

EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

**IN THE DISTRICT COURT  
AT INVERCARGILL**

**CRI-2016-025-000247  
[2016] NZDC 15119**

**NEW ZEALAND POLICE**  
Prosecutor

v

**TONI PORTER**  
Defendant

Hearing: 2 August 2016  
Appearances: Sergeant P Stratford for the Prosecutor  
J Mooney for the Defendant  
Judgment: 2 August 2016

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**NOTES OF JUDGE B A FARNAN ON SENTENCING**

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[1] I have before me for sentence, Toni Porter. Mr Porter is represented by Mr Mooney.

**Charges**

[2] Mr Porter is facing a number of charges including a number of very serious violent offences. In particular, he is facing a charge of injuring with intent to injure his former partner, threatening to do grievous bodily harm, and assault with a weapon. All of this offending occurred on 25 March 2016.

[3] At the time, the defendant was on bail for two charges of wilful damage and one charge of common assault. I understand that the reason that he was at the victim's house on 25 March and inflicted the violence on her, was because he had

asked her if he could use her address as a bail address following him being charged with the earlier matters in February 2016.

### **Summary of facts**

[4] The summary of facts in relation to the February matters are that on 6 February 2016 the defendant was a passenger in a male associate's vehicle in Invercargill; there was a female also in the vehicle. The defendant had been drinking and was intoxicated. The defendant directed his male associate to pull over so that he could see someone at the Invercargill address. The male associate stopped the car where directed, and the defendant got out and walked onto the property from the car. The defendant approached [details deleted] and knocked on the door. The male occupant of the caravan opened the door; he is one of the defendant's victims. A scuffle ensued between the defendant and this victim. The victim lost his footing, then regained his feet and pushed the defendant away. The defendant yelled at the victim, questioning whether he knew who he was. The defendant struck the victim's nose, causing it to bleed. The defendant clawed at the victim's eyes with his fingers, causing redness and a cut below his left eye which bled. The victim pushed the defendant away from the caravan. The victim followed him to ensure he left the property. The pair had a further scuffle between [details deleted] and the fence, before the defendant's associate called to the defendant to stop it and to leave with them. The defendant went back to the car and left with his associate.

[5] Later on 6 February, at about 9.30 pm, the defendant arrived at his ex-partner's address with a male and female associate – I presume the two same associates he was with earlier in the day when he became involved in the incident in [details deleted].

[6] The defendant's ex-partner is the victim in respect of further offending that occurred on 6 February. The defendant was still heavily intoxicated. His associates left after he had been dropped off at his ex-partner's address, after a short time. The victim's daughter [details deleted] so the defendant and the victim were at the house alone. There was an argument about their relationship. The defendant became agitated and angry. The victim tried to move away from the defendant by heading

towards her bedroom. The defendant followed her into the hallway. The dispute continued and the defendant lashed out violently and struck the door of the victim's bedroom with the heel of his foot, putting a hole in the timber. At the time, the police arrived seeking the defendant on an unrelated matter and he attempted to flee. The defendant accepted that he had damaged the property at his ex-partner's home. As a result of the incident on 6 February (being at his ex-partner's home) the defendant was charged with being unlawfully on property, and wilful damage, in addition to the assault that had occurred earlier in the day.

[7] The defendant's ex-partner, the victim, read her statement to the Court today. These charges, on their own, were relatively serious and it may be surprising that the defendant was allowed to go and live with her on bail as he had offended against her.

[8] Later, again on 6 February at 10.30 pm, the defendant was again at his ex-partner's address. She attempted to calm him down, without success. He became further agitated and that is when the incident regarding the door occurred. The defendant was charged and subsequently bailed.

[9] On 26 March 2016 when the defendant was at his ex-partner's house, even more serious offending was inflicted by the defendant on his ex-partner. She has read her victim impact statement to the Court today, directing it not only at the Court, but at the defendant. She set out in her victim impact statement the impact that this offending by the defendant earlier in February, and subsequently in March, has had on her and her daughter. On 21 March 2016 when the defendant was at the victim's home on bail, the victim's three year old daughter was also present [details deleted].

[10] On 25 March 2016 the defendant and the victim were in bed, along with the victim's daughter. An argument ensued and the defendant took the child and placed her in her bedroom, shutting the door behind her. A prolonged assault and abuse of the victim took place over the following several hours. The details of that were canvassed by the victim in her victim impact statement and she clearly has been impacted by the defendant's offending against her. The defendant started abusing the victim verbally. He pulled the covers off the bed and hit the victim three times about

the head using the heel of his hand in a punching motion. He then walked to the hallway and uplifted a heavy door stop in the shape of a dog and threw it at the victim, hitting her in the knee, elbow and forearm.

