

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2017-004-012469
[2018] NZDC 13820**

THE QUEEN

v

[ROBERT WATERS]

Hearing: 29 June 2018
Appearances: K Mills for the Crown
B Mayer for the Defendant
Judgment: 29 June 2018

NOTES OF JUDGE M A CROSBIE ON SENTENCING

[1] Good morning Mr [Waters], you are [in your mid-twenties] and you are appearing today for sentence on seven charges. They are: threatening to kill, which carries a maximum penalty of seven years' imprisonment; five charges of male assaults female, each of which carry a maximum penalty of two years' imprisonment; and one charge of breach of parole.

[2] Your sentencing today follows an earlier sentencing indication hearing that was held on 7 May 2018 and that was the day that your trial was due to start. I think on that occasion your family were present as well. I acknowledge that they are present today and I know that this will be a difficult day for them. Today also, however, is about the victim. I have to hand, a victim impact statement which I have received since the indication hearing. I also have a probation report and I have written submissions from your counsel, Mr Mayer and from Ms Mills for the Crown. I have taken into account all of those and I have taken into account all of the purposes and principles of the Sentencing Act 2002.

[3] The charge of threatening to kill, as I have said, carries a maximum seven years' imprisonment; then there is a male assaults female, the specific charge carries a maximum of two years which related to throwing a shoe at the victim. The four representative charges covered the conduct identified under headings, "Incident 2, 3, 4 and 5," and that is how I am going to refer to them in my sentencing today, as they were referred to in the summary of facts. The conduct described under those headings includes the full range of what we call domestic violence: spitting; strangling; dragging the victim by the hair; kicking and stomping on her while she was on the ground; pushing; shoving; and grabbing her.

[4] I have read the facts previously. They will be attached to my notes but I will refer to salient features as I progress through. The offending occurred over the course of five separate incidents spread [across seven months in] 2017 in what the Crown describes accurately as a turbulent domestic relationship between you and the victim. The indication process was not an easy one because there was so much offending and it is spread out over such a period of time.

[5] The purposes and principles of sentencing today are first to hold you to account and promote in you some responsibility. You have a lengthy criminal history including numerous convictions for violence that include violent offending against the same victim. So for that reason, I have to denounce your conduct. I note that you have female family members present and I hope that you have a large degree of respect for them. But what your criminal conduct evidences is a complete lack of respect for women in relationships. It evidences a violent disposition and one that clearly needs treatment. That is a key message from me to you today, Mr [Waters]. The Courts will react sternly to domestic violence, particularly where it repeats itself.

[6] Now, the current offending was committed while you were on parole for previous offences committed against the same victim. That means the previous sentences and parole conditions have done nothing to deter you. It also means that until treated and reformed, you present a risk to the safety of the community and the

community needs to be protected from you. That calls into focus, in my view, the prevention principle in *R v Ward*¹.

[7] You desperately need rehabilitative assistance to ensure that you do not harm others and appear before the Court again. That will be easier said than done. It is going to be my recommendation, given your age, that you be assessed by the Department of Corrections psychological services as soon as your sentence begins so that you can continue with the one-on-one psychological counselling that you have started. It will also be a matter for you to assess at some point whether you attend a violence prevention unit. There is only one of those but I think your offending has reached such a stage that that needs to be looked at carefully.

[8] I should say, Mr [Waters], that I have also read the several letters that have been sent to you by me and your family and one of the striking things about what those letters tell me is the other side of you; the side that they know; and the side that they love and back. One of them believes that you have set your mind to change the way that you react to controlling anger. No one shies from the fact that you have displayed anger but that you are learning and will learn traits to grow out of that angry behaviour.

[9] As is so often the case, your family stressed to me that you are kind; that you have a great spirit; that you get along with people; that you are good at making friends; and there is even a reference to being “cheeky”. Your grandmother writes, and you are lucky to have a grandmother who is still alive and supporting you, of how generous you are; how kind you are to her; and all the great things you do for her. She says that apart from some issues that you have had, which she refers to in that letter, that she believes that you will be all right and, like all the writers of the letters, she loves you very much.

[10] They are really warm and heartening comments to read, Mr [Waters], and I respect them. Those people are going to be around you during your prison sentence and when you are released but can I say this to you as a father, a son and a grandson? Perhaps you need to listen to them a little more. Perhaps you need to model yourself a little bit more on the good things that your family portrays to you and not be too

¹ *R v Ward* [1976] 1 NZLR 588.

good or too staunch to take their advice, because the decisions that you have made have got you into a really tough spot at the moment.

[11] The lead offence, Mr [Waters], is that one from [date deleted] and that is incident 3. I adopted a starting point of 18 months for that, having regard to the aggravating features of an attack to the throat which caused the victim's breathing to be restricted and the extent of the violence. The offending also occurred in the context of a domestic relationship where there was trust between you and her.

