IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-004-5617
[2019] NZHC 2586

THE QUEEN

v

NGATAMA JAMES KAIENUA

Hearing:	11 October 2019
Appearances:	B Dickey for the Crown S Tait and J Hudson for the Defendant
Judgment:	11 October 2019

SENTENCE OF GAULT J

Solicitors:
Mr B Dickey, Meredith Connell, Office of the Crown Solicitor, Auckland
Mr S Tait and Mr J Hudson, Barristers, Auckland

[1] Mr Kaienua appears for sentence following guilty verdicts on two charges on 29 July 2019 after a judge alone trial.[1]

[2] I found Mr Kaienua guilty of being a party to one charge of assault with intent to rob,[2] and party to one charge of aggravated wounding.[3]

[3] Both of these offences carry maximum penalties of 14 years' imprisonment. These offences are both qualifying offences under the "three-strikes" regime. This offending is Mr Kaienua's third strike. Therefore, I am compelled by legislation to impose the maximum sentence on both charges,[4] whatever the merits. I have no choice about that.

[4] I must also order that Mr Kaienua serve that sentence without parole, unless that would be manifestly unjust.[5]

[5] I have concluded it would be manifestly unjust for Mr Kaienua to be in prison for 14 years without the possibility of parole. I will set out my reasons.[6]

The offending

[6] The following facts were uncontested at trial. On the day of the offending, 19 June 2018, Mr Kaienua was spending the day with his then 16-year-old friend, who I will call "Y", because his name is suppressed. Mr Kaienua was 27 at the time. Y is the younger half-brother of Mr Kaienua's then partner.

[7] Around 7 pm Mr Kaienua and Y were at the Grey Lynn shops. They had changed into darker clothing than they had been wearing earlier. They walked along Great North Road and paused for just under two minutes opposite a dairy. They then crossed the road towards it, but walked past it, heading back along the road. They returned two minutes later. Y went into the dairy. Mr Kaienua waited outside.

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1 *R v Kaienua* [2019] NZHC 1794.
2 Crimes Act 1961, s 236(1)(a). Maximum penalty 14 years' imprisonment.
3 Section 191(1)(c). Maximum penalty 14 years' imprisonment.
4 Sentencing Act 2002, s 86D(2).
5 Section 86D(3).
6 Section 86D(5).

[8] Mr Patel, a member of the family who owned the dairy, was manning the counter. Y waited in the dairy for approximately two minutes while two other customers came and went, and as soon as the second customer completed his purchase and left the dairy, Y moved behind the counter, pulled out a knife and attacked Mr Patel.

[9] Y quickly escalated to thrusting the knife into Mr Patel, while also trying to open the cash register. Mrs Patel, Mr Patel's mother, was in a kitchen near the back of the store. A family friend was also there. Mrs Patel saw a man close to her son behind the counter and came running. She fell as she entered the back of the dairy and cut her forehead. The family friend had heard Mr Patel calling for help and also came into the dairy. Mrs Patel got up and grabbed Y who was still struggling with Mr Patel. Y stabbed her and pushed her over.[7] Y then ran off. The Patel's family friend ran out of the dairy after Y, but then stopped and went back inside.

[10] Meanwhile, Mr Kaienua was waiting near two rubbish bins some metres past the dairy's entrance. He variously looked at his phone and at passers-by while leaning on the bin. When Y ran out of the dairy, he gestured at Mr Kaienua then ran off down the road. Mr Kaienua did not react except to shift his position slightly. He then straightened up, but then lent back on the bin when the Patel's family friend ran out after Y. Mr Kaienua stayed like that until the friend went back inside, before crossing Great North Road and walking away.

[11] During the trial the main issues were whether Mr Kaienua was involved in planning the robbery, knew that Y had a knife, and acted as lookout.

[12] In my reasons for verdicts, I drew the following conclusions on the evidence:

(a) Y intentionally caused grievous bodily harm to Mr Patel and did so with the intent to rob him.[8]

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7 Mrs Patel also injured her shoulder. It is not clear whether this occurred when she fell running in or when Y pushed her over - but nothing turns on this.

8 *R v Kaienua* [2019] NZHC 1794 at [82].

