

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**CRI-2017-009-008031
[2018] NZDC 1158**

THE QUEEN

v

SHAUN FRANCIS WHITTAKER

Hearing: 24 January 2018

Appearances: C Bernhardt for the Prosecutor
A Garrett for the Defendant

Judgment: 24 January 2018

NOTES OF JUDGE A D GARLAND ON SENTENCING

[1] Shaun Whittaker, you appear before the Court for sentencing today on charges of aggravated robbery, unlawfully getting into a motor vehicle, four charges of dishonestly using a document, one charge of driving whilst disqualified third or subsequent, a charge of possession of an offensive weapon charged under the Crimes Act 1961 and a charge of summary offences and assault.

[2] The facts relating to your offending are as follows:

- (a) On 7 July 2006, you were convicted of driving whilst disqualified and you were disqualified from driving indefinitely.
- (b) Between 9.30 am and 1.00 pm on 3 September 2017 a white Ford Fiesta motor vehicle was unlawfully taken from a driveway in Templeton.

The car was valued at \$2000. At approximately 7.15 pm on 3 September 2017 you entered the residential home of the victims of the aggravated robbery through an unlocked door. You approached the two victims who were in the lounge. You pointed what you represented as a short-barrelled firearm at the victims while aggressively shouting, "Get the money, get it out of the safe. I know there's a safe." You pointed the imitation firearm directly at the female victim tapping the barrel on her chest as she backed away. You walked down the hallway and kicked the laundry door open entering it. The female victim picked up her phone and started to call the emergency number, triple one. You realised what she was doing and you shoved her arm causing her to drop the phone. The male victim stood up and approached you telling you that they did not have a safe and they did not have any money. You removed a small bullet from your breast pocket and said to him that you would shoot him. You told the victims that you just had to put the bullet in your gun and that you could shoot them. The male victim grabbed at you and tried to push you out the door. You then stabbed his left hand with a small screwdriver that you had in your possession causing a graze and you told him that you could stab him with the screwdriver. The male victim then removed his mobile phone from his pocket and told you that he only had \$30 and he went to remove it from the cover of his phone. You grabbed the phone out of his hand and took possession of the \$30 in cash and four of his bank cards. You then left the address in the unlawfully taken Ford Fiesta car. That vehicle was subsequently dumped on the roadside nearby.

- (c) At 7.34 pm you entered [the bar] in Hornby. You produced the victim's [debit card] and you asked for \$500 in cash. A staff member entered the transaction in the Eftpos machine. You then repeatedly inserted the card and pressed enter. In the end, you told the staff member that the card did not have a PIN number and that you had just found the card so you did not get any money.

- (d) About five minutes later you entered [service station 1] in Hornby. Again, you produced the victim's [debit card] and purchased two packets of Winfield Red cigarettes for \$65 using the PayWave function.
- (e) Shortly after that you went to the automatic teller machine inside [service station 2] Hornby. You attempted to withdraw \$300 using the card but apparently were unsuccessful. Shortly after that you used the card attempting to make a purchase across the counter in the petrol station for \$92.05 but that transaction was declined. You then attempted to make another purchase for just under \$60 and that was declined as well.
- (f) Then several days later on 5 September you drove your own Honda car down Colombo Street, Christchurch. You parked opposite the Baileys Bar in Edgware. The third victim of your offending was sitting outside the Baileys Bar. You jumped out of your vehicle and you took a crossbow out of the boot of your car. You pointed that crossbow at the victim and yelled at him. I am not told whether or not that crossbow was loaded with a bolt and so I must assume that it was not. You then put the crossbow back in the boot and you ran across to the victim. You punched him once causing him to land on the ground after falling over some tables nearby. As he was getting up you just pushed him over again.

[3] The pre-sentence report writer tells me you are 41 years of age. The offending related factors are identified to be a harmful pattern of drugs use, a propensity for violence, your attitudes, antisocial peers and your lifestyle. You are assessed as being at high-risk of reoffending and causing harm to others. You indicated to the probation officer that you are genuinely remorseful for your offending, in particular, in relation to the aggravated robbery which targeted this couple who you said were known to you. The recommendation is for imprisonment.

