

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

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

**CRI-2018-404-000264
[2019] NZHC 1050**

THE QUEEN

v

TERRANCE RUDOLPH

Hearing: 14 May 2019

Appearances: H Steele for the Crown
W Andrews for the Defendant

Judgment: 14 May 2019

SENTENCING NOTES OF MOORE J

Introduction

[1] Terrance Rudolph, at the age of 30 you appear for sentence on:

(a) one charge of aggravated robbery;¹ and

(b) one representative charge of dishonestly using a document.²

[2] You pleaded guilty on 1 March 2019.

[3] I now turn to the facts of your offending. Those facts will be well-known to you. But because sentencing is quintessentially a public function and must be conducted in open Court I am required to set out the facts on which I will be sentencing you.

The facts

[4] At around 2:00 am on 15 January 2017 one of your co-offenders, Asia Robertson, was at a bar on Karangahape Road. It was there that she met the victim. At around 3:00 am they agreed to leave the bar together.

[5] Ms Robertson and the victim caught a taxi and picked up your second co-offender, Carly Goodson. The three of them stopped by a motel room rented by Ms Goodson before heading to the victim's address in Eden Terrace to pick up his car. Ms Robertson then drove the group to a motel in Epsom.

[6] You were already at the unit. After the group arrived, Ms Goodson and the victim went into a bedroom together. The victim agreed to pay Ms Goodson for sex. At that point, Nykell Hegotule burst into the bedroom. He is another co-offender. Mr Hegotule was armed with a large knife. He was wearing a t-shirt emblazoned with a gang logo.

¹ Crimes Act 1961, s 235(b); the maximum penalty is 14 years' imprisonment.

² Section 228(1)(b); the maximum penalty is seven years' imprisonment.

[7] Mr Hegotule demanded the victim's money. He threatened to stab him. He told him he was a gang member. Ms Robertson entered the bedroom, followed by you. You were holding a knife.

[8] Ms Robertson and Mr Hegotule demanded the victim's PIN number. They directed him to transfer \$5,000 to a bank account of their choosing but then told him to cancel the transfer. They took his mobile phone and wallet.

[9] You and Ms Robertson told the others that you were going to go to an ATM to withdraw money using the victim's bank card. As you were leaving, the victim made an attempt to flee through a ranch slider. You and Ms Robertson blocked his escape. Mr Hegotule punched him in the back of the head and he collapsed dazed. He was hit again. Then he was bound and gagged.

[10] You and Ms Robertson left the motel in the victim's car. You withdrew \$2,800 from various ATMs in the area.

[11] Mr Hegotule and Ms Goodson left the motel soon after. The victim was abandoned at the motel, still bound and gagged. Eventually he managed to free himself and summons help.

The victim

[12] Your victim received treatment for a fractured eye socket and concussion. He has provided a victim impact statement. In addition to the physical injuries he suffered, he speaks of the enormous psychological toll of your offending.

[13] He describes suffering anxiety attacks. He struggles to interact with strangers. Because he works in the restaurant business, this is something which affects him constantly. After the offending he was diagnosed with acute stress disorder. Seeing violence on television brings back memories of the trauma he suffered. Unsurprisingly he says what you and your associates did to him has changed his life.

[14] The money you stole was never recovered or repaid. Coupled with the loss of wages over the six weeks of his recovery, he was unable to work. This meant he was

unable to return to his home country to visit his parents, as he customarily does annually.

Subsequent events

[15] You were arrested on these charges in June 2017.

[16] On 15 September 2017 Whata J granted you EM bail.³ But you absconded on 6 December 2017 and despite the best efforts of Police was unable to be found. You failed to appear at trial callover on 14 February 2018. I issued a warrant for your arrest. On 5 July 2018 this Court ruled that the trial of your co-defendants should proceed in your absence.⁴

[17] Ms Robertson received a sentence indication on 24 April 2018.⁵ She accepted it and pleaded guilty to charges of aggravated robbery, kidnapping, unlawfully taking a car and dishonestly using a document. On 27 June 2018 Woodhouse J sentenced her.⁶

[18] Mr Hegotule and Ms Goodson went to trial. Mr Hegotule was convicted of demanding with intent to steal, injuring with intent to injure, aggravated robbery, kidnapping and dishonestly using a document. Whata J sentenced him on 29 October 2018.⁷

[19] Ms Goodson was convicted of demanding with intent to steal, kidnapping and dishonestly using a document. She was sentenced by Whata J on 3 December 2018.⁸

[20] You were arrested on 3 November 2018 and, as I said, entered pleas of guilty on 1 March 2019.

[21] By way of explanation, your lawyer, Ms Andrews, says that you were afraid of your co-offenders' gang connections. She says you ran away because you feared

³ *Rudolph v R* [2017] NZHC 2263.

