

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

**IN THE DISTRICT COURT
AT PALMERSTON NORTH**

**CRI-2015-054-003064
[2017] NZDC 10625**

THE QUEEN

v

JOSEPH WALTER WARNER

Hearing: 22 May 2017
Appearances: M Blaschke for the Crown
P Murray for the Defendant
Judgment: 22 May 2017

NOTES OF JUDGE J D LARGE ON SENTENCING

[1] Joseph Walter Warner, you appear for sentence today in respect of two charges of aggravated robbery and one charge of injuring with intent to injure. The first two charges are inter-related inasmuch as they both concern one family, albeit two generations of that family.

[2] I am told by Mr Blaschke who appears for the Crown that both of those named victims are present in Court today. They are entitled to be here, it is a public Court. In addition, I have had made available to me the victim impact statements written by each one of those two gentlemen and the partner of the senior of the two victims.

[3] By way of background to the offending, you on 30 October were with another person. The first victim (the younger of the two) received a text and travelled around in his father's car to the address. He then sent a text to the female present to say he

was there. He then entered the house and was met by you. You had your face covered with a mask and were holding an air pistol. He believed it was a real firearm. He was then forced into the lounge at gunpoint where a second male was sitting on the couch with his face covered with a mask and that other person was also holding a pistol.

[4] You demanded money from the victim and you began striking him in the head and face with the pistol you were holding. You asked him if that was his ute. The number of blows that were struck to him caused him to fall unconscious to the ground or the floor. When he regained consciousness, you forced him back into the kitchen demanding his cellphone and his keys which the victim handed over.

[5] At that point, you removed your mask and made a phone call. When this happened, the victim recognised you as someone he had gone to school with. While in the kitchen, he was struck again with a pistol about the head and face by you, that caused him again to fall down to the ground or floor unconscious.

[6] About an hour later, a second vehicle arrived at your address and you forced the victim out of the house and began walking him towards the road. You still had the pistol pointed at the victim. There was another vehicle parked outside the property with people in it. As the victim approached the road where the Mazda ute was parked, another person arrived who was wearing a mask as well. You told the victim to sit in the front passenger seat while the other person sat in the driver's seat. You sat directly behind the victim, pushing the pistol into the rear of his head and demanded the victim to take you to where he could get some money to pay. He directed you to his house.

[7] The other vehicle with two unknown people in was following the Mazda utility vehicle and during that drive, you continued to strike the victim in the rear of his head and at one point you stubbed a cigarette out on his head. When you arrived at that address, you forced the victim at gunpoint around to the rear of that property and you gained access to that property.

[8] Once inside the house, the victim walked up the stairs and woke up his father, the second victim. The victim told his father that he needed money and indicated there were people downstairs. The victim's father went downstairs to investigate. You were still masked at this stage and you had the pistol to your side and you demanded \$500 in cash. The second victim, the father, told you that he had the cash in a shed that he could give him. You seemed to be communicating with someone outside at that particular point, but instead you demanded that the second victim, the father, instead go to an ATM machine and withdraw the money himself and you directed him outside, out the rear door, pointing the pistol at him. The first victim remained at the house.

[9] The second victim walked out and was directed to sit in the front passenger seat of the Mazda utility. You sat directly behind him and you pushed the pistol into the back of his head, that is the second victim's head. Prior to getting into that vehicle, the second victim observed the second vehicle parked outside the property.

[10] The other person involved drove the Mazda ute through town towards the [Bank] in Terrace End and during that trip, you struck this victim from behind on the back of the head with the pistol. Prior to reaching the ATM in Terrace End, you directed the driver of the vehicle to drive to an ATM situated at the Milson Shopping Centre because a marked police patrol car had just driven past the vehicle. At the Milson Shopping Centre, you removed your mask and placed it over the face of the victim. You demanded that he withdraw \$700 in cash. He obviously did so because after handing over the money to you, he sat back in the front passenger seat.

[11] He was driven along Ruahine Street towards the intersection with Featherston Street but prior to reaching the Mobil service station, the vehicle stopped and you told him to get out of the vehicle. You told the victim not to call the police. In addition to the money, the first victim had his cellphone valued at \$150 taken. After the second victim was told to get out of the vehicle, you took that Mazda utility valued at \$10,000 but that vehicle was subsequently recovered.

[12] The first victim, the son, received cuts, abrasions and swelling to his face, head and mouth. The second victim received a cut and swelling to the rear of his head.

