

**IN THE DISTRICT COURT
AT WAITAKERE**

**CRI-2016-090-005948
[2018] NZDC 3234**

**THE QUEEN
NEW ZEALAND POLICE**

v

MACLEAN KAISUVA
Defendant

Hearing: 21 February 2018

Appearances: S Farnell for the Prosecutors
M Kan for the Defendant

Judgment: 21 February 2018

NOTES OF JUDGE J JELAS ON SENTENCING

[1] Mr Kaisuva, you are only 20 years old and you are here today for sentencing on a total of three charges, two of which the Crown are prosecuting and one in which the Department of Corrections are prosecuting. The two Crown charges include one charge of aggravated robbery and the second of giving false details.

[2] On 21 November 2017, you received a final warning under the provisions of the three strike legislation as provided for in the Sentencing Act 2006. Thus, you will be required to serve the full term of your sentence imposed without parole.

[3] The facts upon which these charges have been brought, for which you have accepted responsibility, are that you and another went to the [location deleted] Superette on Friday, 16 September 2016 at around 6.30 pm. The superette was open

and was being operated by the owner operator and victim of the offending. The two of you entered the superette through the front door. Your co-offender was holding a pistol in his right hand and you were carrying a shopping bag. The victim, upon seeing the two of you enter, ran out the back of his shop into the storeroom. He was attempting to escape the two of you. Your co-offender chased him and caught him at the back door. He held him about the neck in a headlock position and pointed the pistol at his head. He was dragged back into the shop, where he was demanded to open the till. Fearing for his safety, he complied with the request and you then put forward the shopping bag that you had brought forward into the superette in order for cash to be placed in it. The till contained approximately \$300 cash in total. Your co-offender then demanded that the cigarette cabinet be opened, which the victim complied with, and cigarettes were also taken. The two of you fled from the supermarket towards Manukau Park.

[4] The victim of this offending has prepared a statement. He has owned the superette for 13 years. He has been robbed approximately 14 times during that period. Because of his level of earnings he cannot afford to pay anyone else to work the shop for him. He comes to work feeling scared and wondering if he is going to survive the day and make it home. He is more than aware that it only takes seconds for people such as yourself to come into the store and cross the counter to where he is working.

[5] You have a history for violence, as is reflected in your criminal history. Your last significant sentence was handed down on 28 January 2016. That included the charge of injuring with intent to cause grievous bodily harm, assault on a police officer and threatening to kill. It also included several charges of burglary.

[6] I note in your letter to the Court that you do not perceive yourself as being a violent person. However, your prior convictions and your admission of this present offending would suggest otherwise.

[7] The sentence you received at that time was a sentence imposed to give you an opportunity to examine why it was you were before the Court and try and provide you with some skills and assistance to make change. And while I note in the report the Department have prepared that you did undertake some of the programmes provided

to you, including some counselling sessions with drug and alcohol services and the Mauri Toa Rangatahi programme, you have re-offended shortly after the home detention sentence ended. This offending occurred while you were still completing your post-detention conditions and during the six-month come up to call upon period imposed for one breach of your home detention sentence.

[8] The report writer from the Department of Corrections, like myself, has noted your prior convictions, and the alarming number of prior convictions and short period of time of which the seriousness of your offending has increased. As a result, your risk assessment for potential harm to others is considered to be moderately high. While you have some prosocial supports around you, it is also clear that there are other influences in your life and that the prosocial support has not been consistent.

[9] You have readily acknowledged to the report writer your misuse of drugs and alcohol, as you have noted in your letter to me, and you acknowledge that you need to address those issues if you are to avoid re-offending in the future.

[10] While I accept what you have said in your letter to me that this offending does not show all aspects of your personality, these are the aspects of your personality that are most known to the members of public and if you want to be perceived in a different light to this offending it will be up to you to make real change and not re-appear before the Court again.

[11] To determine what the starting point should be for the aggravated robbery offence, I need to look at aspects of that offending. The first aspect is that the circumstances of this offending clearly demonstrate that there was an element of premeditation and determination. While I accept those factors were not particularly sophisticated, you and your co-offender went to the superette wearing items that were designed to conceal your identity. You were carrying a shopping bag to gather the stolen goods in and carry them away from the premises. And, a firearm was taken.

