IN THE HIGH COURT OF NEW ZEALAND
WHANGANUI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGANUI ROHE

CRI-2019-044-2718
[2021] NZHC 2905

THE QUEEN

v

HAYZE NEIHANA WAITOKIA

Hearing:	28 October 2021
Appearances:	R N Benic for Crown R M Lithgow QC and A Jeremich for Defendant (via AVL)
Date:	29 October 2021

SENTENCING NOTES OF ISAC J

Introduction

[1] Mr Waitokia, you may sit while I am talking. I will get you to stand up at the end.

[2] You have pleaded guilty to one charge of injuring with intent to injure,[1] and one charge of aggravated assault,[2] following a sentence indication I gave you on 22 July 2021. Prior to any further adjustment, the end sentence I reached was two years and ten months' imprisonment. That was to be served cumulatively on the sentence you are currently serving.

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1 Crimes Act 1961, s 189(2), maximum penalty five years' imprisonment.
2 Section 192(1)(c), maximum penalty three years' imprisonment.

[3] In sentencing you today, I will set out the facts of your offending before setting a "starting point" that reflects the nature and circumstances of your offending. I will then consider your personal circumstances to see whether the starting point should go up or down, which will produce the end sentence.

Facts

[4] First, the facts.

[5] You were a sentenced prisoner at the Whanganui Men's Prison. On 13 January 2019 you cut your lip. You told Prison staff at the time that you had fallen over but in the reports before me you appear to suggest you had been assaulted by your cell-mate.

[6] It was decided that you should be taken to the Hospital. At about 9.45 pm, you were handcuffed and placed in the rear of a Department of Corrections van by two prison officers. One of them was due to finish his shift but because the Prison was short staffed, and you were in need of medical attention, he stayed on to help you and his colleagues by acting as a guard.

[7] During the journey, you managed to slip one of your hands out of the cuffs.

[8] At approximately 10 pm the officers parked the van outside the Hospital. One officer opened the door of the van, at which point you pushed the door open and struck the officer a number of times in the head with the handcuff. The other officer then tackled you around the torso and you struck the second officer several times about the head with the handcuff before reaching forward and biting and removing part of the officer's ear.

[9] You were eventually injected with a sedative, restrained, and returned to the van. The second officer had 19 stitches to his head, as well as the loss of part of his ear, although I am told that grew back. He had black eyes, bruising, and had to take two weeks off work as a result of the injuries you caused him.

[10] You say you cannot now remember the assaults, but accept that you were responsible for them. One of the prison officers reported that there was nothing leading

up to the incident and that you just came out of the prison van fighting. His assessment was that you were trying to escape. I have to say that is the only explanation I have heard that makes sense of your behaviour that evening. It is also consistent, unfortunately, with a pattern of your previous assaults, in which you have generally used violence in a situation where it was not warranted. It was unprovoked.

[11] Now to the starting point for your offending.

Starting point

[12] In imposing this starting point — and indeed the rest of the sentence — I have to bear in mind guidance from the Court of Appeal that offending of this nature within a prison environment deserves a stern response, and that deterrence and denunciation should be at the forefront of the principles to apply.[3]

[13] In the sentencing indication I set a starting point on the lead charge of injuring with intent to injure of three years' imprisonment.

[14] *Nuku v R* is the guideline judgment for your offending,[4] and considered the application of the guidelines in *R v Taueki*[5] to offences involving violence other than those involving intent to cause grievous bodily harm. I noted in the sentencing indication that bearing in mind the guidance in *Nuku* should not be applied mechanistically,[6] and the cases cited by counsel,[7] that your offending falls at the top

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3 See *Kepu v R* [2011] NZCA 104 at [19], and *Tryselaar v R* [2012] NZCA 353 at [18] on the question of totality adjustments to reflect the fact the offender is already serving a sentence of imprisonment.

4 *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39.

5 *R v Taueki* [2005] 3 NZLR 372, [2005] NZCA 174.

6 *Nuku v R,* above n 4, at [43].

