IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CRI-2018-012-002380
[2019] NZHC 1301

THE QUEEN

v

ANTHONY JOHN WHEBLE

Hearing:	11 June 2019
Appearances:	C McDiarmid for Crown DJ More for Defendant
Sentence:	11 June 2019

SENTENCING NOTES OF TOOGOOD J

Introduction

[1] Anthony Wheble, you have pleaded guilty to the attempted murder of Diego Marques.[1] Because you have previously been convicted of serious violent offending, this is a second-strike offence. A warning to that effect was given to you at the time you pleaded guilty; and it means you must serve the full term of the sentence I impose on you without parole.[2]

Plea

[2] Your plea has concerned me. While you did not deny attacking Mr Marques, your initial not guilty plea was based on your assertion that you intended only to teach him a lesson, not to kill him. It was apparent that your request to change your plea to one of guilty was motivated by an irrational concern about your safety if you were required to return to the Otago Correctional Facility during your trial in Dunedin. The Court made it clear – on two occasions – that it would not transfer your trial to Christchurch. Mr More took instructions from you and said that you were prepared to acknowledge that you were guilty of attempted murder and to plead guilty. I accepted that plea on the basis that it was consistent with your claim that you attacked Mr Marques because he had threatened you and you were fearful.

[3] Since then, however, you have reverted to claiming to that you did not intend to kill Mr Marques. Mr More has again taken instructions from you and has assured me this morning that you do not deny that you are guilty of attempted murder and that you understand that you must be sentenced on that basis.

The facts

[4] The facts which, by your guilty plea, you accept as true, are these. Mr Marques and you were serving sentences of imprisonment at the Otago Corrections Facility in Milburn. At the time of the offending, you both resided in Wing H, Unit 33 at the facility. Unit 33 is a two-storey block with cells on both levels and a day room on the

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1 Crimes Act 1961, s 173; the maximum penalty is 14 years' imprisonment.
2 Sentencing Act 2002, s 86C(4).

ground floor. The day room is an open area with tables and chairs where prisoners are able to socialise.

[5] On the morning of 28 October 2018, Mr Marques and you were in the day room. Other inmates were present, playing cards and conversing amongst themselves.

[6] You had armed yourself and you were stalking Mr Marques around the day room. The weapon you had selected was a shank: a modified plastic knife approximately 10 centimetres long with a metal razor-blade fused to one end.

[7] At a certain point you ran up behind Mr Marques. With your left hand you grabbed his shoulder and with your right hand you cut him across the throat with the shank. Mr Marques suffered an eight-centimetre cut to his throat. Fortunately, it was not deep enough to sever his carotid artery.

[8] Mr Marques bowed his head and covered himself with his hands in an attempt to protect himself. You tried to cut his throat twice more but were unsuccessful. A fellow inmate intervened and ushered you away from Mr Marques, who made his way to a chair clutching his wounded throat. Another inmate assisted him into the recovery position on the floor.

[9] But you were not done. You ran back to Mr Marques and stomped twice on his head with considerable force. Someone else intervened. Initially you backed off from Mr Marques, but then you scared away the man who had intervened by threatening him with the shank. You went back to Mr Marques and kicked him once to the head with moderate force. You circled his body and delivered a further five kicks to his head and face. These were full-force kicks.

[10] At this point Corrections Officers intervened. You released the shank and were restrained.

[11] Mr Marques was airlifted to Dunedin hospital. He received 15 stitches to his throat. He also sustained a mild nasal fracture and severe bruising to his head and face; and he was discharged after five days.

Victim impact statement

[12] Mr Marques has provided a victim impact statement and has spoken again to the Court this morning. His foremost feeling is one of confusion. He does not know why you tried to kill him. He says he did nothing to provoke you in any way. But now Mr Marques is on edge all the time; he is suspicious of people generally and lives in constant fear and paranoia.

[13] Physically, he has been left with a scar that stretches from the back of his neck to the beard-line in the front. It is a constant reminder of what you did to him. Mr Marques says people stop and stare at him.

Approach to sentence

[14] Adopting the standard approach to sentencing, I must first set an initial starting point based on the characteristics of the offending, including its gravity, which is informed by sentences given in similar cases and, in particular, by the observations of the Court of Appeal, whose judgments I am required to follow. Following that, I will consider whether any of your personal circumstances justify an adjustment to the starting point, either through aggravating factors such as a history of similar prior offending, or through mitigating factors such as any remorse you might have shown.

[15] I will then give you a discount to reflect the fact that you have taken responsibility for your offending by pleading guilty. Finally, I will step back and consider whether the end sentence I have arrived at is appropriate, having regard to the principle of totality.

