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

IN THE DISTRICT COURT
AT WANGANUI

CRI-2016-043-002059
[2018] NZDC 4056

NEW ZEALAND POLICE
Prosecutor

v

HENDRIX TANE WAITERE
AKA HINA TUTAKI
Defendant

Hearing:	2 March 2018
Appearances:	Sergeant D Morrison – for the Prosecutor S Burlace – for the Defendant
Judgment:	2 March 2018

NOTES OF JUDGE P P CRAYTON ON SENTENCING

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[1] Ms Tutaki, you face sentence today on a number of charges. You know the circumstances you find yourself in because you have been here enough times.

[2] The start of this matter was back in 2016 over a six month period. You befriended the victim who lives in Australia, although originally from this area. You convinced that victim to transfer money across to you to care for granddaughters, even providing what can only be described as a most distressing pretence, that one of the children had passed and money was required for a funeral. That allowed you to obtain $1100 from the victim. The victim became aware because this matter had publicity on a television current affairs programme.

[3] Over the period of 2012 to 2016 you had similarly had contact with your other victim through social media. You made a pretence of family and wider whanau. You used the pretence to convince that person of a tale which would give rise to guilt and family obligations to you. That victim believed your deception and you held out, in the most cruel way, a deceit that there could be contact with a hitherto unknown child.

[4] You delayed, you procrastinated, you manipulated and you obtained money during that time, for gifts for grandchildren, petrol, general living, and the victim believed that what he was doing was supporting his whānau. The final occasion you posed as his daughter, saying that one of the children was ill, a grandchild, and needed money and you advised that the child had died, and that there was a tangi and that the remains were to be returned to Hamilton.

[5] The victim travelled to Hamilton because he had been informed that he would not be welcome at the tangi. When he arrived in Hamilton, he was told that there was no such cremation. Over $8000 had been obtained by you as a consequence. Again, this came to light through some investigative journalism. You, when interviewed, admitted what had happened on that programme. You said you needed money and it was an easy way to get it and you estimated you had received about $16,000. You have then been admitted to bail. You entered your guilty pleas on 26 January and you get credit for that, back in 2017.

[6] You next came to the attention of the police as a result of an incident on 21 June 2017. You went to [address deleted] and you had been drinking. There was an argument. You threatened to punch the victim, your mother, in the face and threatened to burn the house down. The police, when they spoke to you, record that you agreed you had threatened your mother and that you had told them you owned the house, you could do what you wanted with it. What then occurred was that on 27 June you pleaded guilty and you were bailed.

[7] On 25 December 2017, you were driving in Wanganui. You were spoken to by police and subject to a breath test. Your reading was 1127. That is four and a half times the permitted level for driving. It is approaching three times the criminal level.

You were asked about your identity and you lied. You gave a false name. It was only after being fingerprinted that you admitted who you were.

[8] And so I consider your previous history. You have a very poor history for driving with excess breath alcohol; in 2012, on three occasions, each either close to or over 1000. You were sent to prison for a period of one year in November 2012. You had previously appeared in 2010 for the same and, throughout your history, it is punctuated by dishonesty, by deception, by behaviour that was deceitful and you have repeatedly gone to prison for the same.

[9] You were first subject to a prison sentence, or the direct alternative, for a raft of obtainings and forgery which occurred through 2007 through to 2009 when, in the New Plymouth District Court, you were sentenced on 15 October 2009 to eight months' home detention. You breached that sentence and you were sent to prison as a consequence. You obtained by deception repeatedly through 2010, 2011. The only matter that can be said to your credit is it is though six years since you appeared discretely before the Court for a matter of dishonesty but of course we know that through that time you were practising your deceit on your victim with the figment of your deceitful imagination, preying on that person, and what they believed was a familial connection with you.

[10] Regarding those charges, I have been referred by the submissions placed before me to a number of authorities. I have been referred to *R v Varjan*[1], which identifies the considerations that I should have when looking at a matter such as this and involving deceit or deceptive behaviour. There are certain factors which are important: the circumstances, the scale, the number of victims, the type of the victims, the motivation, the amounts involved, the period, the seriousness of the breach of trust and the impact on your victim.

[11] The victim impact statement obtained closer to the time of your apprehension and the discovery of this offending reflects the very significant emotional harm you have caused to your victim.

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[1] *R v Varjan* [2003] BCL 705.

[12] And so I look at the submissions of the prosecution, who have also referred me to *Blackmore v R*[2] and to *R v Jones*[3]. The prosecution make the submission that there was planning and premeditation, that it was repeated over a long period and there were two victims. The value is just over $9000.

[13] The prosecution submit that the starting point of two years six months to three years' imprisonment would be appropriate to reflect that offending and they submit an uplift for your previous history of six months would be appropriate. The end point for that offending would be 27 to 31 and a half months. They submit that a one month period for threatening behaviour would be appropriate and they refer me to *Clotworthy v Police*[4] and *Samson*[5] when I have to consider your excess breath alcohol and driving whilst disqualified offending. What that refers to is a previous Appellate Authority where the Court has considered the approach for someone who is a recidivist driver whilst disqualified and someone who drives with excess breath alcohol repeatedly.

[14] The prosecution submit that the drink-driving offending falls into a category where 12 to 18 months should be the starting point and there should be an uplift for the driving whilst disqualified of four months. That, after your plea has been credited, would take it to a cumulative sentence, they say, of 15 months.

