

**IN THE DISTRICT COURT
AT DUNEDIN**

**CRI-2016-012-003158
[2017] NZDC 13133**

THE QUEEN

v

**SEAN ANDREW ROCHE
JEREMY PHILLIP CLARK**

Hearing: 14 June 2017

Appearances: C E R Power for the Crown
M J Scally for the Defendant Roche
A Dawson for Defendant Clark

Judgment: 14 June 2017

NOTES OF JUDGE M A CROSBIE ON SENTENCING

[1] Sean Andrew Roche, you are 27. Jeremy Clark you are 43. You are both for sentence today charged jointly with aggravated robbery, which carries a maximum penalty of 14 years' imprisonment; aggravated assault carrying a maximum penalty of three; two charges of wilful damage, maximum penalty three months; unlawfully being in a closed yard, same penalty.

[2] Mr Roche, you have additional charges of possession of an offensive weapon, maximum penalty three years; resisting, maximum three months and refusing a blood specimen.

[3] I have had regard to a good amount of material on both of you, written submissions from your counsel, written submission from the Crown, and oral

submissions today. You have both taken time to write to the Court and to the victims. I have taken into account what family and supporters have had to say about you and what they have written to the Court - a variety of people, a variety of sentiments - and have taken into account what the victims have had to say.

[4] I have taken into account all the purposes and principles of the Sentencing Act 2002.

[5] Dealing first with the facts. On 10 December last year, you were walking on Great King Street just after midnight on 10 December. You had both been drinking, you were affected by alcohol, and neither of you knew the people you were about to meet. You walked down a shared entranceway that led to a group of single storey apartments. You, Mr Roche, were carrying a broom that you had acquired on the way.

[6] Entering into the enclosed yard of one property, you walked on to the front porch and approached the front door. Those actions woke the occupants who called out asking what you were doing. You responded by yelling abuse and smashing a bedroom window with the broom in Mr Roche's possession and then walked back to the end of the pathway. Hoping to get a description of you, an occupant who became the first victim left the apartment taking a golf club. He went to the end of his path and saw you standing about 10 metres away in the entrance to his property. After uttering a few words, you, Mr Roche, rushed towards him and swung the broom handle. The victim put his arm up to deflect the blow, the handle struck the victim across his left arm and back. He responded by hitting you, Mr Roche, on your legs with the golf club. At this point, you came forward, Mr Clark, and together you pinned the victim against the high fence and took the golf club off him. You both punched him about the body, with you, Mr Roche, telling him he was going to die.

[7] Managing to break free he ran back to his property and shut the door. You chased him and proceeded to attack the front door with the golf club, smashing the wooden panel door. That is dealt with by the wilful damage charge. And, up to this point, being on the property is the unlawful being in an enclosed yard, the broom is the offensive weapon, and the aggravated assault is what you did to this man.

[8] It was only when the victim's partner told you she had called the police that you left.

[9] About 10.30 am, the next person had parked his car outside his flat in Great King Street, saw you approaching on the footpath. He walked into the lower foyer of his apartment complex, shutting the door behind him. As he started to walk up the stairs leading to his apartment, he heard the foyer door open and went back to investigate. He found you in the foyer. As this victim asked if he could help you, you, Mr Clark, walked past him on the stairs while you, Mr Roche, remained below. Facing him, you, Mr Clark, held on to the stair railings and appeared to be preparing to launch yourself at him. He moved back but you, Mr Roche, blocked him, preventing him from leaving the foyer. He was asked to give you a ride home in his vehicle but he refused. You grabbed him by the front of his T-shirt and punched him twice in the face. That was you, Mr Clark.

[10] Mr Roche, you asked him to hand over his keys and his cell phone which he was holding. Mr Clark, you then punched him three more times in the face and warned him not to involve the police. Taking keys, cell phone and wallet, you left the address. You got into the victim's Toyota vehicle which was parked outside. You, Mr Roche, drove it to an address in Pine Hill. Wallet and phone were thrown out of the car before you arrived there. Police located the car a short time later and a dog tracked to the house where the two of you had gone. You were arrested.

