

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

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

**CRI-2017-044-004671
[2019] NZHC 2734**

THE QUEEN

v

DAMIAN KARL WERETA

Hearing: 25 October 2019
Counsel: BR Northwood and RMG Hindriksen for Crown
RM Mansfield for Defendant
Judgment: 25 October 2019

SENTENCING REMARKS OF DOWNS J

Solicitors/Counsel:
Crown Solicitor, Auckland.
RM Mansfield, Auckland.

Introduction

[1] Mr Wereta, you are for sentence on a charge of wounding with intent to cause grievous bodily harm. This is your third strike. This means I must impose the maximum penalty of 14 years' imprisonment unless I impose preventive detention, which the Crown urges. In relation to each sentence, there is also the question of a minimum period of imprisonment, something you will have heard Mr Mansfield, your lawyer, talk about this morning. I will come back to this topic. First, your strike offending.

First-strike

[2] On 1 February 2013, a District Court Judge sentenced you to 10 and a half years' imprisonment on a raft of serious charges: aggravated robbery with a firearm; unlawfully taking a car; demanding with menaces; threatening to kill; three of assault with intent to injure; causing grievous bodily harm with intent to injure; breaching community work and breaching release conditions. The aggravated robbery and grievous bodily harm offences were first-strikes. The victim of the latter was, I gather, a Corrections Officer. Unfortunately, I do not know more about these offences. I have tried to find the Judge's sentencing notes, without success. I do not even know who the Judge was. But, the aggravated robbery was obviously committed in the community because, as I have said, a firearm was used.

Second-strike

[3] On 17 September 2015, Andrews J sentenced you to a further seven years and nine months' imprisonment. This because two years earlier, you stabbed another prisoner with a shank; with others, punched and stabbed another prisoner; and attacked a third prisoner. For the uninitiated, a shank is a sharpened implement made in prison—a prison knife essentially. One of your victims suffered life threatening injury. You pleaded guilty on the morning of trial to an offence of injuring with intent to injure and two of wounding with intent to cause grievous bodily harm. The latter were second-strike offences. The Crown sought preventive detention. Andrews J decided,

“on balance”, a finite sentence was preferable, hence the additional seven years and nine months.¹

This offending

[4] This brings me to your third-strike; your offending for sentence today. On 12 November 2017, you and four others attacked another prisoner without warning. A co-offender began the attack with punches to the victim’s head. Once the victim was on the ground, you punched and kicked him to the head and abdomen. You then repeatedly stabbed the victim with a shank to the head, neck and upper back.

[5] You gave the shank to a co-offender to wield. He too repeatedly stabbed the victim. You and others kicked the victim while he did so. He then gave the shank back to you.

[6] Corrections officers arrived. You stabbed the victim while they watched.

[7] Your co-offenders continued the assault. You and they taunted the victim with Black Power slogans while he lay defenceless—and seriously injured. The victim was from an opposing gang, the Mongrel Mob. You then stabbed the victim twice more. You and your co-offenders taunted the Corrections officers. You said to them, “this is what happens when you put a mobster on my landing”.

[8] The victim managed to stagger away. As he did so, you stabbed him twice more to the upper chest and neck. After what is described as a protracted negotiation with the guards, you dropped the shank. You and the other offenders then congratulated each other on what you had done. Some of your co-offenders tipped water and shampoo on the ground to make the difficult role of Corrections officers even more so.

[9] All this happened in Auckland Prison, a maximum-security jail.

¹ *R v Wereta* [2015] NZHC 2248 at [51].

[10] The victim suffered multiple stab wounds to his face, neck, head, back and side. One narrowly missed his jugular. He nearly died. But for emergency surgery, he might have.

Starting point but for the three-strikes regime

[11] You are the last defendant to be sentenced for this offending. Wylie J adopted a nine-year starting point for the offender who began the attack.² The Judge uplifted that by a year for personal aggravating factors, giving an adjusted or overall starting point of 10 years. Fitzgerald J adopted an eight and a half year starting point for another offender.³ The Judge uplifted that by six months, again for personal aggravating factors; so, overall a nine-year starting point.

[12] I consider you the primary offender. You had the shank, wielded it repeatedly, and allowed another to use it. You inflicted most of the very serious wounds. That you did not commence the attack is, I think, beside the point. You very quickly joined it, using a potentially lethal weapon.

[13] Eight things make your offending worse, albeit with considerable overlap. First, you employed very serious violence; indeed, extreme violence. Second, you used a weapon. Third, you specifically attacked the head by stabbing and kicking. Fourth, you attacked the victim *because* he was from an opposing gang. Fifth, you acted in concert with others. Sixth, as Wylie J noted, there was some planning to this offence. Seventh, you committed it while in prison for similar offending. Eighth, you have a bad record for violence.