Starting point

[16] The maximum penalty for attempted murder is 14 years' imprisonment. There is no guideline judgment for this offence. But the starting point is usually set by reference to the Court of Appeal's guideline decision that is used to assess the seriousness of offending involving the infliction of serious violence.[3] The existence

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

of an intent to kill, however, clearly calls for a longer sentence than might otherwise have been the case.[4]

[17] The Crown identifies the following aggravating factors of your offending, as set out by the Court of Appeal in the guideline judgment:

(a) extreme violence;

(b) premeditation;

(c) serious injury;

(d) the use of a weapon;

(e) attacking the head; and

(f) the vulnerability of the victim.

[18] The Crown also refers to a further aggravating factor that is not listed in the guideline, but it says is nonetheless relevant. That is the fact that your offending took place in a prison environment. The appropriateness of providing an uplift for such offending is well-established,[5] because good order and discipline within a prison environment is essential.[6]

[19] Taking all these factors together, the Crown says your offending falls squarely within band 3 of the guideline which has a range of imprisonment from nine to 14 years. It presses for a starting point of between 11 and 12 years' imprisonment.

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4 See *Ali v R* [2019] NZCA 35 at [8] and *Taylor v R* [2017] NZCA 53 at [21]. See also *R v Beerens* [2018] NZHC 2669 at [20]; *R v McRae* [2017] NZHC 1881 at [21]; *R v Simon* [2017] NZHC 235 at [7]; *R v Ae* [2016] NZHC 965 at [27]; *R v Walker* [2015] NZHC 3214 at [49]; *R v Falani* [2014] NZHC 1879 at [14]; *R v Pengelly* [2013] NZHC 527 at [35] and *R v Craw* HC Auckland CRI-2005-057-18, 7 June 2006.

5 *Tryselaar v R* [2012] NZCA 353 at [18]; *Pulete v R* [2013] NZCA 216 at [28]; *Karetu v R* [2013] NZCA 408 at [18]–[19]; and *Kepu v R* [2011] NZCA 104 at [18]–[19].

6 *Lake v R* [2017] NZCA 39 at [7].

[20] Your counsel, Mr More, says the starting point should be 10 years. He says your offending falls towards the bottom of band 3. Although serious, the injuries sustained by Mr Marques were not life-threatening. And Mr More disputes that he was vulnerable. He also points to the "bad blood" between Mr Marques and you. But if his submission is that you were somehow provoked into attacking Mr Marques, and I do not believe it is, I make it clear there is no evidence of that kind to mitigate your offending in any way.[7]

[21] I accept the Crown's position on all but one of the aggravating factors listed and take them into account:

(a) The violence of the attack is properly characterised as extreme in that it was repeated and persistent. First, you slashed Mr Marques' throat from behind; you then attempted to slash him twice more; when he was on the ground defenceless, you stomped on his head; you then kicked him six times in the head or face. This was an unprovoked attack, without warning and from behind. Mr Marques had no opportunity to defend himself.

(b) The attack was planned, but it did not have the element of careful preparation that was present in at least one of the other cases where a starting point of 11 to 12 years was considered appropriate.[8]

(c) The slashing of Mr Marques' throat with a razor blade could well have killed him, and he might have died from any one of the kicks to the head. That makes the injuries serious in terms of the guideline,[9] but Mr Marques recovered relatively swiftly. He remains physically and emotionally scarred, however.

(d) Except to the extent that it may be relevant to the degree of planning involved, I do not think it makes much difference to the aggravating

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7 *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR 369 at [62].

8 *R v Williams* [2017] NZHC 427: under the pretext of tattooing the victim, the offender had contrived to meet him in circumstances where they would be alone.

9 *R v Taueki* at [31](c).

factor of the use of a weapon that you claim to have obtained it from another inmate, rather than making it yourself. A razor blade is an inherently dangerous weapon.

(e) Attacking the head is an aggravating factor because the head is a vulnerable part of the body. Slashing the throat and stomping on and kicking the head of a victim carries the risk of lasting, even fatal, harm.

(f) I do not accept the submission that Mr Marques was vulnerable to a degree that amounts to a separate aggravating factor. Unlike several of the other cases I have cited below, the victim was attacked in the presence of other inmates and prison officers were able to intervene. A victim is not vulnerable simply because they were caught by surprise.[10] What is required is a fact-specific enquiry.[11] Mr Marques was in a crowded room and there was nothing to suggest it was not being supervised by Corrections staff or that you did anything to impede their access. It is true that, to a certain extent, you exploited Mr Marques' vulnerability after the initial attack, once he was in the recovery position.

(g) It is an aggravating factor that you committed this seriously violent crime while serving a prison sentence.[12] Given the violent tendencies of many prisoners, the courts need to do what they can to protect prisoners who have no choice but to be confined to a prison environment by imposing stern sentences for violent prison offending.