[12] As to the extent of the violence, the facts of that indicate that she had gone to your house and that there was an argument; that is that turbulent relationship that I am told about. She tried to leave but you told her she wasn't going anywhere. Once you were asleep, she attempted to leave. You woke and stopped her by grabbing her and pushing her onto the bed. You moved to lock the bedroom door. She tried to escape through the ranch slider in the bedroom. You tipped over the bed and mattress while trying to get to her before grabbing her by the throat. You put both hands around her throat and held her up against the wall, using both hands to apply pressure to her neck for a short period, during which she was unable to breathe. She began to panic due to that and, for a length of time, she was unable to breathe. You released her, at which point she again tried to escape from you, this time running through the kitchen. You caught up with her, grabbed her by the hair and then dragged her by the hair back down the hallway while you spat on her and continued a tirade of verbal abuse. When the complainant next escaped, she ran outside towards her car. You chased her and took her car keys.

[13] Another aspect of this, Mr [Waters], is the extent of the harm on the victim. As I have said, she has filed that victim impact statement. She had been in a relationship with you for around two years and she lived with you for a much shorter period of time, about [timeframe deleted]. She describes that the relationship was volatile with small arguments escalating. She has experienced bleeding from the face, bruising to neck, face, arms and legs and the dragging of the hair. Due to you stomping on her hips, she was unable to walk properly for a few weeks.

[14] In addition to the financial injuries, there have been some financial costs. In addition to those, there has been the emotional harm. She has been harmed in many ways. She has lost a lot of confidence she says. She is often scared of the repercussions she may face after this is over. She is still scared of you. She feels demoralised and worthless due to being spat on. She has found herself very anxious and flinches when someone tries to get close to her. She feared for her life when you strangled her. She is afraid to speak up honestly against you. She finds it difficult now to trust anyone or let them into any personal areas of her life. She still has fears around her life and freedom due to the threats. She has had to seek professional support due to the abuse from you. She now suffers from anxiety and will be on temporary medication. She is still terrified of you and clearly, Mr [Waters], it is going to take her a long time to get over this.

[15] Now, the sentencing indication was carried out at Mr Mayer's request at very short notice and as the trial was about to start, so there was not an opportunity to refer to authorities in detail, rather general principles were adopted. But I need to refer to a few of those now because we need to do things correctly.

[16] As the Crown has correctly submitted, I referred obliquely to a decision of Katz J in *Police v Kingi*² and did so on the basis of a sentence of nine months imposed for one punch only in a rather general and generic way. Both Ms Mills and Mr Mayer accept the more appropriate decision, also a decision of Katz J, is *Graham v Police*³, a 2014 New Zealand High Court decision, where Her Honour allowed an appeal against an end sentence of two years' imprisonment imposed for the offence of assault with intent to injure. That conviction arose from a single punch that the appellant delivered to the victim's face and caused her to lose four teeth and caused a large laceration to the lip. On appeal, Katz J adopted a lower starting point of 18 months and while the offence in that case carried a maximum penalty, three years, and caused greater injuries, loss of four teeth, the offending was of short duration.

² *Police v Kingi* [2013] NZHC 2020.

³ *Graham v Police* [2014] NZHC 2112.

[17] The Crown submits, and I accept, that could be contrasted with the present case where, in the course of the incident, you repeatedly did the things that I have referred to already. Having regard to the aggravating aspects of incident 3, not present in the facts of *Graham*, the Crown submits, Mr Mayer accepts and I accept, that a similar starting point to that adopted in *Graham* is appropriate. Katz J also had regard to *R v Nuku*⁴ which is the lead decision providing guidance for violent offences, although obviously the offences in *Nuku* carry a greater maximum penalty than the present case but the offending on any analysis is within band 3.

[18] The [incident 1 event] [in 2017]. During the sentencing indication process I took into account the totality principle. What I did was indicate a starting point that each offence might attract on its own before deducting with regard to overall culpability. I have to say that this sentencing is not straightforward. In many cases, we see a continuing course of violent conduct over a few hours or a few days. Here there was significant separation in time and the reality is very serious offending on separate occasions.

[19] In respect of incident 1, which gave rise to a single charge of threatening to kill, I adopted a starting point of six months' imprisonment. I adjusted that down to four months for totality. The decision cited by the Crown in *Police v Edmonds*⁵ supports such a term as being conservative. That decision is often referred to with respect to sentencing levels for the offence of threatening to kill. The Crown acknowledges that there were multiple threats in *Edmonds* and only one in the present case. The offending in the present case, however, had a clear impact on the victim. She was so afraid of the threats she did not attempt to leave the property. As in *Edmonds*, the offending occurred while he was subject to a sentence for offending against the same victim but which I address below regarding aggravating features personal to you. In the Crown submission, *Edmonds* supports the starting point of six months that I articulated.