[14] Given this and the starting points adopted by my colleagues, I would have adopted a 10 and a half year starting point, inclusive of your record and the fact of offending within prison. Your offending is comfortably within band three of a guideline judgment for grievous bodily harm and, I believe, a bad case of its kind.⁴

² *R v Rangitoheriri* [2018] NZHC 2355.

³ *R v Tonga* [2019] NZHC 712.

⁴ *R v Taueki* [2005] 3 NZLR 372 (CA) at [40].

[15] It will be apparent from what I have said I do not accept Mr Mansfield's written submission this was somehow excessive self-defence; self-defence by a pre-emptive strike; or some idiosyncratic combination of both. The victim was outnumbered five to one. You repeatedly used a shank on him. The attack lasted no less than five minutes. It is no coincidence the victim was from an opposing gang. I repeat: this is why you attacked him. You know this. To contend you had to do so because he might have later attacked you is to advocate for the law of the jungle; not the Rule of Law.

[16] On your behalf, Mr Arthur Taylor has filed an affidavit saying the mere fact you had a weapon does not mean this was premeditated. I accept that. But again, as Wylie J noted when dealing with a co-offender, this attack was planned in some way; it was plainly coordinated by you acting with others.

[17] I also reject the analysis the offending is somehow less culpable because of the prison environment. I acknowledge prisons are unpleasant, indeed dangerous places. I am familiar with them. But, however politely or carefully framed, this submission is ultimately inconsistent with the longstanding principle violent offending in prison, whether against a Corrections officer or another prisoner, is a serious aggravating factor.⁵

[18] From a 10 and a half year starting point, I would have deducted six months for your guilty plea. It came late. You committed this offence 12 November 2017. You were to be tried 18 March 2019. You pleaded guilty on 15 March, so, three days before trial. Your offending was squarely captured on closed-circuit television and did not rely on the assistance of the victim (who we all know would not have testified). Your conviction was inevitable. I do not accept you are remorseful and make no allowance for that. You told the experts in this case you felt no empathy for the victim but sad for his family.

[19] There are no other mitigating features. I do accept your background helps explain your offending—about which more soon—but yours is a case in which the seriousness of your offence precludes allowance for your background.⁶ Moreover, to

⁵ See, for example, *Waru v R* [2019] NZCA 347.

⁶ See, for example, *Arona v R* [2018] NZCA 427.

say your offending is less culpable because you have been brought up to believe opposing gangs are the enemy is perilously close to countenancing gang warfare, something Courts have long expressed great concern about, and treated—rightly—as a significant aggravating factor and significant community problem.

[20] So, had this been a conventional sentencing exercise, I would have imposed a sentence of 10 years' imprisonment.

Your background

[21] I come to your background. I have had the benefit of four comprehensive reports: a pre-sentence report from Mr Jonathan Dutton; a cultural report from Ms Donna Hemi, you might recall speaking to her; a report from a clinical psychologist, Ms Sanjeeta Sharma; and a report from a forensic psychiatrist, Dr John Jacques.

[22] Your background is depressingly familiar, indeed sad. You are one of many children. Your father was the president of the local Black Power chapter. His example was far from positive. Your early life was afflicted by violence, alcohol and drugs. You went into state care from a young age. You suffered yet more violence. You were moved from home to home. You had little stability. You left school when 14—with no qualifications and little ability to read and write. You later joined the Black Power gang. As you acknowledge, you have never had a proper job. You have spent much of your life in prison. You have suffered violence there and, obviously, dealt that too.

[23] You are Ngati Porou. You have little cultural connection with your Maori heritage or proud iwi.

[24] You turn 40 in February next year. You have several children and a long-term partner. I am told she continues to support you.

A pattern of serious offending and harm

[25] You have an extensive criminal history, including 27 convictions for violence beyond today's offence. Many are serious. Your history of violence is traceable to

1997, when you injured with intent to injure or with reckless disregard. Later that year you committed an assault; an assault with a weapon; and wounded with intent to cause grievous bodily harm. You were then only 17. You have been violent ever since; there are no obvious gaps in your history. You have obviously caused serious harm to the community. You have nearly killed at least twice: by this offence, and by your offending in 2013. Again, this you all know.

A tendency to commit serious offences in the future

[26] Mr Jonathan Dutton, the pre-sentence report writer, considers you pose a high risk of harm to others. He notes, as I have, your propensity for violence and your extensive criminal history.