[22] Having regard to a number of other sentences for attempted murder in the prison environment,[13] I agree, however, with Mr More's assessment that this case falls towards the lower end of band 3 and consider that an appropriate starting point is 10 years' imprisonment.

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10 See *Sheppard v R* [2013] NZCA 639 at [17]-[19].
11 *Graham v R* [2011] NZCA 131 at [13].
12 Sentencing Act 2002, s 9(1)(c).
13 *R v Johansen* HC Auckland CRI-2004-083-001849, 2 June 2005; *R v Vincent* HC Auckland CRI-2006-044-285, 2 April 2008; *R v Shepherd* HC Auckland CRI-2007-044-9145, 19 October 2010; *R v Williams* [2017] NZHC 427.

Aggravating factors

[23] You were 23 years old when you committed this crime last October; you are now 24. You have many previous convictions dating back to 2010. The early offending was typical of youth crime: theft, wilful damage, burglary, threatening behaviour, assault, unlawfully taking motor vehicles. You escalated the seriousness of your offending in July 2014 when you committed a series of robberies and aggravated robberies involving violence.

[24] Ordinarily, your criminal history would warrant an uplift to the starting point to recognise the additional need for deterrence and community protection because you have not learned from sentences of imprisonment. But, because of your record, you will serve your entire sentence without parole, so such an uplift is not necessary.[14]

Mitigating factors

[25] Mr More draws attention to mitigating factors in your personal background. It would be an understatement to say that you have had a difficult life, and I accept that various factors have had a negative impact on your mental health. It has been difficult for me to assess the extent to which this might have led to you offending as you did. Principally, that is because you have been reluctant to communicate with the various people who have tried to talk to you, including the pre-sentence report writer and the psychologist, Dr Nuth. I urge you to be more open in the future. Discussing things in your past will enable those whose job it is to help you to assist in your rehabilitation.

[26] I have done what I can with the information available to me from the pre-sentence report; Dr Nuth's report; and letters written by your mother, grandmother and great-grandmother.

[27] In short, I understand these things:

(a) You are a paradigm example of the historic failure of our welfare and criminal justice systems to help young offenders. Your living situation

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[14] *Wipa v R* [2018] NZCA 219 at [26]-[29] and [36].

as a child was unstable: you were bounced around between your mother, your father and Child Youth and Family Services.

(b) Your father struggled with alcohol and substance abuse. This contributed to his mental health issues. When you were eight years old, and living with him, he suffered a psychotic episode and was institutionalised for four months. He also spent time in prison.

(c) You became involved in crime at 15. Periods of Social Welfare supervision and short terms of imprisonment did nothing to rehabilitate you and steer you off the path to serious criminal offending.

(d) After you were imprisoned for the aggravated robberies, your father took his own life, as his own father had done. I understand that he was devastated by the knowledge that you would be serving a lengthy sentence of imprisonment. His death obviously left a mark on you. Episodes of your self-harming while in custody are recorded by the Corrections Department.

(e) You have attention deficit disorder, for which you have been prescribed Ritalin in the past, an obsessive-compulsive disorder and a "likely recent history of psychotic episodes", according to Dr Nuth.

[28] The purposes and principles of sentencing require that I must impose the least restrictive sentence that is appropriate in the circumstances,[15] and I must have regard to the need to assist in your rehabilitation and reintegration.[16] I am required to take into account your age[17] and your personal and family background.[18] Personal circumstances discounts tend to be informed by several overlapping factors. In your case, these are deprivation, trauma, drug and alcohol abuse, mental health issues and your youth. Larger discounts tend to rely on identifying linkages between personal

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15 Sentencing Act 2002, s 8(g).
16 Section 7(1)(h).
17 Section 9(2)(a).
18 Section 8(i).

circumstances and the offending and thus the moral culpability of the offender.[19] I am satisfied there is a link here and that it would be wrong to treat you as if there was nothing more to your personality than that you are extremely violent. I must have regard to the underlying causes.

[29] The three important women in your life – your mother, her grandmother and your father's mother – have written movingly to me about the person they know and love. They talk about what you have endured in your life, including the tragic death of your father and its continuing impact on you. Significantly, they have told me about your potential and the good they see in you: you are an accomplished artist and you have written poetry and rap. It is to their great credit and yours that they and many other members of your family continue to love and support you. I have heard their pleas that I should impose the shortest sentence possible so that you can be returned to them for continuing support.

