EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT TAURANGA

CRI-2017-070-002242
[2018] NZDC 4291

THE QUEEN

v

TIARE TE WHUIMARAKI ERU

Hearing: 7 March 2018

Appearances: S Davison for the Crown
T Bayley for the Defendant

Judgment: 7 March 2018

NOTES OF JUDGE P G MABEY QC ON SENTENCING

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[1] Mr Eru is for sentence today on a charge that on [date deleted] in Tauranga he wounded a named complainant, [the victim], with intent to injure her. That is a charge under s 188(2) Crimes Act 1961 with a maximum penalty of seven years' imprisonment.

[2] His guilty plea was entered on Monday 5 March although it was on that day that the Crown Solicitor presented an amended Crown charge notice. Mr Eru was originally charged under s 188(1) Crimes Act with wounding with intent to cause grievous bodily harm, which carries a maximum penalty of 14 years' imprisonment. The Crown Solicitor, in the exercise of her discretion, has concluded that the appropriate charge is the lesser charge under subs (2). When that was presented Mr Eru immediately pleaded guilty.

[3] The facts which relate to Mr Eru's offending are these. On [date deleted] the complainant was together with Mr Eru. They were at a property in Tauranga and on that morning when she awoke she found Mr Eru angry and aggressive. He stated, "Someone is going to get a real good hiding today." It was after saying that he obtained a hammer which he put down the front of his pants. Upon seeing this the complainant became fearful and went outside onto the street. He followed her and yelled at her. The public were alarmed and rang the police.

[4] He followed her as she walked off and he broke into a run. When he caught her he grabbed her and struck her to [the head] with a hammer. She was then assisted by members of the public and Mr Eru was arrested shortly after that.

[5] The complainant did not receive, as was originally suspected, a fractured skull but had an area of swelling and abrasion on her scalp.

[6] Mr Eru has a long list of previous convictions but which does not contain extensive convictions for violence. In 2008 he was imprisoned for six months for assault with intent to injure, a domestic violence offence. Prior to that, in 2001 he was imprisoned for three months for assault with a weapon. There is nothing else.

[7] The Crown solicitor has filed written submissions contending for a start point of three years' imprisonment. That is at the top of band 2 of the guideline authority of *Nuku v R*[1] but because of the overlapping nature of the bands, it is also one year into band 3.

[8] Mr Davison refers to the aggravating factors of premeditation, attack to the head, use of the weapon and victim vulnerability. There was the use of a weapon and attacking the head and also a degree of premeditation in the expression of intent to do violence to someone and the taking of the hammer, concealing it and then pursuing [the victim] to carry out the threat of violence. I do not know if the original threat about someone getting a hiding was directed at her but certainly she became the object of that threat.

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[1] *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39, (2012) 26 CRNZ 106.

[9] I am aware of comments from the Court of Appeal in *Flavell v R*[2] where the Court considered that the sentencing Judge was wrong in the circumstances of that case to count use of a weapon and attacking the head as separate aggravating factors. In *Flavell* a baseball bat was used to strike once to the head of the victim.

[10] With respect to the comments made by the Court of Appeal I find it difficult to reconcile that approach with *R v Taueki*[3] which isolates as distinct aggravating factors the use of weapons and attack to the head. I treat them as separate aggravating factors in this case and I note that Ms Bayley, whilst making the point about the comments in *Flavell*, appears to acknowledge that they are separate and distinct.

[11] This is not a case where I consider victim vulnerability is an aggravating factor. The vulnerability of victims anticipated in *Taueki* and other cases goes beyond the fact that the victim may be a female and the defendant a male, which in most cases results in an imbalance of strength or power. Vulnerability in the sense anticipated requires more than that and often refers to infancy, age or a victim already disabled and where an attack might continue.

[12] There is premeditation, use of a weapon and attacking the head but I take issue with Mr Davison's start point of three years. On the facts in *Nuku* a start point of three years' imprisonment was upheld on appeal. Nuku's offending was clearly more serious than Mr Eru, it involved a home invasion and whilst there was no weapon, it involved a prolonged attack including an assault to the head. The Court of Appeal regarded the level of violence and the home invasion as serious aggravating factors. Both are absent here and I consider that by comparison to *Nuku,* Mr Davison is aiming too high at three years.