[4] Today you have provided me with some letters and with a document titled, 'Your Memoirs from Inside the Wire,' which I have taken the time to read. In your

letter to the victims of the aggravated robbery you expressed remorse and acknowledge the impact that your offending has had on them. You have told them of your regret and you accept responsibility for the emotional harm that you have caused. You have also written a letter to the Court expressing your regret for what you have done, particularly in relation to the aggravated robbery. You tell me about the medication that you were previously on which you subsequently were unable to acquire down in Canterbury and you tell me, as a result of that, your reoffending started again. You tell me that you feel sorry for what you have done to the victims.

[5] As I said, I have also read the memoir that you have written and there would not be an exaggeration to say that if half of what you have said is true then it reads like a roadmap to crime. I accept what counsel has suggested which is that you have certainly had a very difficult childhood and upbringing which has, no doubt, contributed to your behaviour.

[6] In sentencing you, I need to bear in mind the purposes and principles of sentencing set out in ss 7 and 8 Sentencing Act 2002. In particular, I need to hold you accountable for the harm that you have caused. I need to denounce your conduct on behalf of the community and I need to impose a sentence which will not only deter you but which will deter others. I bear in mind the gravity of your offending and the seriousness of the charges upon which I must sentence you by comparison with other offences. I need to impose a sentence on you which is generally consistent with that imposed on other offenders for like offending. I also need to impose the least restrictive outcome appropriate in all the circumstances.

[7] For the Crown, Mr Bernhardt submits that I should take a starting point of seven years' imprisonment on the lead charge of aggravated robbery. I should apply an uplift of six months for the charges of dishonestly using the debit card. The Crown submits that a cumulative sentence of around 12 months' imprisonment should be imposed for the charge of possession of the offensive weapon and for assault. The Crown also submits that the charge of unlawfully getting into a motor vehicle could be dealt with by way of concurrent sentence with the aggravated robbery and that a cumulative sentence should be imposed on the charge of driving whilst disqualified third or subsequent. The Crown asks for an uplift in relation to your past history. The

Crown accepts that full credit is available to you for the charges upon which you entered early guilty pleas.

[8] Mr Garrett, on your behalf, emphasises the miserable, oppressive and abusive background that you have sadly sustained. He submits it is understandable when one takes into account that background that you might resort to crime, particularly when you are living on your wits, have no permanent accommodation and against a background of drug abuse. He acknowledges especially when one reads your memoirs that you clearly have a lot of anger and grief in relation to your upbringing. In particular, he submits that the Court should bear in mind that between 2012 and 2015 when you were prescribed Concerta coincidentally, there is no offending history in your criminal record. Unfortunately, once you came down to Canterbury it appears that the clinicians decided that it was not appropriate for you to be prescribed that drug any longer and, hence, you drifted back into drug abuse and reoffending. At the end of the day, Mr Garrett submits once you have served your sentence you will be released back into the community. He asks that I adopt an appropriate starting point and not to impose any uplift for your past history in order to give some hope. He asks that I give you full credit for your early guilty pleas and also for your remorse as expressed.

[9] These offences carry maximum penalties of between six months' and 14 years' imprisonment. The lead offence is clearly the charge of aggravated robbery. There is a tariff case for aggravated robbery and that is *R v Mako*¹ that I have considered. In that case, the Court of Appeal gave some guidance in relation to what are described as 'invasion robberies'. The Court said:

Forced entry to premises at night by a number of offenders seeking money, drugs or other property, violence against victims where weapons are brandished even if no serious injuries are inflicted would require a starting point of seven years or more. Where a private house is entered, the starting point would be increased under the home invasion provisions to around 10 years.

[10] As the Crown conceded, the home invasion revisions have now been repealed. However, in the Sentencing Act 2002, home invasion is to be regarded as an aggravating factor in relation to offending.