7 *R v Wright* [2014] NZCA 119 (starting point of three years' imprisonment for injuring a police officer with intent to injure upheld on appeal. Defendant punched the officer in the mouth, causing him to fall backwards onto concrete. Defendant continued to punch the officer about the head and face, throwing over thirty punches while the handcuffs were attached to one wrist.) *Gilles v R* [2014] NZCA 115 (starting point of three years' imprisonment upheld on appeal for injuring a prison officer with intent to injure. Appellant was a prisoner who, without warning, punched prison officer in the head. Officer was rendered unconscious and appellant punched him again.) *Rafiq v R* [2017] NZCA 220 (starting point of three years' imprisonment was considered available. Appellant had lain in wait for his neighbour before striking him several times with a piece of wood. While victim was on the ground, the appellant punched him three or four times and kicked him with work boots.) *Ormsby v R* [2014] NZCA 73 (Court of Appeal substituted a starting point of two and a half years' imprisonment for pushing partner to ground, jumping on top of her and biting off a portion of her left earlobe.)

of band two or at the lower end of band three. Briefly, the central aggravating features of your offending are what I consider to be an element of premeditation, the targeting of the officers' heads, the high degree of violence involved, in particular biting of an officer's ear, and the fact that you committed the assaults while in prison serving a sentence for violent offending. There was also violence towards public officials that resulted in significant injury, and the offending took place in what I find to be an attempt to escape custody.

[15] I also indicated a discrete uplift of six months to reflect the offending against the second prison officer was appropriate, given what the likely starting point on a charge of aggravated assault alone would have been.[8] This leads to an adjusted starting point of three years and six months' imprisonment.

[16] I will now turn to mitigating and aggravating features personal to you.

Personal mitigating and aggravating features

[17] I indicated an uplift of three months to the adjusted starting point was required to reflect the need for deterrence, given your criminal history and the fact you were serving a sentence of seven years' imprisonment without parole for wounding with intent to injure, your third strike offence. However, I did invite further submissions on whether this uplift would amount to 'double counting' in the context of the three-strikes regime.

[18] Your counsel submits that your recidivism has been adequately accounted for and that the harsh consequences of the three-strikes regime should be mitigated by not applying an uplift for previous convictions. But for the three-strikes regime, the offending for which you are currently in prison would have attracted a sentence in of

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8 The Crown referred to the cases of *R v Brooking* CA419/04 7 March 2005 (starting point of two years' imprisonment for pushing a police officer through a roof following a rooftop foot chase); *R v McClean* CA54/06 30 August 2006 (starting point of 18 months' imprisonment for hitting a police officer's head with handcuffed hands, rendering him unconscious in the holding cells at the District Court); *R v Mahanga* HC Whangarei CRI-2011-088-2950, 12 December 2011 (starting point of nine months' imprisonment for dropping a shoulder and knocking a police officer to the ground while being arrested.)

two years and three months'.[9] Your counsel's main submission on this issue is made in reference to the Supreme Court's recent decision in *Fitzgerald v R*.[10]

[19] The submission is that *Fitzgerald* requires a Court to consider the New Zealand Bill of Rights Act 1990 where a sentence is manifestly unjust or disproportionality severe. In this case, the current charges are not third strike offences, and the problem arises with the challenge created by a conventional uplift for previous convictions when in fact those previous convictions have already created an excessive sentence. Your counsel submits the judiciary's available discretion should be used to mitigate the effects of a regime that has resulted in recognised manifestly unjust and disproportionately severe sentences.

[20] Of course, on one view the seven-year sentence is simply a result of the three-strikes regime, and it has no relevance to the extent of any uplifts for the current offending. And I doubt that the judicial discretion should be used to simply mitigate the effects of the three-strikes regime.

[21] However, there is force in the submission that — in the context of an offender serving the maximum penalty for offending as a result of the three-strikes regime — any uplift for previous offending could itself be disproportionate. The requirements of deterrence and denunciation are already clearly in focus in any sentence that requires an offender to serve the maximum term of imprisonment available. In that context, I consider a discrete uplift for your previous offending would be disproportionate and is unnecessary to meet the purposes and principles of sentencing.

Guilty plea

[22] As previously indicated to you, I consider a full discount of 25 per cent is appropriate for your guilty pleas. You entered the pleas at a relatively early stage and immediately following my sentence indication.