(b) Y wounded Mrs Patel and did so with the intent to facilitate his flight upon the commission of the imprisonable offence of assault with intent to rob.[9]

(c) Mr Kaienua was involved in encouraging and planning the robbery, and as acting as a lookout.[10]

(d) Mr Kaienua and Y had an unlawful common intention to rob the diary with a knife as a weapon. Mr Kaienua knew that Y's offending was a probable consequence of carrying out that plan, that is that there was a real possibility that the knife could be used intentionally and those inside the diary could be stabbed.[11]

(e) I did not find it proved beyond reasonable doubt that Mr Kaienua knew the plan was for Y to use the knife to cause grievous bodily harm to Mr Patel or to wound Mrs Patel with the intent to facilitate flight such that Mr Kaienua's involvement amounted to aiding, abetting or inciting Y to do that.[12]

[13] So, I found Mr Kaienua guilty of being a party to Y's offending.

Victim impact statements

[14] I have victim impact statements from both Mr Patel and Mrs Patel.

[15] Mr Patel writes that he was stabbed six times, in the head, shoulder, stomach and hand. Apparently Y said nothing before or during the assault. Mr Patel tried to move away, but Y just kept stabbing him. Mr Patel was in hospital for six weeks, and had multiple surgeries. He felt helpless, and was stressed because his family was finding it hard both to run the dairy and visit him. He is now back at the dairy, but finds it difficult to work at night. He said what they did that day, and its consequences

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9 At [83].
10 At [84] and [87].
11 At [90]. So Mr Kaienua was a party under s 66(2) of the Crimes Act 1961.
12 At [89]. So Mr Kaienua was not a party under s 66(1).

for him personally, will affect the rest of his life. He has several scars and terrible memories.

[16] Mrs Patel writes that when she saw her son being attacked, she instinctively ran towards the attacker, wanting to get Y off her son. She only realised she had been stabbed and had dislocated her shoulder later. She writes that since the attack it has been hard for the family to run the dairy. She also finds it difficult being in the dairy at night, and she and her husband do not go out to as many events in the community as they did before, as they are scared to leave Mr Patel alone. Mrs Patel also has scars and horrible memories.

[17] I thank both Mr Patel and Mrs Patel for their statements. It is clear they both have suffered enormously because of the actions of Y and Mr Kaienua.

Mr Kaienua

[18] I now turn to Mr Kaienua's personal circumstances.

[19] Mr Kaienua is 28 years' old, and of Cook Islands-Māori descent. His Iwi is Ngāti Rangiwewehi. He spent over seven months on electronically monitored bail before he was found guilty, did not breach his bail conditions, and spent the time building relationships with his parents and siblings.

[20] Mr Kaienua has a criminal history, although it is not as lengthy as many that come before this Court. Prior to 2012, Mr Kaienua's offending was low level. However, this escalated when he was convicted of sexual connection with a young person, his first strike offence for which he was sentenced to two years and one month's imprisonment, and then assault with intent to rob in 2014, his second strike, for which he was sentenced to three years and nine months' imprisonment. He had to serve the full length of that sentence due to it being his second strike.[13] I will return to the circumstances of this offending later.

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[13] Sentencing Act 2002, s 86C(4).

[21] The pre-sentence report writer notes that the key contributing factors to Mr Kaienua's offending are a propensity for violence, substance abuse (he says he was drunk and high at the time of this offending), friends and associates, poor problem solving skills and a lack of impulse control. He is also a high-risk gambler. The report writer assesses him as being at a very high risk of re-offending should he not receive treatment.

[22] While Mr Kaienua was in prison for his second strike offence, he suffered an extremely traumatic event, such that he received a formal acknowledgment. I do not consider it is necessary or desirable to go into any more detail in the interests of not victimising Mr Kaienua further. Suffice to say that I am satisfied that prison is a far more distressing place for Mr Kaienua as a result.