⁴ *R v Hegotule* HC Auckland CRI-2017-004-1086, 5 July 2018.

⁵ *R v Robertson* [2018] NZHC 788.

⁶ *R v Robertson* [2018] NZHC 1557.

⁷ *R v Hegotule* [2018] NZHC 2790.

⁸ *R v Goodson* [2018] NZHC 3155.

reprisal from your co-offenders in the event you gave evidence against them. She says that once you learned the trial had been resolved you handed yourself into the Police.

Starting point

[22] I now turn to address the starting point for your sentence. Before doing so, it is necessary for reasons of parity to first set out the starting points imposed on your co-offenders. I am conscious each was sentenced on a different combination of charges. But, like you, each was convicted of or pleaded guilty to a charge carrying a maximum sentence of 14 years' imprisonment (either aggravated robbery or kidnapping).⁹ For that reason, I am satisfied it is possible to make useful comparisons between the respective levels of culpability between them and you. I shall thus assess the starting point in your case and compare it to those of your co-offenders by reference to the varying levels of involvement each of you had in the offending.

[23] Ms Goodson attracted an overall starting point of two years and nine months' imprisonment. In reaching this figure, Whata J had regard to the "relatively minor role" played by Ms Goodson in the kidnapping and what he described as the "non-existent" role in the assault.¹⁰

[24] Woodhouse J adopted a substantially higher starting point for Ms Robertson; four-and-a-half years. His Honour referred, nonetheless particularly to the element of planning in the offending which while not sophisticated involved the use of knives. He also referred to the "low levels" of violence involved in tying the victim up, and the impact the offending has had and continues to have on the victim.¹¹

[25] For Mr Hegotule, having regard to his role in the physical violence, Whata J considered a starting point higher than Ms Robertson was called for. But there was also evidence at trial that Mr Hegotule was a latecomer in the plan to rob the victim; a plan which quickly escalated in its seriousness. Whata J adopted a starting point of five years.¹²

⁹ Crimes Act 1961, s 209.

¹⁰ At [13].

¹¹ *R v Robertson* [2018] NZHC 788 at [22].

¹² At [8].

[26] Against that background I need to consider the various aggravating factors identified by the Court of Appeal in *R v Mako*.¹³ There are only two which are evident in your offending to any significant degree. The first is the impact on the victim. I have discussed this already. The second is that you armed yourself with a kitchen knife. This could only have been for the purposes of facilitating the joint enterprise; either to intimidate or to cause injury.

[27] The fact that there were multiple offenders is of course inherent in the particular charge of aggravated robbery to which you pleaded guilty.¹⁴

[28] I accept there was an element of premeditation insofar as the victim was lured to the hotel room. But the planning was unsophisticated and, it seems to me, developed and evolved as events unfolded. And, like Mr Hegotule, I accept you were a latecomer to the plan. You only became involved once the enterprise was underway. You say you were sleeping in the hotel room when the others arrived unexpectedly. I accept that on the summary of facts that cannot be disproved. However your offending is viewed, it is apparent that you were not one of the masterminds, nor indeed one of the chief participants.

[29] The Crown seeks a starting point of four years. It bases this on the claim your offending was more serious than Ms Goodson's but not as serious as Ms Robertson's. In contrast, Ms Andrews presses for a starting point of between two and three years.

[30] I agree with the Crown that your role in the offending was more significant than Ms Goodson's. While it is correct that Ms Goodson became involved earlier, she was something of a bystander. On the other hand, although you came to it later, you were a willing and active participant. You armed yourself with a kitchen knife and together with Ms Robertson, actually carried out the purpose of the robbery by visiting the ATMs and withdrawing funds totalling \$2,800. It is also notable that you helped prevent the victim's desperate attempt to escape. It cannot be said that you took no part in his detention.

¹³ *R v Mako* [2000] 2 NZLR 170 (CA).

¹⁴ Crimes Act 1961; s 235(c).

[31] Balanced against that, however, there is nothing to suggest that you knew of the offending from its inception. I accept that there is no evidence you were aware of any plan to rob the victim until it was actually unfolding before you.

[32] In the circumstances, I consider an overall starting point of three years and nine months' imprisonment is appropriate.

Personal factors

[33] Ms Andrews has provided the Court with a helpful psychological report from Dr Jon Nuth. It sets out relevant factors of your personal background. Reading the doctor's findings, along with the presentence report, I summarise the position in the following way:

- (a) Although biologically born male, you have always identified as female. You told Dr Nuth you have lived as a female since you were 12. For the past three to four years you have been receiving hormone treatment. You plan to have a gender reassignment surgery.
- (b) You grew up in Glen Innes with your parents and four siblings. Your father was violent and had an alcohol problem. He was particularly abusive towards your mother and had friends in Black Power, who often drank at the house.
- (c) You report a disruptive and often traumatic childhood. You say you witnessed your sister being raped when she was seven. At around the age of 11 or 12 you were taken into the care of CYFS and shuttled around various homes. At age 13 you were befriended by a group of girls. This was the beginning of your introduction to the sex trade. To use your words, the girls "made money off [you]" by prostituting you out to older men. You were also plied with methamphetamine. This became your life. You lived, off sex, staying with clients or living in hotels, and developing addictions to drugs and alcohol.