[27] Ms Sharma considers you pose a high risk of violent re-offending in prison—and beyond. This because of your gang association and “entrenched use of violence as a means of coping with challenging situations”. Ms Sharma considers your “violent behaviour appears to be well entrenched and difficult to shift”. She believes the persistent nature of your offending and your inability or lack of motivation to maintain treatment means even a long-term determinate sentence may not adequately protect the community.

[28] Dr Jacques says you demonstrate “multiple risk factors associated with future serious violence”. He says you pose a high risk of serious violence, and a high risk of committing a further qualifying offence. He says preventive detention may be the only way to ensure you receive the necessary interventions to reduce risk.

[29] Both experts consider you have Post-Traumatic Stress Disorder (PTSD for short) and Antisocial Personality Disorder. Dr Jacques says those with PTSD can be hypervigilant and emotionally tense or on edge, and have difficulty controlling their emotions. Dr Sharma says Antisocial Personality Disorder correlates to recidivism, meaning there is a link between it and re-offending.

[30] The experts’ risk assessment mirror those given to Andrews J only four years ago. As you may recall, Dr Visser considered you posed a very high risk of further

violent offending following your release. Dr Goodwin, a psychiatrist, said you posed a high risk of violent offences.

Efforts to address the cause of the offending

[31] The experts commend your apparent willingness to engage in rehabilitation. Dr Jacques says you told him you needed to take responsibility for your behaviour and you were motivated to receive help. Ms Sharma believes you can make some therapeutic gains, albeit these have been limited by violent responses to emotional triggers. I note you spoke positively to the experts about your future. You told Ms Hemi, the writer of the cultural report, you hope to distance yourself from the Black Power gang and remove your related tattoos. I endorse or support these remarks. So, there are glimmers of hope.

[32] That said, a sense of perspective is called for. Andrews J was essentially told the same things four years ago. She noted you had “begun to address your offending” and to “start anew”.⁷ Her Honour remarked it could not be said psychological intervention had failed.⁸ In other words, you have made these types of positive remarks before but then committed another very serious crime. As I have said, you almost killed someone with a prison-made knife.

Preferability of a finite sentence

[33] I acknowledge the preferability of a finite sentence. But I again note you have been at this juncture before.

Likelihood the defendant will commit another qualifying offence at the sentence expiry date?

[34] Your current sentence expiry date is 3 May 2025. You will be eligible for parole three years earlier, so 3 May 2022. Both obviously will be changed by this sentence. I must be satisfied you are likely to commit another qualifying violent offence at your sentence expiry date—potentially many years from now.

⁷ *R v Wereta* [2015] NZHC 2248 at [48].

⁸ At [49].

[35] I am so satisfied. The experts agree you will continue to pose a significant risk. Their assessment is consistent with your extensive history of violence. This includes serious violence outside in the community. In any event, you will undoubtedly encounter opposing gang members when you are released, and stressful situations seemingly beyond your control. The latter are a fact of life. You do not yet have the wherewithal, meaning ability, to cope. Your instinctive response is violence. As you know, this will have to change.

[36] My conclusion also reflects events since 2015. Andrews J gave you a final chance essentially. You did not take it. Instead, you committed yet another very serious crime.

[37] I note also you blame others for what you did. You say the Department of Corrections should not have put the victim on your wing. Your thinking is not helping you. Nor is your connection to Black Power. Gangs and violence are twins.

Minimum period?

[38] The law requires me to impose a minimum period of 14 years unless your circumstances and those of the offence, that period would be manifestly unjust.⁹ The Crown highlights a minimum period of 14 years is appropriate. It points to the seriousness of this offence; your criminal history; and the risk you pose. I acknowledge the force of the Crown's analysis.

[39] However, please listen carefully. I am satisfied a 14-year minimum would be manifestly unjust. But for the three-strikes regime and preventive detention, your sentence would be 10 years' imprisonment. I would have ordered a minimum period of two-thirds. An indeterminate sentence with a minimum period of 14 years would be grossly disproportionate.

[40] A second reason is especially important. The community will be safer if you are motivated to reform. A shorter minimum period may give you that incentive. Approached the other way, if I sentence you to preventive detention and impose a

⁹ Sentencing Act 2002, s 86D(7).

14-year minimum period, you may ultimately emerge from prison angrier and more violent. I believe it is important you have some hope, and important for the community you have some hope.

[41] For these reasons, I impose a minimum period of eight years' imprisonment. This is closer to what the minimum period would have been but for the three-strikes regime; avoids a grossly disproportionate sentence; but protects the public. You will not be released until the Parole Board considers it is safe to do so. This is something you should work for. Your partner and children deserve better.

Sentence

[42] Mr Wereta, please stand: I sentence you to preventive detention with a minimum period of eight years' imprisonment.

[43] Please stand down.

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Downs J