

**IN THE DISTRICT COURT
AT PALMERSTON NORTH**

**CRI-2016-216-000019
[2017] NZDC 8662
THREE STRIKES WARNING**

THE QUEEN

v

ISAIAH JAMES TUTAKI

Hearing: 27 April 2017
Appearances: M Blaschke for the Crown
N Wright for the Defendant
Judgment: 27 April 2017

NOTES OF JUDGE L C ROWE ON SENTENCING

[1] Isaiah Tutaki, you appear for sentence having pleaded guilty to a charge of aggravated robbery from Gisborne and then while you were on bail for that offence, to a charge of wounding with intent to injure in Palmerston North.

[2] You are supported today by a large number of members of your whānau and I acknowledge their support today and their presence. They have travelled to be here and it says something about you, I think, that you do have positive support and you have people who care about you in the community who want to see the best for you and do not want to see you where you are at the moment.

[3] It is also a pretty sad day when I have recommendations of imprisonment for a man who is 21 years old and facing such serious charges.

[4] The aggravated robbery in Gisborne occurred on 26 February 2016. The victim and his partner were staying at a boarding house in Gisborne. They encountered some young acquaintances of yours; obviously there were disagreements or problems between them and one of them then involved you. You and he hatched a plan to visit these people and to take the term from the summary of facts, “to tax him” for what it was said he had done to your female acquaintances.

[5] Your 14 year old acquaintance knew this person, went into the address, saw what was available to be stolen, came back and spoke with you and then you and he were let into the address. You demanded that the gentleman give you property. He refused, you punched him two or three times to the jaw with considerable force, knocking him unconscious.

[6] The punches caused fractures to his jaw to the extent that he required surgery and two titanium plates to be screwed into the upper and lower border of his jaw. He also suffered the loss of property including a laptop, a Smartphone and some cash.

[7] Significantly he suffered considerable fear afterwards that he might run into you. As he said, it really changed his life and he has issues trusting anyone.

[8] While you were on bail for that offence, you were with three others who together attacked a victim in Palmerston North. You all emerged from a car. Two of your associates were carrying weapons in the form of a baseball bat and a hammer. The victim was subjected to blows by you and your associates which included multiple punches and kicks to his head and body as well as blows with the weapons. It is not suggested you had one of the weapons but equally you were part of a group where you knew weapons were involved and your conduct would have acted as an encouragement to the others; you all acted as a group. That is the real point that I am making.

[9] There is a point made by your lawyer that these were not lethal weapons compared to something like a gun or a hammer. The cases make it clear, however, that when such weapons are deployed to the head or body of a victim; they are seriously dangerous weapons and can well prove lethal. People have been killed by

baseball bats and hammers before and it is only a matter of luck that they did not prove lethal on this occasion.

[10] The victim suffered a skull fracture. He woke up in intensive care and was transferred to Wellington. He spent three or four weeks in a rehabilitation unit. It has taken him some time to try and recover from these injuries. At the time of writing his victim impact statement he did not feel physically able to work and suffers fatigue which I accept is related directly to the head injury that he suffered. So by anyone's account, these are very serious offences.

[11] There is a requirement in sentencing for me to compare your case with others and ask myself what have other Courts done in similar cases and you have heard the lawyers talk about a case called *R v Mako*¹ which is what we call the leading case, sets the benchmark for what people should get for aggravated robbery and the Crown rely on a passage which suggests that if you go into a place where someone resides and rob them, starting points of seven years plus imprisonment can be imposed. Your lawyer has argued that that should be moderated when compared with some other cases that she has referred to and I have read her submissions and carefully considered where I get to compared to *R v Mako*. I agree with your lawyer that a starting point as high as six or seven years for this aggravated robbery is too high. Your lawyer suggests a starting point for the aggravated robbery should be three and a half years' imprisonment. I regard that as a bit low. In *R v Mako* the Court says that for a street robbery, in other words where you hit someone up in a street for property that belongs to them, starting points of up to three years' imprisonment can be appropriate. Your lawyer says the correct starting point is somewhere between that three years and seven years that the Crown referred to.

[12] The factors that I have regard to when I set a starting point are that there was a degree of pre-meditation. On the one hand, I agree with the Crown that you and your friend set out to rob these people and planned to do it but what I accept you did not plan was the violence or the degree of violence. In essence you made that up as you went along. So on the one hand you planned to rob them, on the other hand I do not think you intended, when you went into the house or into the place they were

¹ *R v Mako* [2000] 2 NZLR 170

residing to use that extent of violence or cause those injuries. Nevertheless you went into a place where these people were entitled to feel safe; it is where they were staying at the time. It would be the same as if they went into your home and did the same thing to a member of your family. It would be outrageous and you would be enraged by it I am sure.

[13] I also have regard to the very serious injuries that you caused here. Two or three punches directly to the jaw by a young fit man such as yourself can cause very serious injuries to someone and here you did. This person required surgery, a plate to be fitted to their jaw.

[14] The starting point that I adopt for the aggravated robbery is four and a half years' imprisonment. So nowhere as high as the Crown say I should start but not as low as your lawyer says I should start and those are the three main factors that affect me when I consider what the appropriate starting point should be.