- (d) Although not suffering from any mental health difficulties, you recently battled depression after your sister committed suicide roughly two years ago.

[34] More optimistically, despite what can only be described as a deprived and tragic start to life, you appear to have turned something of a corner recently. You say that your time on remand in prison has been “a blessing”. You say it has given you insight into your past and helped you break the cycle of sex work and drug use. You have given up smoking and started a new, apparently stable, relationship. You aspire to a career in upholstery. Since being in prison, you have successfully engaged in rehabilitative programmes for alcohol and drug abuse and problem gambling. Certificates for the completion of these courses have been given to me.

[35] I also note that the letter you wrote to the victim contains expressions of remorse. You say you take full responsibility for your actions. You seek your victim’s forgiveness.

[36] You also offered to participate in restorative justice processes with him. Given the circumstances and the effects of your offending it is unsurprising he is not willing to engage. However, irrespective of that, your willingness to participate is a matter I must and do take into account.

Aggravating factors

[37] Given your background, it is no wonder that you have accumulated a number of convictions. But they are mostly minor. They involve low-level driving, property and drug-related offending. There is nothing in your history which compares in seriousness to the current offending. Mr Steele, for the Crown, properly and fairly does not seek an uplift for your prior convictions.

Mitigating factors

[38] Ms Andrews seeks discounts for what she says is your remorse, personal background, offer to attend restorative justice and attempts to rehabilitate yourself. It

is unclear what level of discount she seeks, although as I understand her, it is at least 10 per cent.

[39] Ms Andrews also brought to the Court's attention the amount of time you have spent remanded in custody, some 289 days. It is plain from her submissions that this time has provided you with the opportunity to engage fruitfully in various Corrections' programmes and to reflect on how it is that you now come before this Court for sentence. However, beyond that there is little relevance to the time you have spent on custodial remand. That is a matter for Corrections in calculating your release date. In any case, I should make it clear that the Court must disregard time served where the ultimate sentence is imprisonment; credit for time served arises only once a decision is reached that the sentence will be one of home detention.¹⁵

[40] With regard to the other discounts sought by Ms Andrews, I accept that you have expressed remorse for your actions. But any claim that you have shown sufficient levels of remorse warranting a discrete discount beyond that implicit in pleas of guilty is irreconcilable in my view with the fact that you absconded for whatever reason from your EM bail address and evaded Police for a number of months.

[41] I note that this Court has recognised that the "added difficulty" a transgender defendant might suffer while serving a sentence of imprisonment may, in certain circumstances, justify a discount.¹⁶ Such a discount is predicated on and analogous to a situation where a medical condition or mental health issue would render a sentence of imprisonment a more severe penalty for a particular offender.¹⁷ Parallels may also be found in the recognition Courts will give when a prison sentence may be especially onerous on young persons.¹⁸

¹⁵ Sentencing Act 2002, s 82; Parole Act 2002, s 90; see also *Longman v Police* [2017] NZHC 2928 at [10].

¹⁶ *R v Warwick* HC Auckland CRI-2010-057-508, 15 June 2010 at [31]-[34] and *Tua v Police* HC Auckland CRI-2011-404-340, 18 November 2011 at [26]; see also the report of the Chief Ombudsman: Beverley Wakem and David McGee *Investigation of the Department of Corrections in relation to the Provision, Access and Availability of Prisoner Health Services* (2012) at 105-107.

¹⁷ *R v Verschaffelt* [2002] 3 NZLR 772 (CA) at [22] and *R v Wright* [2001] 3 NZLR 22 (CA).

¹⁸ *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77](b) and [85].

[42] In your case, however, it appears that your time in prison has helped you to turn something of a corner in your life. In that sense it has had a beneficial effect and there is nothing before me to suggest that prison in your case will carry the particular burdens other transgender defendants may suffer. For that reason I am reluctant to give a discount on that score.