[13] Mr Davison distinguishes the authority of *Hetherington v Police*[4] referred to by Ms Bayley on the basis that in *Hetherington* there was no premeditation. That is correct but that is balanced out by the degree of violence in that case.

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[2] *Flavell v R* [2011] NZCA 361.
[3] *R v Taueki* [2005] 3 NZLR 372 (CA).
[4] *Hetherington v Police* [2015] NZHC 1829.

[14] Outside a bank Mr Hetherington encountered a victim and in a spontaneous act punched him to the head, punched him further to the head and body when he was on the ground and then hit him twice on the back of the head with a glass bottle. On appeal a start point of two years and three months' imprisonment was reduced to 18 months. The Judge said that two years and three months' imprisonment was more suited to band 3 of *Nuku v R*. I am not sure about that comment given the overlap between bands 2 and 3.

[15] I need to consider which band this offending falls within. Both counsel say band 2 and I agree. Three or less *Taueki* aggravating factors exist. There are none of the features which the Court in *Nuku* said would justify a band 3 analysis.

[16] I consider that the start point of 18 months in *Hetherington* is too low for Mr Eru's offending. There was premeditation in Mr Eru's offending and I make a distinction between the use of a hammer, violently used to strike the head of a person, and the picking up of a glass bottle which happened to be lying about and then striking to the back of the head. It does not take much to imagine the potential injury that can be caused by a tool such as a hammer against an empty bottle of unknown dimensions.

[17] I consider that the start point which is appropriate for Mr Eru's offending is two years' imprisonment and that will be the start point. Mr Davison submits for a six month uplift for previous convictions but I consider that trespasses into the area of double punishment. Certainly something is due by way of uplift for a serious act of domestic violence, albeit in 2008, and I adopt an uplift of three months. That takes me to 27 months' imprisonment.

[18] Ms Bayley, having contended for the two year start point which I adopt and acknowledging that some uplift is due for previous convictions, turns to mitigating factors. She made a cautious reference to the possible potential for credit under s 9(2)(fa) Sentencing Act 2002 for the manner in which the case has been conducted, although that point was not strongly pressed. I do not consider that any such credit is due. There is also a reference to the possibility of remorse which might exist over and above the guilty plea. There is nothing that would justify any further reduction for remorse.

[19] I interpolate at this point to record that Mr Eru was content to be sentenced today in the absence of a pre-sentence report. The obtaining of a pre-sentence report is a matter of judicial discretion. Where a Judge is to sentence for a very short-term of imprisonment reports are very often not called for. However in a sentencing such as this, and whilst there may be discretion to call for a report, it is generally understood that the proper course is to call for a report. Matters arise in reports which are directed at mitigation and rehabilitation. In this case there is a waiver of any right that Mr Eru may have to a report.

[20] Ms Bayley, who is experienced counsel, has given him advice and I accept her acknowledgement that her client is fully informed when it comes to the question of the need or otherwise for a pre-sentence report.

[21] Ms Bayley is on sound ground when seeking a 25 percent reduction for guilty plea and Mr Davison acknowledges that. When the Crown changed course on the charge the guilty plea was immediately entered.

[22] The 27 month sentence should thus be reduced by 25 percent being the full credit for guilty plea. Rather than toy with days or parts of weeks, I adopt a rounding approach and reduce the start part by seven months, which is slightly more than 25 percent, to 20 months' imprisonment.

[23] That then raises the potential for post-release conditions. It is almost invariably the case that release conditions are recommended in pre-sentence reports but without a report I have the power to impose special release conditions if I wish. Mr Eru is subject to standard conditions upon release as his sentence is greater than 12 months' imprisonment. They will apply for six months but in addition I add a special condition that Mr Eru will submit to assessments, courses and counselling as may be directed by his probation officer and if so directed will complete any programmes, courses or counselling. That special condition will endure for the same period as the standard conditions.