[15] Then when you were in Palmerston North and you were part of this attack, you will have heard that I have previously given Mr Takarua a sentence indication close to four years' imprisonment as a starting point, having regard to the very serious injuries caused to that victim. The use of the weapons, the fact that you all acted as a group. There are cases that I have referred to, a case called *R v Nuku*², a case called *R v Taueki*³ which sets out the sorts of factors that I have to take into account.

[16] Here I have regard to what may have been a brief period of violence but it was violence involving four people, four on one, attacks to the head of this man, the use of weapons, you were part of that group. While there is no evidence you were wielding a weapon, equally you were part of that group attack and very serious injuries were caused to him.

[17] A starting point as high as four years could well be justified but it would be wrong of me to say four and a half for the aggravated robbery plus four for the

² *R v Nuku* [1997] BCL 578

³ *R v Taueki* [2012] BCL 502

wounding charge, that would be wrong. An eight and a half year starting point for both offences together would just simply be far too high. The law requires me to apply what we call totality. In other words reduce it to a level that properly reflects a proper starting point for what we call the criminality of what was involved.

[18] Here I uplift the four and a half years by two years, so I have reduced that starting point. Instead of going as high as three or four years, I reduce it down to two for the wounding charge in Palmerston North.

[19] That takes me to an overall starting point of six and a half years, that is 78 months. There has been some discussion with the lawyers about whether or not there should be a further rise in that. Having regard to two factors: one you were on bail for a really serious charge when you participated in that wounding, and two, you have previous convictions that are of concern, which while not extensive include a conviction for injuring by an unlawful act as well as other convictions for violence.

[20] I think some increase is required for those factors, particularly offending while on bail. You need to understand that if you are on bail for a serious offence there is no room to commit other serious offences and the community becomes very, very concerned if people are on bail and while on bail commit serious violent offences. But I must moderate any uplift, I cannot just say it is outrageous; I have got to impose years and years because of those factors.

[21] Here I increase my starting point by six months for those two factors; your previous convictions and offending while on bail. It takes me to an overall starting point of seven years that is 84 months. Your lawyer urges me to give you discounts for your remorse and your age. She refers to factors such as the fact that were some impulsivity to what you did, that you are still a relatively young man. You have some growing up to do and some maturing to do. It is to me a real tragedy that some of your growing up that is still to occur, is going to occur in a prison.

[22] Again in *R v Mako* there was a discussion about how much credit should be given for youth and that is related to how open a person is to rehabilitation, matters of that nature.

[23] There would be a strong argument to say that because of your convictions I should not give you much of a credit but equally you have written letters of apology and the pre-sentence reports about you suggest you are open to rehabilitation. You want to try and do something about your drugs and they suggest that you are sorry for what you got involved in. I think they are important factors. I think you deserve some time off that starting point to recognise those factors.

[24] In this case I discount that starting point therefore by 17 months, so that is one year and five months I am going to take off that starting point for remorse and your age. Some people might say that is a generous discount. I just think it is right in these circumstances.

[25] It brings me back to 67 months. There has also been some discussion about how much credit you should get for your pleas. The guilty pleas were not entered at the first opportunity but equally there was a lot of toing and froing going on. I do not know how confusing you found that process, you are relatively new to this process, despite your convictions. I will give you the benefit of the doubt and give you a discount that is somewhat more than 20 percent overall, 14 months.

[26] It takes me back to an end point of 53 months imprisonment. The Crown originally wanted you to get a minimum term of imprisonment because of your convictions, because of how serious these offences were.

[27] I agree with your lawyer, that you are capable of rehabilitation. I would like you to go to your first Parole Board with your whānau, to make a good case to be released as early as possible but with good supports. It is up to you and how you behave from now until parole and it is up to your whānau in the support they can provide for you.

[28] I would like to think that there are positive things that can be achieved for you while you are serving your sentence. You can find programmes that suit you. You can identify with where you come from and find things that give you strength to be a constructive member of the community which is what I want for you and what I think your whānau want for you.

[29] In all of the circumstances I regard the appropriate outcome – if you are able to keep up with everything that I talked about – as 53 months’ imprisonment overall, that is four years five months.

[30] I impose that sentence in the following way.

- (a) I impose four years five months on the aggravated robbery charge.
- (b) I impose three years’ imprisonment concurrently, in other words, at the same time on the wounding charge.
- (c) On the charge of aggravated robbery, you are required to receive what we call a three strikes warning. I know you have received one for the wounding charge but you also need to get one as a matter of law for the aggravated robbery charge.

[31] So given your conviction for aggravated robbery and I now convict you of that charge, you are subject to the three strikes law. You will be given a written notice of the consequences of this warning that I am giving you which also lists serious violent offences. If you are convicted of any serious violent offence, other than murder after this warning and a Judge imposes a sentence of imprisonment, then you will serve that sentence without parole or early release. If you were convicted of murder after this warning, then you would be sentenced to life imprisonment without parole unless that would be manifestly unjust in which case you would receive a minimum term of imprisonment. What this in essence means is if you committed a similar offence to one of either of these, a serious violent offence, and a Judge gave you a jail, you would serve all the jail, no parole. That is what it essentially means.

[32] I express a hope for you Mr Tutaki that at your age, this is not a crushing sentence for you. That you find things that will give you strength, particularly from your whānau and that you actually demonstrate that you can be a constructive member of the community on your release and that you go back to your supports that will give you strength in the future.

LC Rowe
District Court Judge