

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

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

**CRI-2018-004-001036
[2019] NZHC 679**

THE QUEEN

v

DONAVAN SCANLAN

Hearing: 3 April 2019
Appearances: D Johnstone for the Crown
L Freyer for the Defendant
Judgment: 3 April 2019

SENTENCING NOTES OF MOORE J

[1] Mr Scanlan this morning you appear for your second appearance in this Court for trial callover.

[2] You were charged with indecent assault which carries a maximum penalty of seven years' imprisonment.¹ By virtue of s 86D(1)(a) of the Sentencing Act 2002 ("the Act") that charge was a stage 3 offence because you received a first warning under the Act on 20 November 2012 and a final warning on 29 November 2017. The consequence of a third conviction, it being a qualifying offence for the purposes of the provision, is that you would be required to serve the whole of the maximum penalty without parole. In other words you would be sentenced to seven years' imprisonment and you would serve every day of that sentence.

[3] The Crown, in my view very properly and responsibly, particularly having regard to the nature of the index offending, has applied this morning to amend its charge notice to an offence which carries a maximum of two years' imprisonment and is not a qualifying offence for the purposes of s 86D.² Ms Freyer does not oppose that application. Understandably on your behalf she supports it and on that basis I have amended the charge notice which alleges an indecent act with intent to assault or offend.

[4] Having granted that application the charge was put to you and you entered a plea of guilty and I entered a conviction.

[5] Both the Crown and Ms Freyer ask that I deal with this matter now. I am prepared to that. However, the law requires me to obtain a waiver of your right to have a pre-sentence report prepared. Ms Freyer, having just taken instructions from you advises me that you are prepared to give such a waiver. On that basis I am prepared to deal with you now without the assistance of a pre-sentence report.

¹ Crimes Act 1961, s 135.

² Indecent act with intent to insult or offend under s 126 of the Crimes Act; maximum penalty two years' imprisonment.

[6] The offending for which you are to be sentenced is simply the continuation over many years of what the Crown describes as nuisance-type offending. It is the most recent in a vast number of relatively low level stupid offending.

[7] On this occasion in the middle of the day in November last year you were at Mission Bay. It is plain that you were drunk. You were walking along the beach carrying a bottle of wine and pestering sunbathers. For some reason you were also walking with a crutch. You approached a woman who was lying face down on a towel sunbathing. You placed the end of the crutch between the woman's legs and used it to lift up her skirt for a very short period. She was wearing a bikini bottom. There were bystanders, notably a father and his young daughter who observed this.

[8] The complainant shouted out, "You fucking creep", picked up her belongings, ran away. She has not been seen since. Your actions, however, were notified to the Police. About 20 minutes after this incident you were identified by the witnesses and pointed out to the Police. The Police knew exactly who you were. They had dealt with you only very recently before that. You were plainly drunk at the time. When the Police spoke to you, you denied really touching her.

[9] Your previous conviction history can only be described as horrific. It runs to 52 pages. I do not have time to analyse it but it is on any analysis appalling.

[10] Those who recreate on our city's beaches and in our parks are entitled to be protected and to be free from the predations of people like you. I agree with the Crown that the principles of the Act engaged in your case are the protection of the public and holding you to account for the harm you have caused. As the Crown submits and your counsel agrees, the application of these principles in your case requires the imposition of a term of imprisonment. The question is "of what duration".

[11] Both submit that a term of imprisonment of one year in these circumstances is appropriate. I agree. However, the provisions of the Act require me to consider whether or not given that this is a sentence of less than two years I should consider home detention.³ I have considered home detention. I have also considered other

³ Sentencing Act 2002, s 80A.

community-based sentencing options. I am satisfied, as is the Crown and your counsel, that in your case home detention is inappropriate. In my view it is inappropriate for two at least reasons. First, given your history of previous convictions something needs to be done to attempt to address or arrest this chronic history of nuisance offending. Secondly, imposing a sentence of home detention would be an exercise in futility for at least two reasons:

- (a) first it does not seem that you have a home or at least a home that would be appropriate for home detention purposes; and
- (b) secondly, given your criminal history, there can be no confidence that you would abide by the conditions of any home detention order.

[12] The consequence of a term of imprisonment of one year is that you would be entitled to be released having served six months of that term. Mr Johnstone tells me that taking into account time served on remand, this would be reached in about mid-May.

[13] The advantages of ordering a term of imprisonment is that the Parole Board will be involved and there will also be the power to impose post-release conditions. In my view it is absolutely essential that intervention of that sort occurs in your case because as I have already commented the public needs to be protected.

[14] You can consider yourself extremely lucky that you are not today being sentenced as the Court would otherwise have been required, to seven years' imprisonment. It is only because good sense and proportionality has been applied to this case by both the Crown and your counsel that you have avoided that sentence.

[15] In the circumstances I am satisfied that having regard to your previous convictions, recognising that you have pleaded guilty at the earliest reasonable opportunity and considering the totality of your offending that a term of 12 months' imprisonment is appropriate and I now sentence you to that term.

[16] Stand down.

Moore J

Solicitors:

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