[11] You, Mr Roche, became aggressive and abusive, you refused to accompany them and struggled when handcuffed, you continually lunged at the police dog, yelling at it. You became aggressive towards the arresting officer and attempted to leave the patrol car. You were eventually restrained and driven to the police station. You said you had driven the victim's car. You underwent a breath screening test during which you continued to be aggressive in your behaviour abusing the police, you refused to go for an evidential breath test. Those last two charges, resisting and refusing, obviously apply to you, Mr Roche, only.

[12] There are a number of victim impact statements. It is appropriate that I refer to those. Counsel tell me that they have gone through those with you.

[13] The people who were inside the house describe their fear and terror at the banging on the door and window. The male, when confronting you, was terrified, you were drunk and abusive and did not want to listen. He felt vulnerable as there were two of you, being alert and worried about the slightest noise at night, had to take some time off work. The living arrangements have changed; the man's partner was significantly affected by what happened.

[14] The victim of the aggravated robbery was only 19 years, a third year university student, living in a flat with six others. Speaks of being punched in the side of the face which at the time was sore and tender. When it happened; he had got rung up by a flatmate to pick her up, which he did, then got home and walked in and got robbed. He was pretty shaken by what happened, was not in a position to defend himself because there were two of you, he was trapped in between the two of you, he said you were really aggressive and violent and he could not reason with you. It was a brand new iPhone 7 and his keys. The phone was totally smashed and water damaged, the car needed a new windscreen and panel damage. The cost of the phone was \$1700 and the car repairs about \$300. He did not expect that to happen in his flat, he is a lot more aware of what is happening at night.

[15] On the issue of reparation, there is nothing back about the damage to the phone. Sorry, the Crown has just reminded me of the damage to the phone, which reminds you how expensive these things are, \$1677.72. And the additional financial losses etcetera, referred to in the reparation report as \$213.63. So, that is a total of \$1890.35 between the two of you.

[16] In terms of other material, I obviously have probation reports about you. You have both got pasts. I will come to that. You, Mr Clark, have a more extensive history than Mr Roche, including an aggravated robbery, although that occurred a significant time ago. In terms of why we are here today, first of all it is to hold you to account. In part, that is recognised by this public sentencing exercise, the two of you in the dock, being in custody for some time, you had a chance to think about things. Perhaps what sets you apart from some others is I have got evidence that you have both started thinking about what you need to do, started courses; I have got certificates here for

you Mr Roche, is it on the ARD course? And you have both spoken with counsel and with the Probation Service about the things you want to do.

[17] I have to denounce your conduct. Clearly, both of you were fuelled up with alcohol or whatever else was on board. I hope you recognise from the summary and from the victim impact statements that while, with respect to the first victim, the younger couple, you might view the offending at the lower end of the scale, that is not how they perceive things. They do not know what is going on outside. Clearly, you frightened the heck out of the young man, and then, of course, as far as the aggravated robbery is concerned, it has probably dawned on you, with the maximum penalty that attaches to that, just how serious this type of thing is.

[18] We seem to be routinely sentencing people for aggravated robberies and this is not a street robbery. It is worse than that because you have actually gone into someone's home, granted into the foyer area. On a scale of things, obviously it is not as bad as going into a dairy or a pharmacy armed. It is a bit more serious than stopping someone on the street. There is a sliding scale between the two extremes, but it is what it is. If you try to take something from someone that is not yours and you threaten them with violence or appear to threaten them with violence, aggravated robbery. The two of you together makes it more serious.

[19] The Crown submits a starting point for the aggravated robbery which is the lead charge for both of you is three and a half years' imprisonment. The Crown says that should be uplifted by six to eight months to reflect the aggravated assault and associated charges, giving a nominal starting point of between four years and four years two months' imprisonment.

[20] With respect to you Mr Roche, a further two month uplift should be applied to reflect the additional charges, including the broom and the other matters which on their own without the aggravated robbery and the assault would not normally see a sentence of imprisonment, and I accept that, but they have to be dealt with in totality.