[13] In addition to that offending, there is the injuring with intent to injure charge, that occurred between [dates deleted] when the complainant was at Milson Line. She had been picked up by you and taken to an address. During that evening, she became aware of certain information and there was an argument started and you accused her of [details deleted] after looking at some Facebook messages. You then got up from where you were seated and started punching her in the face with your fists. At first you only punched her once but it turned into several punches each time as the night progressed. Your behaviour would escalate quickly into anger before you would calm down. You would then try and cuddle the victim after you had been violent to her.

[14] The complainant also had other difficulty with another person. The victim, as a consequence of your actions and potentially the actions of another party suffered two black eyes, swelling to her face and head area, and that required medical attention. I do not suggest for a moment that you are responsible for all of the injuries, bruises and the like suffered by that victim, however, given the earlier parts of the summary I have just read, you certainly caused quite a number of them. Your indicating assent now is an acknowledgement that I take that you acknowledge that you did cause bruises, black eyes, and swelling to her head and face area.

[15] The Crown have submitted in their submissions that the second of the aggravated robberies should be the lead offence. It happened second in time when you left the first property with the first victim and arrived at the second property, the home of the first victim and also the home of the second victim. I think the Crown are correct that that should be the lead offence.

[16] The Crown have submitted that there should be a starting point set in relation to the lead offence, there should be an uplift for the second offence which in time is the first that occurred, namely the first aggravated robbery, so there will be a discrete

and second uplift for that offending. Then there is a third lot of offending against the female victim and that requires again a discrete uplift.

[17] The purposes of this sentencing are well settled in s 7 of the Sentencing Act. You have got to be held accountable for what you did, there has to be a sense of responsibility for and your acknowledgement of the harm. There has to be a provision for the interests of the victims. There has to be denunciation of the conduct that you undertook and there has to be a sentence that deters others from committing the same or a similar offence. There also has to be a component to the sentence which will address and assist your rehabilitation and reintegration to society when the sentence is concluded.

[18] Mr Murray, your counsel, has responsibly acknowledged, no doubt on instructions from you, that you accept the reality that the only available sentence today is a term of imprisonment.

[19] I have to take into account the gravity of the offending and I have to look at the aggravating factors. I have got to consider the violence that was used in respect of each of the two robberies and the violence that was used in respect of the injuring with intent to injure on the female victim.

[20] All three offences included actual violence. In respect of the two aggravated robberies, a pistol was used to assault each of the two victims as well as being used by holding it against their head. There is the other factor of the stubbing out of a cigarette on the first victims head.

[21] Similarly, another aggravating feature is your unlawful entry or your unlawful presence because your entry into the second victim's home was as a companion to the first victim, but the first victim had little choice. So there was clearly no invitation available to you that would lawfully allow you to be there.

[22] I am also told in the Crown's submissions that this offending occurred while you were on bail for other matters. The victim impact statements set out the cost that

each of those victims incurred: for additional security, for relocation, and the actual loss of the money and the cellphone.

[23] I have to consider premeditation. Mr Murray has endeavoured to persuade me that there was little premeditation and that planning was almost an instantaneous continuation of the first aggravated robbery with the second. But I think it only fair that that second aggravated robbery take into account your clear intention to take the first victim to the home. You had the pistol, you had his car. There was by implication someone else involved external of your vehicle, which is noted by the first victim, and then noted by the second victim that the vehicle you were in, the Mazda ute, left the second victim's home to travel to the ATM.

[24] Mr Murray may well be correct in his submission that you are a "poster boy" for methamphetamine and your experience can show how methamphetamine affects people. When I look at you today, I do not see the same man who responded and reacted and the actions of the man on 31 October. I have read your letters, they show insight. You will credit for that in due course.

[25] But in October, these victims were terrified of what happened to them and when I look at the fact scenario critically and objectively, I can understand how they would be terrified. I note that you are agreeing with me again via your assent in nodding your head up and down, that is because you are now thinking clearly. Possibly during remand time, you have had your brain cleared of methamphetamine and it may be that methamphetamine was the driver that night. But as Mr Murray said, that is no excuse. It may be a reason but it is no excuse, nor can it justify what you did.

[26] The other issue about premeditation is the Crown use the word "luring" of the first victim to the first address you were at. Clearly there must have been some premeditation because when the first victim arrived at that first address, you were there with a pistol, you were wearing a mask and so was the second person.

[27] All of the ingredients of aggravated robbery are present and what makes this worse is those factors which are clearly set out in a case called *R v Mako*.¹ It may mean little to you but the Crown have emphasised the following matters. I have referred to them in some detail but I will just go through their headings because they all apply:

- (a) The degree of planning and preparation.
- (b) The number of participants and the nature of their deployment.
- (c) The disguises which I have mentioned, hence to conceal your identity.
- (d) The number, type and use of weapons, your pistol and the pistol with the other person.
- (e) The target of the victim, the target of the second victim.
- (f) The Crown also mention the presence of members of the public, I put that to one side.
- (g) The violence that was actually used.
- (h) The property that was stolen and whether it was recovered. Well yes, the vehicle was but the cash was not and the phone was not.
- (i) The aggravating factor of you transporting each of the victims to place where they did not want to go and you did so with the pistol.