[11] He continued to abuse her, picking up a shoe from the hallway. It was a gym shoe but had a chunky sole. He returned to the bedroom and, holding the shoe by the toes, started hitting the victim on the right side of the face, with the heel of the shoe, between three to four times. Photographs of the victim's injuries have been made available to the Court and show there, very clearly, significant bruising. The victim's face is swollen and there is a particularly dark bruise on her stomach area, as well as bruising over her arms and other parts of her body.

[12] During some of this attack the victim was in bed and attempted to protect herself by putting her hands and arms up. She repeatedly told the defendant to stop; however, he responded by continuing to hit her. Throughout the assault the defendant continued with his action of using the heel of the shoe about the face and the body of the victim. At one stage the victim was sitting on the edge of the bed and he pushed her onto her back and got on top of her. He placed her hands around her neck and leaned forward, placing his body weight on her. The defendant choked the victim and crushed and squeezed her neck. The victim described thinking she was going to die after the defendant stopped choking her. Again, he repeatedly hit her with the heel of the shoe.

[13] Over the period of the assault the victim says she was hit at least 20 times with the shoe and that, on occasions, this was very hard. The defendant also grabbed the victim by the hair and twisted it around his hand and threatened, again, to punch her. At one stage the victim asked to go to the toilet and the defendant would not let her, so she had to go in the bath. The defendant then told the victim, "If you tell the police and if you do anything to alert the police, it will only take seconds for me to get a knife from the kitchen and stab you and then I'll throw (the victim's daughter) through a window and disfigure her for life." This comment was the basis for the charge that the defendant ended up facing, of threatening to cause grievous bodily harm. The defendant also threatened to do the same thing to the complainant's mother. He punched her in the stomach and as I said, I have seen significant

bruising to that area in the photographs that I have before me. While all of this was going on inside the victim's house, the victim's daughter was present and the curtains were drawn. The victim was fearful and worried for her daughter's safety.

[14] At about 8.30 pm on Saturday evening, after these events had started, an associate of the defendant arrived at the address. While he was there, the victim was able to grab her daughter and flee the house to seek safety. The victim said in her victim impact statement when she addressed the Court today, that the person who she went to did not recognise her because of the state she was in as a result of the defendant's actions in assaulting her.

### **Victim**

[15] As a result of the victim's extensive bruising, she was taken to [location deleted] Hospital and had to have cat scans and x-rays. Although she had no broken bones, there was significant bruising and swelling which I have referred to. The police subsequently spent several days trying to locate the defendant. He was finally located a few days afterwards, after he had booked a ticket on the Intercity bus to go to Christchurch.

[16] In addressing the victim today, the defendant apologised to her and said the reason he did not hand himself in was because he was fearful that various people were after him, but the victim saw this as cowardice behaviour and not showing any remorse on his behalf by acting in this way.

[17] The defendant told the police that at the time of this attack on the victim that he was stressed about work and other matters in his life. In support of that statement to the police, the defendant's counsel, Mr Mooney, has provided the Court with information suggesting that the defendant has, at different times, had serious mental health challenges which have caused him mental health issues.

## **Restorative justice**

[18] After the first series of offending the defendant was referred for a restorative justice conference which took place on 2 March 2016. That involved the victim of what became the subsequent, more serious offending. In that restorative justice conference the defendant had then reflected on his behaviour. He had apologised to the victim. She had accepted his apology and there were arrangements put in place for the defendant to replace and repair the damage that he had caused to the victim's home. He had also agreed to attend a Stopping Violence programme and agreed to attend alcohol and drug counselling.

[19] Normally, Mr Porter, someone who attends a restorative justice conference would get some discount in their end sentence for attendance at a restorative justice conference. However, in your case I struggle to reach a conclusion that any discount for attending that restorative justice conference is appropriate for you, because within only a matter of a few weeks you were in contact with the very same victim that you had apologised to on 2 March 2016, and you were severely assaulting her to such an extent that she was fearful for her life. I accept that you have attempted to apologise to her subsequently – ultimately it is up to the victim whether she accepts your apology or not. Your apology to her and any remorse that you say you feel, can be shown to her by not contacting her on your release from prison and ensuring that you do take steps to never behave in this way ever again towards this victim, in particular, but also any other persons who you might ultimately commence a relationship with.