[24] There is a final matter which Mr Davison raises and which requires comment. In his written submissions he seeks a protection order under the provisions of s 123B

Sentencing Act 2002. That section empowers a Judge, in conjunction with sentencing, to make a protection order. Such an order has the effect of an order made in the Family Court. It is registered in the Family Court and is a final order.

[25] There are jurisdictional requirements, they are:

(a) That an offender is convicted of a domestic violence offence. That is clearly satisfied by Mr Eru's conviction.

(b) There is not currently in force a protection order against Mr Eru made under the Domestic Violence Act 1995 for the protection of his victim in this case. That is the case here, there is no protection order.

(c) The Court must be satisfied that a protection order is necessary for the protection of the victim of the offence.

(d) The victim of the offence does not object to the making of the order.

[26] The only information that I have been presented in support of Mr Davison's application for a protection order under s 123B Sentencing Act 2002 is a document signed by the victim on [date deleted] 2017. It is a New Zealand Police document. It is headed, "Request for protection order pursuant to the Sentencing Act 2010, s 123B." I stop to note that the Sentencing Act is not 2010.

[27] The document then reads:

> I am the victim of a domestic violence offence reported to the police on [date deleted].
>
> I was in a domestic relationship with the offender Tiare Eru and I understand that he/she has been convicted and has been sentenced for that offence. I do not object to the issuing of a protection order. I believe I am at risk of further harm from the defendant.

[28] The document then goes on to name [details deleted], is signed by the victim and dated [date deleted] 2017.

[29] It is a template document issued by the police and allows for spaces to be filled in where appropriate. As I have noted it was signed in [month deleted] of last year yet it says that the victim understands that Mr Eru has been convicted and has been sentenced for an offence, which of course was not the case on [date deleted – the date the document was signed] 2017. The other document I have is a victim impact statement dated [date deleted] 2017 which states, "I am fearful for my life. He scares me. When he does this I just prepare to die."

[30] Mr Davison is asking me to be satisfied of the jurisdictional criteria in s 123B of the protection order and in particular that it is *necessary* for the protection for a victim of the offence. He asks me to make that assessment on documents which are nine months old. I have not been given any update, I do not know if the victim still does not object to the issuing of a protection order, I do not know if she still believes that she is at risk of further harm from the defendant.

[31] I would find it remarkable that in the Family Court, on an ex parte basis, a temporary protection order could be made on information this old and this sparse. Here, I am being asked to make a *final* order on information which is old and sparse and which would carry with it all the restrictions that apply to a person who is the subject of a final protection order.

[32] It has become the police practice in this region for prosecuting officers to seek protection orders at a sentencing based on similar information. The standard form police document is filled in at the time of the offence when the victim is understandably upset, where the only advice that the victim may have received is from a police officer and where almost always there has been no time to reflect.

[33] The standard form police document is handed up to sentencing Judges. It is dated months before, as in this case, without any updating information as to whether the victim still does not oppose an order and the present necessity for a protection order to protect the victim of the offence. I doubt very much if my colleagues in the Family Court would ever consider acting on information such as that.

[34] The issue of necessity needs to be addressed in a proper way. The Court of Appeal in *Surrey v Surrey*[5] focused upon the statutory criteria for issuing a protection order under the provisions of the Domestic Violence Act 1995. The Court was considering the particular provisions of that Act but just as is the case under the Sentencing Act 2002 necessity is an essential requirement. The Court of Appeal observations as to the proper approach in determining if there is a necessity apply equally to the Sentencing Act 2002.

[35] At [38] of *Surrey* the Court said:

> The assessment of necessity under s 14(1)(b) requires a broad-based assessment by the Court of the need for protection in the future having regard to both the object of the Domestic Violence Act and the statutory factors set out in s 14 as well as any other relevant factors.

[36] At [40] the Court said:

> In our view, the scheme of the Domestic Violence Act envisages that the Court will assess the risk of domestic violence on the basis of past conduct, informed by the subjective views of the victim and any other relevant factors.