[43] Similarly, I accept that your upbringing was marred by social deprivation and various forms of substance and sexual abuse. But larger discounts for deprivation tend to rely on identifying linkages between personal circumstances and the offending and thus the moral culpability of the offender.¹⁹ In your case, the nexus between your deprived background and your offending is unclear. Dr Nuth described you as of “at least normal intellectual ability with no discernible mental or cognitive difficulties”. It is readily apparent that your transient existence as a sex worker, which is one you resorted to out of necessity, led you to live on the margins of society and become involved with your co-offenders. But other than that, I am not satisfied that personal circumstances influenced your decision-making in the early hours of 15 January 2017 such that it bears on your culpability to a significant degree. This is something you seem to accept. In your letter to the victim, you refer to being impacted by your sister’s suicide, but acknowledge that that is no excuse for what you did. To your credit, you accept full responsibility for your actions.

[44] However, I do not intend to disregard your background entirely. In my view it provides an important context to what I view as your significant efforts at rehabilitation. I have already mentioned the courses you have completed since being in prison. Similarly, given your background, Dr Nuth describes your resilience and freedom from mental health difficulties as “remarkable”. He assesses your positive attitude as genuine. According to the doctor, you are respectful of the criminal justice process and do not show any signs of entrenched criminality. He says you have the potential to build upon your strong but relatively recent progress.

[45] A discount for engaging in rehabilitative measures falls within a sentencing Judge’s discretion.²⁰ In combination with your deprived social background, limited

¹⁹ *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241.

²⁰ *Ross v Police* [2015] NZHC 1633 at [42].

expressions of remorse and efforts at rehabilitation, I consider a discount of 10 per cent is appropriate.

Guilty pleas

[46] I have already outlined the background to your guilty pleas, in particular the nature and the extent of your flight from the authorities. Mr Steele points to your frustration of the processes of justice and says this should be reflected in a reduction to any guilty plea discount you receive. But at the same time he fairly recognises that your decision to plead guilty spared the victim the ordeal of another trial. Given the content of his victim impact statement, your victim would no doubt have undergone considerable stress and anxiety had you had chosen to defend these charges. In these circumstances, Mr Steele is prepared to accept a discount of 15 per cent would be available to the Court. This is something Ms Andrews readily accepts.

[47] This is a very generous discount. Indeed it might be regarded as overly generous. But it does recognise the special factors engaged in your case and I have decided I am prepared to go with counsel and adopt a 15 per cent discount.

[48] Rounding the numbers in your favour, this brings the final sentence to one of two years and 10 months' imprisonment. This sentence, being more than two years' imprisonment means that a sentence other than a full-time custodial term is not available to you. But even if it had been, I am conscious of the principles of sentencing, including the Court's obligation to impose the least restrictive sentence in all the circumstances, but I would not have commuted your sentence to one of home detention. In my view, the seriousness of what happened that night takes it outside the realm of any sentence other than imprisonment. Furthermore, your decision to abscond undermines and confidence the Court might have had that you would serve a sentence of home detention. Indeed, as you told Dr Nuth and reflected in the pre-sentence report, you accept a custodial sentence is the likely outcome and you have expressed a willingness and commitment to make the most of your time in jail.

First-strike warning

[49] I understand that when you pleaded guilty you were not given a first-strike warning. That being the case I am now required to give that warning now.

[50] As you will know, the three-strikes law was passed some years ago. Its provisions are engaged when defendants are convicted of qualifying violent offences. Aggravated robbery is such a charge.

[51] And so I must warn you of the consequences should you commit another serious violent offence. After I have given the warning, you will be handed a written notice outlining the consequences and listing the qualifying serious violence offences.

[52] If you are convicted of any serious violent offences other than murder committed after this warning and if a Judge imposes a sentence of imprisonment then you will serve that sentence without parole or early release.

[53] If you are convicted of murder committed after this warning then you must be sentenced to life imprisonment. That will be served without parole unless it would be manifestly unjust. In that event the Judge must sentence you to a minimum term of imprisonment.

End sentence

[54] Ms Rudolph, please stand.

[55] On the charge of aggravated robbery, I sentence you to two years and 10 months' imprisonment.

[56] On the representative charge of dishonestly using a document, I sentence you to six months' imprisonment.

[57] These sentences are to be served concurrently; in other words at the same time as each other.

[58] Before I direct you to stand down, I wanted to say a few words which will not form part of my formal sentencing remarks.

[59] You are still a relatively young woman. There is no doubt that circumstances have conspired to make life hard for you. There can also be no doubt that those circumstances led you to fall into bad company and that is how you find yourself today being sentenced for serious offending in the High Court.

[60] But despite that, there is room for optimism in your case. You have insight. You are realistic and, it seems, you may now have the support structures around you to turn your life around and use this experience in a positive way. Use your time in prison to self improve. Dr Nuth says you have that capacity and the time you have already spent in jail and what you have made of it reinforces that sense of optimism. You can do it. You have proved you can so that when you return to our the community, you will do so as a fully functioning and effective contributor. I wish you well.

[61] Stand down.

Moore J

Solicitors:
Crown Solicitor, Manukau
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