[21] After further uplifts and discounts, the Crown submits appropriate end sentences for you are well above the three year point.

[22] As far as defence counsel submissions are concerned, they both submit the offending falls at the top of the range of the street robberies identified in *R v Mako*.¹ The starting point should be three years' imprisonment. In their submission, they say that should be uplifted by six months to reflect the other charges, giving a starting point of around four. With respect to you, Mr Roche, a further month should be applied to reflect the additional charges, including a possession of offensive weapon. I think that is a little on the low side for the offensive weapon given that what unfolded on that first aspect of it was probably brought about by the presence of what you armed yourself with.

[23] After further uplifts and discounts have been made, personal aggravating and mitigating factors, they both submit the appropriate end sentence is between two years' and three years' imprisonment.

[24] The guideline decision is *R v Mako* in which the Court of Appeal identified a number of features that will determine the starting point in aggravated robbery cases and then listed common examples of different types of offending. Street robberies involving multiple offenders demanding property may attract a starting point of between 18 months and three years, which may be increased if violence is used. While it is necessary to accurately identify the roles of co-offenders in a joint enterprise, fine distinctions are not to be drawn. The authority there is *Rawhiti v Police*.² Other comments in *R v Mako* are of assistance in assessing the starting point, including the number of participants in their deployment, similarly may reflect more sophisticated or organised activity. Here there is a high level of intoxication as opposed to sophistication, but there was a significant degree of intimidation, in my view, and fear was engendered among the victims. That is clear from the victim impact statements.

[25] Apart from the increased danger from the introduction of even minor physical force and the tension generated by robbery, actual violence on top of threats and intimidation takes the conduct into another dimension and must attract a considerably higher rating in overall seriousness. The extent of any violence and its consequences will be highly relevant either in assessing the robbery offence or if the subject of an

¹ *R v Mako* [2000] 2 NZLR 170 (CA)

² *Rawhiti v Police* [2014] NZHC 1540

additional charge, the total criminality. Property stolen, extent of recovery bears on the offending and associated offending such as vehicle conversion, detention or abduction of victims et cetera is taken into account.

[26] I want to mention three cases: *R v Falanai*³ a decision of Williams J. The defendant there was sentenced to two years and one month imprisonment on one charge of aggravated robbery. There, one defendant followed the victim out to an ATM, confronted him punching him three times in the head, both were intoxicated. After he fell to the pavement, the defendant took cash and tobacco from him leaving him unconscious. The sentencing Judge adopted three years' start point. On appeal, Williams J took the view that three years was inadequate as the degree of violence used in the robbery and its effect on the victim took the case beyond the street robbery example in *R v Mako* where threats of intimidation are the core characteristics. A starting of four years' imprisonment was substituted, given the actual violence and impact on the victim, an end sentence of two years and ten months was imposed.

[27] *R v Fidow*⁴ saw the defendant and an accomplice waiting in a parking lot of a shopping complex where they saw an older woman leave a hair salon. *Fidow* approached her, pushed her to the ground and stole her handbag. She sustained a broken hip, wrist, facial bleeding and bruising. The Solicitor-General successfully appealed the sentence. No challenge was made to the start point of three years and nine months. The Court of Appeal observed that a four year starting point could not have been criticised, given the vulnerability of the victim, the extent of the injuries caused, and lasting adverse impacts.

[28] The Court also confirmed the *R v Mako* approach to actual violence, stating starting points between 18 months and three years' imprisonment will be appropriate where the robbery occurs with bullying or menacing conduct but where there is no actual violence. Higher starting points are likely where, as here, there was physical enforcement of threats of violence in the course of the robbery.

³ *R v Falanai* [2013] NZHC 3239

⁴ *R v Fidow* [2013] NZCA 209

[29] The final decision is *Te Hau v R*.⁵ The appellant and co-offender went to the victim's house to speak about a debt he owed to a gang. After a brief discussion, the co-offender punched the victim twice in the face. The appellant walked around the corner of the house and demanded money, which the victim said he did not have. They entered the house, took the victim's laptop and keys to the vehicle and threatened to kill him if he went to the police, then left with one laptop and vehicle. The victim was not physically injured. There was a subsequent incident a few weeks later where both men demanded money from the victim's father and there are some similarities in the initial aspects of that case with this.