[12] In terms of the number of participants, as I have already noted there were two of you present. One effectively to confront the victim and make demands of him for the cash and then cigarettes and you yourself there to assist with carrying away the

stolen goods, and probably also to some extent to act as a lookout. I have already made mention of disguises and the other attempts you took to conceal your identity, but a further aggravating feature is of course the presence of the firearm. Your co-offender entered the store, as I have noted, carrying the pistol in his right hand. The mere presence of the pistol adds to the level of fear the victim would have felt, which would have been aggravated by the gun being pointed at his head while demands were being made of him.

[13] The premises that you have targeted are premises that have been regularly targeted, as are noted by the Court, in the past. Superettes or dairies operated by persons in suburban areas have been in the news significantly. They are vulnerable businesses, as is obvious here, owned and operated by their owners with usually only one person present.

[14] In terms of the violence and threatened violence, that in my view was significant. The pointing of the gun at the victim's head was significant threatened violence towards him. He no doubt feared for his life and whether he would make it home that night.

[15] The level of property stolen I accept was a moderate amount. There was the cash and the cigarettes. The total reparation that is being sought is \$1095.

[16] Finally, the impact of the offending on the victim I have already read out. This was yet another instance of this victim being unable to carry out his work feeling safe and added to his evergrowing fears of whether or not he will one day suffer serious injury, if not death, while trying to earn a living for himself and his family.

[17] On your behalf today, Mr Kan has attempted to distinguish between your level of culpability and that of your co-accused whose identity is not yet known. In my view, the roles that you played and the acts carried out are indistinguishable. The two of you are equally culpable. You went into a superette with your co-offender knowing he was carrying a gun. The purpose for the gun was to make demands upon the owner. It was not unforeseeable that the owner would naturally try and flee the premises upon

seeing your entry and it was therefore foreseeable in my view that he would be apprehended if he attempted to flee and demands made of him.

[18] Having regard to the factors that I have referred to, I consider that the appropriate starting point for this offending is one of five and a half years' imprisonment.

[19] You do of course have relevant prior convictions which require me to consider whether that starting point should be increased, having regard to the need to deter and denounce you. In addition, as I have noted, you were subject to the post-home detention conditions at the time and subject to a come up to call upon sentence. I consider that the amount of uplift will be kept as minimal. As I have already stated, this sentence will be required to be served by you in its entirety and you will not be entitled to parole. The uplift that will be imposed for those factors will be two months, bringing the nominal starting point to five years eight months' imprisonment.

[20] Mr Kan has requested that I consider credit be given to you for your youth. While I accept that you are young, you are only 20 years, you unfortunately have a list of already significant and serious prior offending. However, I accept that antisocial habits and criminal behaviour that you have are not easily turned around and do take time and you are still young and impressionable. You have not had strong prosocial influences on a consistent nature throughout your life and have lacked, to some extent, support in the home. A level of credit will be given for your youth. The amount of credit will be six months, reducing the sentence to five years two months' imprisonment.

[21] The final factor for which you are entitled to credit for is your guilty plea. A person gets credit for guilty pleas as it is a reflection of your remorse, which I accept, and also because there are savings to be had to the system by not having to prove these charges against you. The victim has not been required to come to Court to relive the events of that day. The Crown acknowledge that credit of up to 25 percent is available and I am prepared to give you the maximum entitlement for credit. The level of credit will be 15 months, reducing the end sentence on the most serious charge to three years 11 months' imprisonment.

[22] On the Crown charging notice of 15 November 2017 on charge 1, the charge of aggravated robbery, a sentence of three years 11 months' imprisonment.

[23] On charge 2 which is giving false details, which is a fineable only offence, a conviction and discharge.

[24] On the Department of Corrections charge of breach of home detention conditions, a concurrent sentence, which means at the same time, of six months' imprisonment.

[25] Your total sentence today will be three years 11 months' imprisonment.

J Jelas
District Court Judge