[30] But it is not as simple as that, Mr Wheble: I have to take into account also that what you did to Mr Marques was appalling and that you are assessed as posing a very high risk of further violent offending and harm to others. Taking a balanced approach, I consider a 10 per cent discount for the personal factors I have mentioned is the most that can be justified. You are still only 24 years old; it is not too late for you to turn things around. But to do that you will need to overcome your hostility to authority and accept the help which I hope will be available from the highly committed psychologists and other experts who work within our prisons.

Guilty plea

[31] You pleaded guilty at a pre-trial hearing approximately two weeks before the trial. The Crown says, rightly, that the case against you was strong; the attack was captured on CCTV. It is said you should not receive much of a discount for your plea. However, your decision to plead guilty spared Mr Marques the ordeal of giving evidence and saved the resources that would have otherwise been required for a trial. I consider a discount of 12 months, or around 13 per cent, is appropriate, albeit arguably generous.

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19 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [63].

Totality

[32] You are currently serving a sentence of four years and six months' imprisonment, imposed by Judge P R Kellar on 30 October 2015.[20] This was for four charges of aggravated robbery and one charge of assault with intent to rob.

[33] The sentence I impose on you today will not begin until the expiry of your current sentence.[21] For that reason, fairness requires that I should make an appropriate deduction to ensure that the total period of imprisonment is not wholly out of proportion to the gravity of the overall offending.[22] I consider that a further discount of twelve months should be applied to your end sentence on that basis.

Requirement under three strikes law to serve the whole sentence

[34] There is also the matter of whether a discount should be given in recognition of the fact that you will have to serve the entirety of your sentence without parole. While sentencing generally takes place without consideration of parole eligibility, the fact that a defendant has to serve a cumulative sentence without parole can be relevant in exceptional cases.[23]

[35] I cannot help but observe that your case proves that there has been an abject failure of the three strikes regime in acting as a deterrent. But I have to apply the law as it is. I do not think yours is an exceptional case. Your first strike warning was given to you on 10 December 2014 in relation to two charges of robbery. The spate of aggravated robberies for which you are currently serving a sentence of imprisonment did not attract a second-strike warning; that is because the relevant offending occurred prior to the warning you received in 2014, although you were sentenced for it much later. But the result of this is that your first-strike warning was far from unjustified in terms of the legislative regime. In addition, you have numerous previous convictions, some for violent offending, including assaulting a prison officer in 2014.

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20 *R v Wheble* [2015] NZDC 21737.
21 Parole Act 2002, s 75(3).
22 Sentencing Act, s 85(2).
23 *Barnes v R* [2018] NZCA 42 at [79]. See also *Dibben v R* [2018] NZCA 134 at [66(c)]; *Palalagi v Police* [2015] NZHC 1832 at [57]-[61].

[36] Against that background, I consider that a premediated attempt to kill a fellow inmate is the sort of offending to which Parliament intended the three-strikes regime should apply[24] and that a further discount should not be allowed.

[37] I arrive, therefore, at a final sentence of seven years' imprisonment, to be served cumulatively with your existing sentence.

Minimum period of imprisonment

[38] I am required to state the minimum period of imprisonment (MPI) I would have ordered you to serve had this not been your second-strike offence, and to give the reasons.[25] An MPI is intended to reflect a conclusion that eligibility for parole after the statutory period of one third of the end sentence would not be adequate to recognise one or more of the principles of accountability, denunciation, deterrence and community protection.[26] I am satisfied that eligibility for parole after two years and four months would not be an adequate response to serious violent offending in the prison environment and the risks you pose to the community at present. But the imposition of a long MPI usually delays access to rehabilitation services. Had it not been for the requirement that you must serve the whole of your sentence, I would have imposed an MPI of three years and six months. I hope that, consistently with the findings in the *He Waka Roimata* report of the Safe and Effective Justice Advisory Group released two days ago,[27] adequate resources will be provided at an early stage of your sentence to enable you to start the process of rehabilitation that your mother and the other members of your family are keen to support. That would enhance the ability of the experts to reduce the risk of violent re-offending and protect the community. As requested by Mr More, I direct that the file and these Sentencing Notes be referred to Prison Psychological Services.

Sentence

[39] Mr Wheble, will you please stand.

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24 Wylie J reached a similar conclusion in *R v Rangitoheriri* [2018] NZHC 2355 at [46].
25 Sentencing Act, s 86C(6).
26 Section 86(2).
27 *He Waka Roimata: Transforming Our Criminal Justice System*, First report of Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group, Wellington, June 2019.

[40] On the charge of attempted murder, I sentence you to seven years' imprisonment and, as required by s 86C(4) of the Sentencing Act 2002, I order that you must serve the full term of the sentence. This sentence is to be served cumulatively with your sentence of four years and six months' imprisonment, imposed by Judge P R Kellar on 30 October 2015.

[41] Please stand down.

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Toogood J