## **Previous history**

[20] You have previously been to prison. You were sentenced to prison in 2009 but that was for unrelated offending involving breaching community work. You do, however, have in your history, other assault convictions. In October 2014 you were convicted of male assaults female, and in November of 2008 you were convicted of a Crimes Act 1961 assault. Additionally, there is a further common assault in 2005.

## **Pre-sentence report**

[21] I have had the benefit of a pre-sentence report for your offending today, Mr Porter. There was an original report dated 11 May. That was prepared in relation to the earlier February offending. There has now been a further, updated report dated 26 July which was prepared to take into account the second more serious offending that occurred in March 2016. Each of those reports recommended a term of imprisonment.

[22] The reports refer to a lifestyle which involved habitual drug and alcohol abuse, coupled with a propensity for violence and poor relationships. You talked about alcohol and drugs exacerbating issues between you and the victim, and you said to the probation officer who prepared the 26 July report that when you saw the photographs of your victim, it made you sick to think that you could do something like that and you told Probation that you need help with addictions so you do not end up doing this sort of thing again.

[23] You were assessed at a high risk of harm to others, especially where alcohol and drugs are concerned. However, perhaps you should reflect on the fact that while you say you were intoxicated when the February offending occurred, you told the Probation Service or the police that in respect of the March offending you were not intoxicated and that you behaved in that way because of other stresses in your life. I accept that you say that you were at breaking point in respect of breaching your bail conditions, but it does not give you any justification for behaving in the way in which you did behave, and I expect that you likely - in the clear light of day - accept that comment by me.

## **Submissions**

[24] Your counsel, Mr Mooney, has filed thorough and detailed helpful written submissions and has also addressed me today in respect of those submissions.

[25] Likewise, the police, in a slightly unusual move, have filed detailed submissions on behalf of the prosecution. Those submissions, likewise, are detailed and helpful.

[26] Both the police and your counsel accept, Mr Porter, that this is serious offending by you, and that the lead offending is the offending that occurred on 25 March 2016. Not only did it involve serious violence by you against the victim, but it also occurred when you were on bail for earlier matters.

[27] In respect of sentence, I need to consider the purposes and principles of sentencing. I need to deter you and others from behaving in this way, and I need to denounce your conduct and consider any of your rehabilitative needs, as well as reintegration of you, ultimately, back into our community. I must also impose the least restrictive outcome.

[28] Mr Mooney, on your behalf, submits to me that the Court of Appeal decision of *Nuku v R* [2013] 2 NZLR 39 (CA) provides sentencing guidance for offences of injuring with intent to injure and, in doing so, the Court referred to earlier guidance in *R v Taueki* [2012] 3 NZLR 601 regarding cases involving intent to cause grievous bodily harm and the aggravating and mitigating features of such offending.

[29] In *Nuku* the Court described three bands of sentencing in wounding with intent to injure cases, based on a number of the aggravating factors that have been described in *Taueki* and that whether or not they were present, affected which band a particular offender fitted into.

[30] In your case your counsel submits that your offending, in terms of *Nuku*, fits into band 2 which is a starting point of up to three years' imprisonment would be appropriate for three or fewer of the aggravating factors listed in *Taueki* are present. Such factors include extreme violence, premeditation, serious injury, use of weapons, attacks to the head and the vulnerability of the victim.

[31] What the police say in support of their submissions is that in your case there were more than three of the factors that I have referred to. The police describe your



violent behaviour on this occasion as extreme violence given the prolonged unprovoked and gratuitous nature of it; that there was premeditation; that your actions were repetitive and occurred and re-occurred during a prolonged period of several hours; and that your behaviour on this occasion could not be considered impulsive or reactionary to any unexpected event.

[32] The police submit that your offending is at the moderate end of seriousness. The police also submit that serious injury occurred, and I accept that submission. I have already described your victim's injuries and, clearly, on my assessment of her circumstances, you inflicted serious injury on her which resulted in hits to her head and significant bruising. There were also the attempts by you of what can only be described as strangulation; the attacks to the head.

[33] Both your counsel and the police accept further aggravating factors and that your victim, being your ex-partner, was vulnerable. There is the additional factor that not only did you inflict this violence towards the victim directly, but that her young child was in the house and would have been exposed to your behaviour on this occasion. That, in my view, is an additional aggravating factor.

[34] Taking all of that into account, Mr Mooney, on your behalf, submits that an appropriate starting point of two and a half to three years would be appropriate for your offending.

