IN THE DISTRICT COURT
AT WHANGAREI

CRI-2017-088-000530
[2018] NZDC 1796

THE QUEEN

v

DAVID SHAUN GALLOWAY

Hearing: 2 February 2018

Appearances: J Scott for the Crown
D Niven for the Defendant

Judgment: 2 February 2018

NOTES OF JUDGE K B de RIDDER ON SENTENCING

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[1] Mr Galloway, at your trial before a jury, you were found guilty of this one charge of aggravated robbery.

[2] That charge, of course, is one of the charges included in what is known colloquially as the, "Three strikes legislation," and the law requires me to give you a warning as to the consequences of a further conviction for a serious violent offence after I have given you this warning.

[3] This warning is simply this; that if you are convicted of any serious violent offence, other than murder, this is after I have given you this warning, and you are sentenced to imprisonment, then you must serve that sentence without parole or early release. If you are convicted of murder after I have given you this warning, you must be sentenced to life imprisonment which will be served without parole unless that would be manifestly unjust, in which case you must be sentenced to a minimum term

of imprisonment. You will be given a written notice setting out that warning that I have just given you.

[4] The facts that the jury heard at your trial were that the victim of your offending was introduced to you by a mutual acquaintance who asked the victim to allow you to stay in his sleepout for a few weeks. He agreed to that and you moved in. During the short time that you were there, on occasions, only a few it seems, you would go into the victim's house to have a bath or a shower or have a cup of coffee with the victim, but that was very limited. You stayed in this sleepout for about three weeks until the victim asked you to leave.

[5] About a month after you left, you went back to the victim's property at around about 4 o'clock in the morning with two others. The victim got out of bed to see who was at his door, saw it was you and told you to go away. You said that you wanted to talk about some money that you owed the victim that he had lent you whilst you were living at his property. The victim then let you into the house and you were promptly followed by two others. He went and got dressed and made some coffee for you, at which point you then pulled out a large knife and pointed it at the victim and, from time to time, touched him on the body with it.

[6] Over the next three hours, you and your two co-offenders effectively helped yourself to a substantial amount of the victim's property, all the while the victim being stood over with the knife, either by yourself or one of your co-offenders. The property that you removed included TVs, clothing, jewellery, a computer, chainsaws and, as the victim described it at the trial, a whole heap of his property. At one stage, you also demanded the sum of $15,000 from him. The evidence was that the offenders were wearing gloves, so obviously to try and minimise the risk of them being identified.

[7] After about three hours, the three of you then got into your vehicle and left and that, of course, left the victim severely traumatised. That was very clear from the way that he gave his evidence at trial but, also, now confirmed in this victim impact statement which has just been handed up. The content of that was hardly surprising. He sums it up in the final paragraph by saying that you have ruined his life and he says that because he used to be a confident person, now he is not. He has had to sell the

home because he could not stand living there. He could not go back to work until recently and, therefore, there has been a severe financial effect on him as well, quite apart from the loss of all the property that he, as he says, had worked his life for and paid for all of his own stuff, so the consequences are obviously highly significant and ongoing for this victim.

[8] I also have the assistance of a probation report. That offers no insight whatsoever into the reasons why you chose to target this victim and rob him of a significant amount of his property. The report, hardly surprisingly, points to your significant record of previous prison sentences and, of course, the recommendation in that report is one of imprisonment, which there is no argument about. Clearly, that must be the case based on relevant authority. Perhaps tellingly in the report, you offer the view that, effectively, to a certain extent, you have grown up in prison and that is certainly regrettable.

[9] I have had the benefit of written submissions from both the Crown and from your counsel, Mr Niven, and, of course, I have read those carefully in preparing for this sentencing yesterday. In summary, the Crown refer to the lead Court of Appeal case known as *R v Mako*[1] and also the Court of Appeal case of *Tiori v R*.[2] This morning, Mr Scott accentuates the fact that a weapon was present and used, although, of course, there was no physical injury caused by that weapon, and, having regard to the authorities the Crown refer to, submits that a seven-year start point is appropriate and that there should be an uplift from that for the home invasion aspect of this offending and for your previous convictions, particularly involving dishonesty.