[30] The sentencing Judge adopted a starting point of three years' imprisonment, given that they acted together, entered a home, there was some violence and a threat. A six month uplift was applied for previous convictions and, after discounts, the end sentence was one of three years' imprisonment. The Court of Appeal did not take issue with the starting point. It viewed the uplift as excessive and a higher discount ought to have been given for plea. The appeal was allowed and end sentence reduced to two and a half years, imprisonment.

[31] The aggregate of the offending, in this case, is more significant in my view. In respect of the aggravated robbery, the following features are present. There were the two of you. I would have to say a not insignificant physical presence. Actual physical violence, around five punches to the victim's head, although the injuries he received were minor. There was an element of premeditation in that he was followed into the property and an additional feature of it occurring within a domestic setting, although it was in the foyer of a complex as opposed to an apartment, but arguably somewhere where he was entitled to feel safe.

[32] There are no mitigating features of the offending.

[33] The presence of actual physical violence justifies a starting point higher than three years identified in *R v Mako* and, having regard to the relevant aggravating features, a starting point for both of you on the lead charge of aggravated robbery is three and a half years, imprisonment.

⁵ *Te Hau v R* [2013] NZCA 431

[34] In my view, you are part of a joint enterprise. The starting point is appropriate for both of you, equally, notwithstanding that it was you, Mr Clark, who inflicted the punches. That approach is consistent with observations recently made by Mander J in *Aitkenhead v R*.⁶

[35] An uplift of eight months was identified for you both by the Crown for the assault. That uplift and for your other offending is within the range, in my view. A further uplift of around two months is appropriate for you, Mr Roche for your additional charges.

[36] I include in that already an adjustment for totality with a nominal starting point for each of you. You, Mr Roche, four years four months. You, Mr Clark, four years two months.

[37] In terms of personal aggravating features, there are further adjustments to be made. Mr Roche, your offending occurred while subject to release conditions and there are some previous convictions. In my view, an overall uplift of six months, with an adjusted starting point of four years ten months. Mr Clark, your offending while subject to post-detention conditions with a long history of relevant previous convictions, an overall uplift of nine months, with an adjusted starting point of four years and 11 months.

[38] Counsel for both of you and the Crown accept that a discount of 20 percent is appropriate. Counsel for both of you submit that there should be further discounts for your remorse, your willingness to pay reparation, for the starts that you have made with respect to your sentence, your reflection and other positive aspects that have been brought to the Court's attention through the letters, your apologies, your willingness to go to restorative justice, et cetera.

[39] In my view, each of you are entitled to overall discounts of slightly more than 25 percent, which will see sentences imposed as follows, and what I do propose to do, to make it more straightforward and further reflect totality, is on the aggravated robbery, you, Mr Roche, will be sentenced to three years and four months'

⁶ *Aitkenhead v R* [2017] NZHC 1104

imprisonment; you, Mr Clark, to three years and three months' imprisonment. On the aggravated assault, nine months to be served concurrently. On the possession of offensive weapon, nine months to be served concurrently. Unlawfully in an enclosed yard, convicted and discharged. Convicted and discharged on the two wilful damages. Convicted and discharged on the refusing the request of a blood specimen.

[40] There will be a disqualification period for you, Mr Roche, in the circumstances, of 18 months.

[41] And, resisting police, convicted and discharged.

[42] Now, I believe I can suspend that disqualification until release date. Is that what I have been told recently, or not? Well, unless I am addressed on it I will leave it there.

[43] I will order the reparation in the full amount to be paid by each of you as to 50 percent each.

[44] I will remit Mr Clark's current fines so that both of them, when they come out, will make a start with respect to the reparation but have nothing else to owe. Reparation if \$1890.35 divided by two = \$945.17.

M A Crosbie
District Court Judge