¹ *R v Mako* [2002] 2 NZLR 170 (CA)

[11] The aggravating features in relation to your offending that I take into account are as follows:

- (a) The property taken in the robbery involved a cellphone, a small amount of cash and four bank cards.
- (b) Your offending did involve the use of an imitation firearm. Although that is a factor inherent in the charge, the fact that you produced a bullet and told the victims that you could load the gun and shoot them is clearly an aggravating factor. You were also armed with a screwdriver.
- (c) In terms of the actual violence, that was limited to stabbing one of the victims' hands with the screwdriver. Fortunately, it did not cause a serious injury as the blade of the screwdriver must have grazed off his hand.
- (d) This offending did involve home invasion, namely the entry into the victims' dwelling house. That is a serious aggravating factor.
- (e) Further, the impact of your offending on the victims has been substantial. That is something that I am sure you can tell having listened to Crown counsel read the victim impact statement. The impact of your offending on the victims, in my view, has caused a very high level of emotional harm.

[12] I accept the Crown's submission that a starting point for this offending should be seven years' imprisonment. For the associated offences of unlawfully getting into a motor vehicle and dishonestly using the victim's bank card, I apply an uplift of six months' imprisonment. Turning now to the remaining offences, these were committed on quite separate and distinct occasions and, therefore, they require a cumulative approach overlaid by the totality principle.

[13] First of all, I turn to the charge of driving whilst disqualified third or subsequent. The maximum penalty for that offence is two years' imprisonment. There

was no other driving fault to aggravate that offending. I have considered the decisions of the Court of Appeal in *R v Butterfield*² and the decision of the High Court in *Peterson v P*³. The starting point for that offence that I would have adopted is one of 10 months' imprisonment if I had considered that offence on its own. Bearing in mind the totality principle, however, I adopt a starting point of six months' imprisonment for that offence.

[14] Turning then to the charges of possession of an offensive weapon and assault. They carry maximum penalties of three years' and six months' imprisonment respectively. As I said to you earlier, I am not told if that crossbow was loaded with a bolt. I am assuming that it was not. Nevertheless, that incident was intended to frighten or intimidate the victim. To emphasise the point you then put the crossbow down and went across the street and used unprovoked violence punching the victim to the ground. The starting point that I adopt for those offences is three months' imprisonment.

[15] Overall, the starting point today I have arrived at is eight years' and three months' imprisonment.

[16] I turn then to the aggravating factors and mitigating factors personal to you. Dealing first of all with the aggravating factors. Sadly you do have a very significant history of relevant prior convictions for violence and dishonesty that includes some 150 convictions and comprises multiple convictions for theft, obtaining by deception, burglary, common assault, male assaults female, assaults on police, unlawfully using a document, receiving, threatening to kill and also possession of an offensive weapon. I note you also have eight previous convictions for driving whilst disqualified.

[17] The Crown submits that a significant uplift is required. Mr Garrett asks that I do not apply an uplift. The uplift that I would have applied based on that past history would have been 12 months' imprisonment but I temper that uplift based on the knowledge of your personal background and that includes the time during 2012-2015 when it appears that you stopped offending. It seems to me that some credit needs to

² *R v Butterfield* CA100/07, 23 July 1997

³ *Peterson v P* [2009] BCL 223 (HC)

be given to you for that. Accordingly, I reduce the uplift to one of six months for those reasons. In mitigation, I accept that you are entitled to full credit for your guilty pleas on all but the charges of unlawfully getting into a motor vehicle and driving whilst disqualified third or subsequent. Pleas on those charges were only entered today. The reduction that I allow for your guilty pleas is one of two years and three months. That results in a sentence today as follows:

- (a) You are sentenced to a term of imprisonment for six years' and six months' imprisonment. I impose that sentence on the lead offence of aggravated robbery.

[18] On the remaining charges, you are sentenced to concurrent sentences as follows:

- (a) On driving whilst disqualified third or subsequent: nine months' imprisonment.
- (b) On each of the charges of using a document, unlawfully getting into a motor vehicle and possession of an offensive weapon: six months' imprisonment.
- (c) On the charge of assault: three months' imprisonment.

[19] I make an order for destruction of the crossbow, bolts and ammunition.

[20] In terms of the Crown's request for reparation I accept that that is a forlorn hope and is quite unrealistic. I have taken that into account when arriving at your sentence. I make no order for reparation.

[21] In relation to the charge of driving whilst disqualified third or subsequent, you are disqualified from holding or obtaining a driver's licence for a period of two years from today.

A D Garland
District Court Judge