[10] For you, Mr Niven points to the District Court case in Christchurch of *R v Collier*[3] and submits that a start point would be appropriate at five years, with a modest uplift for your previous history and for the fact that this offending was committed whilst you were on parole.

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[1] *R v Mako* [2000] 2 NZLR 170 (CA)
[2] *Tiori v R* [2011] NZCA 355
[3] *R v Collier* (DC, Christchurch, CRI-2016-009-001147, 26 July 2017, Judge Kellar)

[11] The first task for me is to carry out an assessment of the culpability factors of this robbery. Firstly, I am satisfied that there was planning and pre-meditation. I accept that it did not require any sophisticated planning but, quite clearly, there was. You knew about the victim's circumstances, that he lived alone, and you went there at 4 o'clock in the morning. Obviously, that was on the basis that you knew he would be there and not out and about, and you took two others with you as support and muscle, effectively, to enable you to carry out this robbery. So, in that sense, it was clearly organised and planned, although, as I have said, not necessarily to any great degree of sophistication. The three of you, effectively, had enough muscle power, as I have described it, to negate any resistance by the victim. He was vulnerable to a certain extent, he was taken by surprise at 4 o'clock in the morning, and with the subterfuge that you wanted to talk about money. No doubt he regrets that he was taken in by you at the time, no doubt partially caused by the fact that he was probably still half asleep.

[12] Finally, of course, and significantly, is the presence of that very large knife which was clearly used to intimidate the victim and to threaten him, to stand over him, to enable you and your two associates to carry out this robbery over this three-hour period. I do not accept that it was only a matter of luck that he was not injured with the knife. Obviously, no steps were taken to actually physically harm him with it but it most certainly was used as a very effective way of preventing any resistance. There was also the amount and value of the property taken.

[13] Quite clearly, I do have to follow the Court of Appeal case of *Mako* but also the Court of Appeal case of *Tiori v R* and, in particular, that latter case discussed. In my view, the situation in *Tiori v R* and the cases that the Court of Appeal discussed in that case are all more serious in their facts than this particular robbery. Also, I distinguish the case of *Byford*[4] where there was a seven-year start point. In that case, an elderly woman was knocked to the ground and then tied up. That involved significant physical violence against her, which is absent in this case apart from the threat for the knife. I also take the view that this case is somewhat more serious than the case of *Collier* referred to by your counsel, Mr Niven.

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[4] *R v Byford* [2011] NZCA 316

[14] Obviously, sentencing for this type of offending, when comparing to other cases, involves a nuanced approach to actually identify the key elements and, having done so, in my view, an appropriate start point of imprisonment on this charge will be one of six years' imprisonment. I am also satisfied that there has to be an uplift for both your previous dishonesty offending and other violent offending and also to take into account what, in my view, is a seriously aggravating feature, that you committed this serious offence whilst on parole. In my view, based on previous cases, I would have been justified in uplifting that start point by a year but I will modify that to one of nine months, partially in regard to the fact that, as Mr Niven has said, you will face a significant period of imprisonment.

[15] In my view, I am not required to reduce that end point by any amount. I accept that you have taken positive steps in prison and that is to your credit but, in my view, that factor is more accurately taken into account when I consider the issue of whether or not I should impose a minimum period of imprisonment. In my view, I should not. Firstly, I take the view that it is a matter for the Parole Board but, secondly, I decline to do so to give recognition to the fact that you now show considerable insight into your history and what your offending is doing to your life and to others who now have rallied around and there is some good prospect that when you are finally released from prison that you might be able to embark on a pro-social and offence-free life and, if the support that I have read in these references this morning continues, then the Court has great confidence that you can finally turn your life around, therefore, I do not propose to impose a minimum period of imprisonment.

[16] On this charge, you are convicted and sentenced to imprisonment for six years and nine months.

K B de Ridder
District Court Judge