[37] Section 14 Domestic Violence Act provides in sub (5) that:

> Without limiting the matters that the court may consider when determining whether to make a protection order, the court must have regard to—
>
> (a) the perception of the applicant, or a child of the applicant's family, or both, of the nature and seriousness of the behaviour in respect of which the application is made; and
>
> (b) the effect of that behaviour on the applicant, or a child of the applicant's family, or both.

[38] At [97] the Court in *Surrey* said:

> The second limb in s 14(1)(b) provides that the Court must be satisfied that the making of an order is necessary for protection of the applicant or a child of the applicant's family or both… This requires an assessment by the Court of the need for protection in the future.

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[5] *Surrey v Surrey* [2010] 2 NZLR 581.

[39] At [118] *Surrey* quotes Priestley J in *K v G*[6] when His Honour set out a list of matters relevant to the assessment in determining if a protection order should be issued under the Domestic Violence Act:

> (a) Whether a protection order is necessary requires consideration of all relevant factors.
>
> (b) It is an error to use the mandatory s 14(5)(a) requirement as a fulcrum for a case.
>
> (c) Despite s 14(5)(a), the court needs to assess the reasonableness of the subjective perception of an applicant.
>
> (d) Whether or not a protection order is necessary is an objective exercise, informed by a number of factors, including the subjective perception of an applicant. That perception, however, is not the only relevant factor.
>
> (e) It is not always sufficient to ground a protection order on the fact that such an order will give an applicant peace of mind. It is not Parliament's intention that protection orders should be used to protect people from unrealistic and unreasonable fears.

[40] Further at [121] the Court referred to a decision of His Honour Judge Walsh in *Colledge v Hackett*[7] when that Judge also detailed matters relevant to an assessment as to whether a protection order should be made. He said:

> (a) Did the violence occur so long ago in the past that its effect is spent? The time that has elapsed since the violence occurred is relevant.
>
> (b) Was the violence a one-off event, with no lasting threat of future abuse?
>
> (c) Was the violence simply symptomatic of the breakdown of the relationship? If the parties have since separated the threat of violence may have dissipated.
>
> (d) Is the character of the applicant such that it is difficult to see why that person should need protection?
>
> (e) What is the perspective of the applicant and the effect on the applicant?
>
> (f) Have any other protective measures been taken with the result that the applicant does not need the protection of an order?

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[6] *K v G* [*protection order*] [2009] NZFLR 253.
[7] *Colledge v Hackett* [2000] NZFLR 729.

[41] All I have are historic documents. Looking at matters objectively I could never be satisfied that the making of a protection order under s 123B Sentencing Act 2002 is necessary.

[42] I could observe that if there was a necessity then in the [number of months deleted] months that has elapsed since the offending an ex parte application could have been made to the Family Court for a temporary order. That has not been done. That is not to suggest that a victim of an offence cannot seek orders under the Sentencing Act 2002 but it is a fair observation in my view to make that there has been no recourse to the Family Court under the Domestic Violence Act 1995 in the meantime. That may be because the victim no longer considers that there is a need on her subjective assessment. The point is I do not know. The information I have is entirely inadequate.

[43] I have commented to Mr Davison that it is unusual to see Crown counsel seeking protection orders at sentencing but his brief from the police is tainted by difficulties that regularly crop up in the list Court. I have suggested to him that he may wish to give a copy of my comments to the police prosecution section in Tauranga for consideration.

[44] For my part I will always find it difficult to make final protection orders under the Sentencing Act 2002 unless I am fully informed as to the current state of affairs. I consider that the proper way for information to be placed before the Court when s 123B is relied upon, is by affidavit. Sworn evidence is required in the Family Court and I see no reason why that should be different in the Criminal Court, particularly when the effect of an order made under the Sentencing Act 2002 is final and not temporary.

[45] Returning to you now, Mr Eru, would you please stand. On the charge of wounding with intent to cause grievous bodily harm you are sentenced to 20 months imprisonment and there will be six months release conditions both standard and the special condition that I have already referred to.

P G Mabey QC
District Court Judge