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9 *R v Waitokia* [2018] NZHC 2146 at [20].
10 *Fitzgerald v R* [2021] NZSC 131.

Personal background

[23] Your counsel submits that a further discount of between 10 – 30 per cent should be applied to account for the social and cultural deprivation that you suffered, especially when you were a child and young person.

[24] I have read the s 27 report. It makes for sobering reading.

[25] You grew up in a household surrounded by violence. Your father would beat you. On one occasion he knocked you out. Your parents had a volatile relationship and your father was a heavy alcohol user and was violent both physically and verbally to your mother and your younger brother. Your mother used marijuana to regulate herself but also went to work to support the family. She was the breadwinner. She was also subjected to violence by your father. The report states you would have only experienced a very disorganised attachment with either parent growing up, and that you would have probably felt very unstable and insecure.

[26] The conditions in which you grew up in no doubt affected the development of your emotional skills and abilities to manage stress. Resorting to violence was modelled to you. It is little wonder then, Mr Waitokia, that as an adult you now suffer from anxiety, and have an established pattern of violence of your own.

[27] The report goes on to state that you are the product of an intergenerational pattern of whānau dysfunction and breakdown. You learnt no tīkanga as you grew up. You do not appear to have experienced meaningful contact or connection with your whānau whanui, your marae, or reo. You know little of your whakapapa and you have just started to learn your pepeha — that is good to hear.

[28] Mr Waitokia, it is important to note two important positive aspects of the reports. First, from what I have read your mother and father have worked very hard to address their own issues. They now provide a loving and stable environment for their grandchildren, two of whom they now care for. So there is another model for you about changing behaviour. Second, the report writer highlighted the strength of your character can be seen in your desire to have restoration, to obtain training or education, and your desire to learn taha Māori. I really want to encourage you to take the time

that you have to spend in prison to get yourself sorted out. I want you to take advantage of the opportunity to connect with your culture and your people. Because you are at cross-roads in your life. You are 31. If you offend again in this way Mr Waitokia, you are on a pathway for lifelong institutionalisation. You do not want that, and society does not want it. But if you keep offending in a violent manner then protection of the community from your violence has to be at the forefront. So, this is a chance now to turn the ship around and only you can do that. And that means making positive choices and sticking with them. I think you can do that. And so does your family.

[29] Overall I am satisfied there is a clear link between the social and cultural deprivation you have suffered as a child and young person and your offending. The Crown does not contend otherwise. I therefore consider that a discrete 15 per cent discount — or as Mr Lithgow said — adjustment, is appropriate.

Remorse

[30] Your counsel submits that a discrete discount between five – ten per cent should apply as a result of your genuine expressions of your remorse, your insight into your offending, and your willingness to participate in programmes that will assist with rehabilitation.

[31] The key factor here is your participation in restorative justice. I hope you have read the report of the restorative justice conference that you attended with one of the prison officers who you assaulted. You are very fortunate to have had that officer attend the conference and the very generous spirit that he showed there. Despite what you did to him he is very supportive of your efforts to rehabilitate yourself and to connect with your culture.

[32] I accept a discount of five per cent is appropriate to reflect your willingness to participate in a restorative justice conference and your desire to address the causes of your offending, and the fact that you have seen this offending as a wake-up call. Beyond that I am not satisfied that it would be appropriate to make any further discount.

[33] In summary, your sentence is calculated in this way:

(a) An adjusted starting point of three years six months' imprisonment,

(b) A 25 per cent discount for your guilty plea;

(c) A 15 per cent discount for social and cultural deprivation;

(d) A further five per cent discount for your engagement in the restorative justice process and your willingness to address your offending.

[34] That leads to an end sentence of one year and 11 months' imprisonment.

Result

[35] Mr Waitokia, if you would stand now please.

[36] On the charge of injuring with intent to injure, I sentence you to one year and 11 months' imprisonment. On the charge of aggravated assault I sentence you to six months imprisonment. That sentence is concurrent.

[37] The sentence I have imposed on you today is cumulative on the sentence you are currently serving.

[38] You may stand down.

Isac J