack of whānau support, and its consequences, as well as the wider cultural context to which Ms Quince refers.

[26] Your offending and personal circumstances, canvassed in the reports before me, are remarkably similar to those of the repeat violent prison offender in *R v Nuku*. Soon after his second strike offence, also of serious prison assaults, he attacked another prisoner from behind, also with a large metal shank. In the course of the fight, and with another prisoner, he struck the victim repeatedly in the head, causing five serious lacerations. There, reports also referenced violence from a young age, neglect, leaving school early, and a gang-affiliated family.²³ While Downs J noted “the mix is depressingly familiar”, he found nothing about Mr Nuku’s personal circumstances made it manifestly unjust to impose the maximum sentence without parole.²⁴ Indeed, he imposed an indeterminate sentence of preventive detention beyond that maximum, precisely to incentivise Mr Nuku’s reform even after serving the maximum term. That suggests Mr Nuku’s offending was more serious than yours.

[27] But the maximum sentence in *Nuku* was seven years’ imprisonment. The principal difference between your and your offending’s circumstances, and those of

²¹ *R v Waitokia*, above n 19, at [22].

²² *R v Campbell*, above n 19.

²³ *R v Nuku*, above n 11, at [24].

²⁴ At [24].

Mr Nuku, is he was charged with wounding with intent to injure – albeit of such severity that he was only “a hair’s-breadth away from the more serious offence of wounding with intent to cause grievous bodily harm”.²⁵ That is, of course, your lead offending.

[28] Yet you are to be sentenced to 14 years’ imprisonment for your very similar offending. There are few third strike cases for offending with that maximum term. *R v Pomee* – in which the maximum term was twice what would otherwise have been imposed, resulting in a 24-year-old offender being imprisoned until he was 38 – is comparable.²⁶ Mr Pomee was sentenced to 14 years’ imprisonment on two charges of aggravated robbery and one of kidnapping. But he was only to serve a minimum term of five and a half years, because his parole ineligibility for the duration of the 14-year term was held to be manifestly unjust.

[29] I also am aware your co-offender’s maximum sentence is only five years. I do not know what of the victim’s injuries are attributable to the weapon he used, but you confronted the victim together, and your co-offender obtained his weapon and continued the offending after the victim had withdrawn from you.

[30] From those perspectives, your parole ineligibility for the whole of the maximum term’s duration is grossly disproportionate. Ordering you to serve that sentence without possibility of parole would therefore be manifestly unjust. For consistency with previous cases, but particularly *Nuku*, I will apply a 50 per cent minimum period of imprisonment.²⁷

[31] That means you are to remain in prison for at least another seven years, and thereafter – unless qualifying for parole – for a maximum term of 14 years. Mr Sanders, I hope this encourages you to pursue your goals; if it does not, you will be serving the full 14 years.

²⁵ At [15(b)].

²⁶ *R v Pomee*, above n 12.

²⁷ Sentencing Act 2002, s 86.

[32] For your assault on the prison officer, I will impose a sentence of 12 months' imprisonment. This was an unprovoked attack, and you previously have assaulted a prison officer.

[33] Last, I consider the offending for which you presently are being sentenced, and your second strike offending, are of a similar kind and a connected series of offences. The similarity in kind is obvious. And, although separated by time, they also are connected in their overall nature as offending while incarcerated, and as your default response to others.²⁸ The sentences I impose should be served concurrently with each other, and with that currently you are serving. That is in any event what must be done with the two offences for sentencing today.²⁹

Sentence

[34] Mr Sanders, please stand.

[35] On the charge of wounding with intent to cause grievous bodily harm, I sentence you to the maximum term of 14 years' imprisonment. I impose a minimum period of imprisonment of seven years.

[36] On the charge of assault with intent to injure, I sentence you to 12 months' imprisonment.

[37] The sentences are to be served concurrently with each other, and with the sentence you presently are serving.

[38] Mr Sanders, you may stand down.

—Jagose J

²⁸ Section 84.

²⁹ Section 86D(6).