[35] On the other hand, the police take the view that because of at least five aggravating factors, I should conclude that there should be a higher starting point to reflect the gravity of your offending. The police have submitted that I should start at about the three years and five months level, as a starting point, in respect of the lead offending, which is a combination of the injuring with intent to injure and assault with a weapon, being the shoe, which both attract a five-year maximum penalty.

[36] The threatening to kill or do grievous bodily harm does carry with it a greater maximum penalty, but in my view your culpability is higher in respect of the other two charges.

[37] Additionally, I have the February 2016 offending to consider. That offending on its own could likely have attracted a prison sentence. I note that the first pre-sentence report which dealt with those initial charges on their own, recommended that the Court sentence you to imprisonment for that offending alone.

### **Starting point**

[38] It is my view, Mr Porter, taking all of the matters I have considered into account, that an appropriate starting point for your offending is three years' imprisonment. That takes into account the vulnerability of your victim, the sustained attack, the hits to the head, the presence of her daughter in the home, and a level of premeditation.

[39] I intend to uplift that starting point by one month because that was offending while on bail. I intend to uplift that by a further six months for the February offending, and I also intend to uplift that by a further three months to take into account your previous offending.

[40] Additionally, I clarify that in terms of the three-year starting point, I take into account all of the charges that you are facing from the incident in February and treat all of the three charges as being part and parcel of the same events, justifying a three year starting point.

### **Adjustments**

[41] Having reached a starting point of 46 months, which is three years and 10 months, I need to then consider what appropriate mitigating factors you should be given credit for.

[42] The police say that you should not get the full credit for your guilty pleas, whereas your counsel, Mr Mooney, says on your behalf that you should be given the full credit for your guilty plea.

[43] If I look at the charges, for the threatening to kill you pleaded guilty at your first appearance in July. On the same occasion you pleaded guilty to the assault with

the weapon; that was your third appearance in relation to that charge but it was related to the threatening to kill incident. In respect of the injuring with intent to injure, that was a charge you pleaded guilty to after that charge was amended, and between the initial appearance in March and when you entered your guilty plea some four months had gone by. In respect of the February offending, you pleaded guilty early in respect of the intentional damage charge, and relatively early in relation to the being on the property without reasonable excuse.

[44] It seems to me, Mr Porter, that you are entitled to a discount for a guilty plea at least at the level of 20 percent.

[45] Additionally, I need to also consider whether or not I will give you any credit for your expressions of remorse. It is clear to me that you did have, at the time and likely still have, mental health challenges. I can give you some discount for that.

[46] I would normally have given you some discount for your willingness to attend restorative justice, but I struggle to give you any discount for your attendance at the restorative justice conference because of your behaviour subsequently towards the victim with whom you attended that restorative justice conference. Having apologised to her in early March, within a matter of weeks you were back at her property, severely beating her. I find it difficult to reconcile that behaviour.

[47] Accordingly, if I take all matters in the round, Mr Porter, it seems to me that you are entitled to a discount of approximately 30 percent. That includes your guilty pleas which have saved your victim having to come to Court at a defended hearing; your expressions of remorse, to some extent; and your mental health challenges. On a strictly arithmetic basis, 30 percent of 46 months is 13.8 months. If I round that up in your favour that would be 14 months. If I take that off 46 months, that is an end sentence of 33 months.

## **Result**

[48] Accordingly, Mr Porter, the end sentence I am imposing upon you today is two years and nine months [amended in paragraph [51] below].

[49] Because that is a sentence greater than two years, I do not have to consider home detention, and any release from prison will be subject to the Parole Board.

[50] I have also been asked to make a protection order against you. That is not opposed. However, before I do that I wish to confirm the penalty.

[51] In respect of each of the March charges – injuring with intent to injure, threatening to do grievous bodily harm and assault with a weapon, you are sentenced to two years and nine months. Mr Mooney has corrected my arithmetic – it is two years and eight months for those three charges.

[52] In respect of the February offending, in respect of the assault charge in respect of the male offender you are sentenced to three months' imprisonment.

[53] In respect of the wilful damage charge, it is one month imprisonment.

[54] In respect of the third charge, which appears to have originally been laid as a wilful damage charge but is now being found without reasonable excuse on property charge, likewise, one month imprisonment.

[55] Also, I am going to make a protection order. There is jurisdiction to make a protection order. It will be made in the favour of your female victim, your ex-partner. There is no protection order currently in place. Your offending against her was in the nature of domestic violence offending and it is my view that the making of a protection order, which is not opposed by you, is necessary to prevent further offending by you and is necessary to protect your victim and her daughter.

B A Farnan  
District Court Judge