[15] Ms Burlace urges me, on your behalf, to consider taking a more restrained approach to sentence. She identifies the case of *Calder;*[6] *Fannin*[7] and Clark and she submits that the dishonesty would merit an 18 month starting point with an uplift of six months for your previous history and an end point of 18 months after credit has been given for plea. She submits that the driving offences would merit a starting point of 14 months as a stand-alone offence and six months as an uplift, with three months for your previous history.

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[2] *Blackmore v R* [2014] NZCA 109.
[3] *Jones v Police* [2000] BCL 509.
[4] *Clotworthy v Police* [2003] 20 CRNZ 439.
[5] *Samson v Police* [2015] NZHC 748
[6] *Police v Calder* [2017] NZDC 4653
[7] *Fannin v Police* [2016] NZHC 168

[16] Ms Burlace urges the Court towards an end point that is then moderated for totality, to leave it as a short term of imprisonment, in other words to leave it at 24 months or less and she urges the Court towards the possibility of home detention.

[17] I say from the outset that on my assessment, even if this sentence got to 24 months, the report upon you, the address provided and your history identifies that you are not someone for whom the sentence could be commuted to home detention. Even if I were to get to 24 months, this sentence has to reflect offending which is so serious, either on an individual approach regarding the two sets of offending, or looked at together, that home detention would not be an appropriate response and would not meet the purposes and principles of sentencing.

[18] I have to, in this sentencing, impose a sentence which holds you accountable for the harm you have caused to your victims, to the community, by your offending. I have to engender in you an acknowledgement for that harm and I have to denounce the offending.

[19] The sentence must deter you and others from offending in a similar way. The sentence must be consistent with other sentences imposed on similar offenders in similar circumstances and the sentence imposed has to protect the community in general from you and your offending. Where possible, the outcome must be the least restrictive in all the circumstances. And so I look at this offending and consider, how do I meet those purposes and principles of sentencing?

[20] The offending reflected by the obtaining by deception, the using the photos and identity, over those two discrete courses of conduct, involving effectively three sets of victims, was extremely serious. There is no other way to describe it. It was offending which lasted, as regards the first victim in time, for four years. Its harm was significant and real. It was planned, it was practiced and it was carried through with ruthless selfishness and self-interest. You had regard only for yourself and what you could gain. The nature of the deception cannot be anything other than an aggravating factor. You led your victim to believe he had family and you preyed upon him. There is no other description for it.

[21] Your second victim, similarly, you preyed upon. You identified, through whatever means, vulnerability in each case and you left two people as victims of your offending. There is no question but that you are, both by this offending and your history, a practiced fraudster and that means that the sentence has to reflect, in your case, a significant element of deterrence.

[22] I agree with the identified range of starting point for sentence that the prosecution have placed before me. This is a deception, this is dishonesty, which has to be met with a stern response. The starting point I identify is one of three years' imprisonment. I uplift that for your history. There is an uplift of four months. That takes the starting point for sentence to three years and four months.

[23] I give you credit for your guilty plea. That is the only credit which is available. That takes the sentence back to one of 30 months, or two years and six months, on the dishonesty. I then consider the offending which you indulged in on bail. The threatening behaviour, whilst distressing and clearly a continuation of what can only be described as drunken and arrogant behaviour, pales alongside the drink-driving and driving whilst disqualified with your efforts at evading detection.

[24] I am assisted by *Samson* and *Clotworthy v Police.* Ms Burlace does her best, I think, in the circumstances to place as positive a picture as can be, when describing it as being a sentence which would merit 14 months as stand-alone offending. She is realistic in that, but that is the end-point for sentence which would be expected, because you fall very squarely to be described as someone who repeatedly drives when utterly incapable. I consider the *Clotworthy v Police* matters to assess your culpability. Your breath alcohol level was, as I have indicated, almost three times.

[25] It had been five years since you had previously appeared before the Court. That is not a long time and is just outside the mandatory penalties that would flow. You have endeavoured to evade responsibility by providing a false name and you were disqualified at the time. I do not double count but I look at it as a whole and, on my assessment, it falls within the 12 to 18 months' parameters and for the driving whilst disqualified third or subsequent, it plainly would merit a sentence with a starting point

to reflect both aspects in the range 20 to 24 months. You would get credit for your plea.

[26] If you were facing this sentence alone, the sentence I would impose, I anticipate, would be between 15 and 18 months. Totality comes into play only to this extent, that I have to consider whether to reflect your overall offending, even though it was on bail. A sentence therefore of approaching four years would be appropriate. Just, I am able to draw back from that. To reflect the offending on bail, my assessment is that for the excess breath alcohol a period of 12 months' imprisonment cumulative is appropriate and a six month concurrent sentence for the driving whilst disqualified and a one month concurrent for the threats. That would lead to an end-point of three years and six months. Ms Tutaki, that will be imposed as follows.

[27] On each of the deception charges, there will be a term of imprisonment of two years and six months. On the driving with excess breath alcohol, you will be disqualified from driving for one year and one day. You will be sentenced to 12 months' imprisonment. On the intent to frighten, one month imprisonment and on the driving whilst disqualified third or subsequent, you will be sentenced to six months.

[28] The excess breath alcohol sentence will be cumulative. There will be an order for reparation in the sum of $1100 to the second victim in time and in the sum of $4000 to your first victim. There will also be one year and one day disqualification on each of the driving matters. They will run from today.

P P Crayton
District Court Judge