[23] I have before me a psychological assessment of Mr Kaienua from Ms Sabine Visser, a specialist forensic clinical psychologist. The report is thorough and detailed, and I thank Ms Visser for her work. I consider the report is best summarised by her conclusion, which I read in full:

> Mr Kaienua is a man with a complex psychological profile with multiple layers of difficulties. He suffered childhood abuse and neglect leading to attachment issues leaving him in adulthood with insecure attachments. As a result, he has Borderline Personality traits which have been further made worse by the loss of his dancing career. His potential for employment and a positive lifestyle was destroyed by his conviction and subsequent incarceration on sexual charges, leading to Mr Kaienua giving up on himself and joining a gang. Through this he committed a further offence leading to a second incarceration where he [suffered a severe traumatic event].[14] This led to (sic) Mr Kaienua to develop PTSD additionally to his already psychological difficulties. My opinion taking all of his history and psychological vulnerabilities into consideration, is that incarceration of any period will be extremely difficult for Mr Kaienua to endure. Mr Kaienua has little psychological resources to cope with the prison environment. A long term of imprisonment such as the 14 years he is currently facing under the third strike, in my opinion would be psychologically catastrophic for Mr Kaienua. It is likely that he will develop further severe mental health issues and self-harm may become part of his coping strategies. It is likely that Mr Kaienua will attempt suicide. I do have strong concerns for Mr Kaienua and would advise on sentencing that he is carefully monitored and receives both psychological and psychiatric intervention.

[14] I have removed the details of the event for the reasons above.

Approach to sentencing

[24] I must have regard to the purposes and principles of sentencing as set out in the Sentencing Act 2002.[15] In serious violent offending such as this, the relevant purposes of sentencing include to hold Mr Kaienua accountable for the harm done to the complainants; to promote in him a sense of responsibility for that harm; to denounce his conduct; to protect the community from his offending; and to deter others from committing the same or a similar offence.

[25] As this is Mr Kaienua's third-strike, as I have said, I must impose the maximum penalty for both offences, being 14 years' imprisonment, to be served concurrently. The sole issue I must decide is whether it would be manifestly unjust to order that Mr Kaienua serve that sentence without parole.

[26] The purpose of the three-strikes regime is to impose maximum terms of imprisonment on persistent repeat offenders who continue to commit violent offences.[16] Parliament has deliberately directed the Courts to impose harsh sentences where offenders continue to commit violent offences in the face of clear warnings.[17] Such sentences will often be disproportionate. The manifest injustice exception is there to avoid grossly disproportionate sentences.[18]

[27] Whether serving the sentence without parole would be manifestly unjust is an intensely fact specific inquiry.[19] The case for a finding of manifest injustice must be clear and convincing, but such cases need not be rare or exceptional.[20]

[28] Having reviewed other cases under the three-strikes regime and in accordance with the submissions of both sides, the following considerations are relevant to determining manifest injustice:[21]

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15 Sentencing Act 2002, ss 7-8.
16 Sentencing and Parole Reform Act 2010, s 3(b).
17 *R v Waitokia* [2018] NZHC 2146 at [22].
18 *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [108](a); and *R v Pomee* [2018] NZHC 2891 at [34].
19 *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [108](f).
20 At [108](b).
21 Particularly *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602; and *R v Waitokia* [2018] NZHC 2146.

(a) the circumstances of the present offending;

(b) the sentence that would be imposed but for the three-strikes regime;

(c) Mr Kaienua's personal background;

(d) the effect of the earlier warnings, and the offending they were imposed for; and

(e) Mr Kaienua's likelihood of reoffending.

[29] I will address these factors, then explain why I consider that to impose a sentence without parole would be manifestly unjust.

Circumstances of the present offending

[30] The present offending is undoubtedly serious. The injuries Mr Patel and Mrs Patel suffered were significant. In addition, as is clear from their victim impact statements, the offending has severely affected their lives and will continue to do so moving forward.

[31] Even so, Mr Kaienua was not the primary offender, and I found after the trial that he did not know that Y was going to attack the complainants in the way he did, although Mr Kaienua did know that it was a possibility Y would use a knife against them. The Crown submits Mr Kaienua's culpability is not significantly less than Y's, because Mr Kaienua was the lookout, and he was significantly older than Y so must have had some influence over him.

[32] I consider Mr Kaienua's culpability is less than Y's, but not that much less. I accept the age difference between them is significant, as Mr Kaienua undoubtedly had some influence over Y. Mr Kaienua knew they were going to rob the dairy, and he knew Y had a knife. Mr Kaienua should therefore be held nearly as responsible for what followed.