[28] And of course I have got to take into account and factor in the victim impact statements and their content.

[29] The Crown have gone through an analysis of other cases, *Tiori v R*² addressing home invasion, that is an aggravating factor. Also there was another

¹ *R v Mako* [2000] 2 NZLR 170

² *Tiori v R* [2011] NZCA 355

appeal case, *Namana v R*³ and the third one was *Pani v R*⁴ That was where someone broke in, smashed their way into the victim's house and assaulted the victim about the head and body with a baseball bat, dragging him to his car and driving him to an ATM where they demanded he give them \$150. He was taken home, he was then searched and a wallet and another computer was taken and the Court upheld there a starting point of seven years' imprisonment.

[30] *Walker v R*⁵ is also another case referred to where a person was driven to an ATM and forced to withdraw \$800. In that case, however, his car was taken and some \$6000 worth of tools were missing. The Court there upheld a starting point of 10 years' imprisonment. The Crown submit that really your case is closer to *Walker* than to *Pani* and the starting point should be closer to the 10 years rather than the seven years. This is where the start point for the more serious of the two aggravated robberies comes into play. Having assessed all of those factors, I mention that I take that second aggravated robbery as the lead offence and then I will shortly add the uplift for the other two.

[31] In terms of balance, I now look at Mr Murray's submissions. He again, as I said, clearly acknowledges the aspect of violence, unlawful entry into the home of the second victim, offending while on bail, the harm to the victim and he says some premeditation. Mr Murray, in his submissions, submits that there should be no uplift for your previous offending, a proposition that the Crown support or rather the Crown do not seek it. Mr Murray supports that that is the appropriate course, there should be no separate uplift.

[32] He raises mitigation in your favour, your guilty pleas, and while chronologically one might say that the guilty pleas have not been entered in a timely fashion, the reality is full credit is able eventually to be given because of the discussions that have been had and the settlement of the summary of facts and the like, and I will come to that shortly. He said that remorse is a factor that should be in your favour because you are remorseful and have shown that. Also he seeks a credit for your being prepared to attend a restorative justice conference.

³ *Namana v R* [2013] NZCA 640

⁴ *Pani v R* [2011] NZCA 45

⁵ *Walker v R* [2011] BCL 274

[33] I have already referred to methamphetamine. Of course there is no discount that can be provided for that. It may well be the driver but people who ingest that or alcohol do so at their own peril and cannot get any allowance from the Court.

[34] Mr Murray has responsibly gone through the factors in *Mako* endeavouring to put the best possible light from your point of view in respect of each of them. He acknowledges the second of the aggravated robberies as being the lead offence and really the cases he refers to are as the Crown does, likewise namely *Pani v R* and *Walker v R*. He submits that from *Namana v R*, those two cases are the most like your case.

[35] He goes through and analyses his submission that there should be a start point for you of six years' imprisonment for the lead offence. He acknowledges there should be an uplift in respect of the second aggravated robbery, the first in time but the second for the purposes of the sentencing exercise, and acknowledges there should be a further uplift in respect of the violent offending against the female.

[36] Having considered all of those submissions, both from the Crown and from Mr Murray, I think the appropriate starting point for the lead charge, that is the second in time aggravated robbery, is one of eight years' imprisonment. I do after considering the cases I have referred to above. I think a start point of 10 years is too high and I think a start point of six years is too low. To that eight years' imprisonment, there should be an uplift of two years for the other aggravated robbery and there should be a further uplift of one year for the violent offences against the female. That brings me to a sentence of 11 years' imprisonment.

[37] You are entitled to the credit for remorse which I referred to and from the 11 years, I deduct six months' imprisonment. I step back and apply what is referred to as the totality principle and look at the total offending over this two, three day period and I deduct a further six months, giving me an end sentence of 10 years' imprisonment.

[38] From that 10 years' imprisonment, I have to deduct other mitigating factors which are your guilty plea and the other mitigating factors that are personal to you in

the circumstances surrounding this offending. In total I apply a discount of 50 percent combining all of those factors, so the end sentence is one of five years' imprisonment.

[39] In respect of each of the two aggravated robbery charges, you are sentenced to five years' imprisonment. In respect of the injuring with intent to injure, you are sentenced to one year's imprisonment, those sentences are to be concurrent. The net result, Mr Warner, is a sentence of five years' imprisonment.

J D Large
District Court Judge