[33] The Crown submit this means that the offending itself is not so minor as to make the lack of parole manifestly unjust of itself, as in other cases where the third-strike was comparatively minor offending.[22] I accept this submission.

The sentence but for the three-strikes regime

[34] Both parties have helpfully provided me with detailed submissions on what an appropriate sentence would be for Mr Kaienua's offending but for the three-strikes regime. I will address this hypothetical sentence more briefly than I otherwise would in the circumstances.

[35] In deciding on this hypothetical sentence, I will follow the normal sentencing process.[23] First, I will set a starting point, based on the characteristics of the offending and informed by sentences given in similar cases. Secondly, I will consider whether any of Mr Kaienua's personal circumstances would justify an adjustment to that starting point, up or down. There would of course be no question of a discount for a guilty plea.

[36] Both parties submit that the injuring with intent to rob charge is the lead charge, as it is founded on the more serious stabbing of Mr Patel. In terms of the starting point, the relevant tariff case is *R v Mako*,[24] which gives sentencing guidance for aggravated robbery, and is also relevant to assault with intent to rob.[25] The Crown and defence submit the aggravating factors are planning and premeditation,[26] there were multiple offenders,[27] the offending involved a serious weapon,[28] an extreme level of violence,[29] and the significant impact on the victims.[30] The Crown adds to these, the nature of the premises targeted – that is a dairy, which increases the risk of members of the public being present and put in danger – and that such small business operators

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22 For example *R v Campebll* [2016] NZHC 2817, where the third strike was an indecent assault involving a prisoner's touching a guard's buttock.
23 *R v Taueki* [2005] 3 NZLR 372 (CA); and *Hessel v R* [2010] NZSC 135, [2011] 1 NZLR 607.
24 *R v Mako* [2000] 2 NZLR 170 (CA).
25 *R v Whata* [2008] NZCA 204 at [16]–[17]; and having regard to the difference between the charges.
26 *R v Mako* at [36].
27 At [37].
28 At [39].
29 At [43].
30 At [46].

are vulnerable due to being frequently targeted.[31] I accept these are the aggravating features.

[37] In *Mako*, the Court commented on the starting point for the robbery of a small retail shop:

> A further example can be given taking another combination of features typical of many aggravated robberies. This envisages a robbery of a small retail shop by demanding money from the till under threat of the use of a weapon such as a knife after ensuring no customers are present, with or without assistance from a lookout or an accomplice waiting to facilitate getaway. The shopkeeper is confronted by one person with the face covered. There is no actual violence. A small sum of money is taken. The starting point should be around four years. Should the shopkeeper be confined or assaulted, or confronted by multiple offenders, or if more money and other property is taken five years, and in bad cases six years, should be the starting point.

[38] The Crown submit Courts often cross-check the sentence for violent offending under *Mako* with what the result would be applying *R v Taueki*, which governs sentencing levels for wounding offences.[32] The Crown says this offending would fall into the lower end of band 3 in that case, which is nine to 14 years' imprisonment. Band 3 is for offending where there are three or more aggravating factors, and the combination is particularly serious.

[39] The Crown submits that from the six-year starting point identified in *Mako* for a bad case, there should be an uplift to between nine and ten years' imprisonment to take into account the extreme violence and the wounding of Mrs Patel, considering nine years' imprisonment is the lower end of band 3 in *Taueki*.

[40] The defence, following a similar approach, submit a starting point of eight and a half years' imprisonment is appropriate. They submit the offending would fall at the upper end of band 2 in *Taueki*.

[41] I agree with the Crown that this offending would fall into band 3. I consider a global starting point of nine years' imprisonment is appropriate.

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31 At [40]–[42].

32 *R v Taueki* [2005] 3 NZLR 372 (CA). See for example *Police v Zafiri* HC Auckland CRI-2010-404-316, 16 November 2010 at [11]–[13].

[42] From that, both the Crown and defence agree that there should be a twelve month deduction to reflect Mr Kaienua's lesser role in the offending.[33] This brings it to eight years' imprisonment.

[43] Turning to factors personal to Mr Kaienua, both the Crown and defence submit an uplift of 12 months would be appropriate to reflect his previous convictions. I accept this is appropriate.

[44] The defence submit a discount of 15 per cent is appropriate to reflect what is identified in Ms Visser's report, particularly Mr Kaienua's history of childhood abuse, the traumatic event Mr Kaienua suffered in prison and his consequent and understandable severe anxiety at being incarcerated, together with accompanying mental health issues. I consider the defence's submission is modest. I would give a discount of 30 per cent to reflect this combination.

[45] This would bring the sentence I would impose, but for the three-strikes law, to six years and three months' imprisonment. A three month discount for time spent on EM bail would reduce this to six years' imprisonment. The Crown did not seek and I would not impose a minimum period of imprisonment because of Mr Kaienua's personal circumstances, so the non-parole period would be one third,[34] being two years.

[46] This is substantially less than the 14 years Mr Kaienua would serve under the three-strikes regime if there is no parole.

Mr Kaienua's personal background

[47] I have already addressed this in detail above. Suffice to say that I consider imprisonment is a particularly severe punishment for Mr Kaienua given his personal history. This is reflected in Ms Visser's conclusion that a term of imprisonment such

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33 Citing *Solicitor-General v Singh* [2014] NZHC 3331; and *Kingston v R* [2010] NZCA 460. The discount in those cases was six months to reflect the offender was a getaway driver, but the starting points were much lower in those cases than here.

34 Parole Act 2002, s 84(1).

as 14 years would be "psychologically catastrophic", and that Mr Kaienua may severely harm himself, if not worse.

[48] I consider that this factor alone would make it manifestly unjust to impose a sentence of 14 years without parole.

The earlier warnings

[49] Mr Kaienua's first strike was for sexual connection with a young person.[35] Mr Kaienua, then 20 years' old, pressured a 13 year old girl into having sex. He infected her with a sexually transmitted disease. He was sentenced to two years and one month's imprisonment. The pre-sentence report prepared at the time notes that Mr Kaienua was remorseful.

[50] Mr Kaienua's second strike was similar to the present offending. Mr Kaienua and two associates formed a common intention to rob a dairy. Mr Kaienua and one of his associates entered the dairy and struck the shopkeeper with a wooden table leg several times in the head, causing injury. The group did not succeed in taking anything. The sentencing Judge described the attack as "vicious premeditated violence against a defenceless man".[36]

[51] There have been some cases under the three-strikes regime that have involved a finding of manifest injustice because the earlier strikes were for relatively minor offending.[37] The Crown submits this is not such a case, because both of the previous strike offences were quite serious, and the second strike is very similar to the present offending. I accept this submission. I do not take the defence to be submitting that the nature of the previous strike offending justifies a finding of manifest injustice.

[52] Apart from a comment to the psychologist, there is no indication that Mr Kaienua lacked the ability to understand the earlier strike warnings.

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35 Crimes Act 1961, s 134(1).
36 *New Zealand Police v Kaienua* DC Rotorua CRI-2014-063-001092, 5 June 2014 at [9].
37 For example, see *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602.

Mr Kaienua's likelihood of reoffending

[53] The pre-sentence report writer assesses Mr Kaienua's likelihood of reoffending as very high, and I consider given his history and the psychological report this can only be correct. But I am not willing to write Mr Kaienua off, and I hope that there is treatment and therapy available to him which may reduce his risk of offending.

Analysis

[54] As I have said, I have determined that imposing the sentence without parole would be manifestly unjust. This is so for two reasons. First, I consider Mr Kaienua's traumatic history in prison, to put it modestly, and the conclusions in the psychological report about Mr Kaienua's mental health of themselves make it manifestly unjust to sentence him to 14 years without parole.

[55] Secondly, I consider the great disparity between the non-parole period he would receive but for the three-strikes regime, being two years, and a sentence of 14 years also makes it manifestly unjust to impose the sentence without parole.

[56] Taking these two factors together, I consider this is a clear case of manifest injustice.

Conclusion

[57] Mr Kaienua, please stand.

[58] On the charge of assault with intent to rob, I sentence you to 14 years' imprisonment.

[59] On the charge of aggravated wounding, I sentence you to 14 years' imprisonment, to be served concurrently.

[60] I am satisfied that it would be manifestly unjust to make an order that Mr Kaienua serve this sentence without parole.[38]

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[38] Sentencing Act 2002, s 86D(3).

[61] Please stand down.

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Gault J