⁴ *R v Nuku* [2004] BCL 1053 (CA).

⁵ *Edmonds* HC Napier AP 24-01, 29 June 2001.

[20] Then there is incident 2 in [date deleted]. That began when the victim tried to leave the property. You ran after her and pushed her back towards the property using two hands and with force. You pushed her against the wall and grabbed her arm. As the victim tried to free herself, you grabbed her by the hair and violently dragged her back up the stairs into the address. Once inside, the victim tried to run. You chased her; grabbed her by her hair and arm; and dragged her to the bedroom. You then stood over her, abusing her and spat in her face. I adopted a starting point of 15 months. Having regard to totality, I reduced that down to nine months' imprisonment. The assessment of the cases I have referred to already and the gratuitous, drawn out and repetitive conduct on this occasion justifies, in my assessment, such a term.

[21] Then we move to [date deleted]. Incident 4. I said on the day I first saw you, that this incident is almost as serious as incident 3. You stood over the victim with your fists clenched, caused her to believe you would assault her. On the previous occasions she would have known your capacity for that. You yelled at her, verbally abused her and spat in her face on more than one occasion. You then charged at her, pushing her down into the couch by her throat. You applied force and she was unable to breathe for a few seconds. When she rolled off the couch onto the floor, you stomped and kicked on her. You made contact with her nose, face and hip. When the victim crawled away, you picked up two shoes and threw them at her. One struck her in the back of the head and gave rise to the standalone offence of male assaults female. I adopted 15 months' imprisonment, reduced to nine months for totality, again by references to the cases and the facts. That is proportionate, if not perhaps conservative.

[22] I then turn to the incident 5, on [date deleted] 2017. She went to your address. There was another female there. That female left shortly after her arrival. Two of you began arguing and you began throwing property around while she was seated. She stood up, you put your hands around the back of her neck and turned her towards you. You put both hands around her neck and shoved her back into the wall. You applied pressure to her throat for five seconds, during which she could not breathe. You struck the victim with your open right hands across her face and nose. I consider the seriousness of the incident would attract a starting of between 15 to 18 months but reduce that to nine months' imprisonment to reflect totality.

[23] The above resulted in an end starting point of 49 months' imprisonment, just over four years. No issue is taken in respect of the individual assessments of starting points. Approaching this in another way, cumulatively, the starting points on each charge total five years nine months to six years' imprisonment. A downward adjustment for totality from that to just over four years is arguably more than proportionate and accounts also for other factors such as your age, remorse, the plea and a focus on a need for treatment.

[24] Then are aggravating and mitigating features relevant to you. You were on parole at the time. You have a significant criminal history. I adopt an uplift of four months' imprisonment in respect of both of those factors, leading to a sentence of four years and eight months' imprisonment. The Crown submits that the uplift is appropriate and comparable to the uplift imposed by Katz J in *Graham* for a serious history of violent offending, resulting in nine previous convictions together with the fact that *Graham* was subject to release conditions at the time.

[25] From that four years eight months, I was then prepared to grant what the Crown describes as the most generous possible discount for a guilty plea of 25 percent. I think the Crown's assessment is correct. It reflected a practical approach at the time of trial. It took into account the nature of the charges would undoubtedly lead to further stress and anxiety on the part of the victim. It would have been very hard for her to deal with and you have spared her that. You have also spared your family having to go through that and hear the facts of all of that.

[26] I noted the end sentence would be determined upon receipt of the probation report. There has not been an opportunity for restorative justice. As far as the probation report is concerned, it is not a bad one. You are showing some insight. You did not attempt to minimise your behaviour or shift blame. That is a good start. You had been in a relationship with her just over one year after you both met at [relationship details deleted].

[27] In hindsight, you said the relationship was toxic and dysfunctional. There was constant fighting and verbal abuse. You say that she was provocative; knew what buttons to push; and that she frequently blackmailed you when things went wrong by threatening to call the police.

[28] While I understand that there are two sides to every story, Mr [Waters], unfortunately I can only deal with you on the basis of the offences that you have pleaded guilty to. I acknowledge your sense of responsibility in that. I sense that your family were probably very concerned about the nature of the relationship and what that was doing to you, but the bottom line is you needed to have stepped back. You needed to have left it.

[29] Hopefully, what you are learning now with the counselling is how to deal with those relationships because this will be the hardest thing I have to say to you today. With the level of violence I have seen in there, unless you are treated, you have the capacity to kill someone. You need to be treated. You need to do something about that. As soon as we are getting into offending that involves the throat, as soon as we are getting into offending that involves hits to the head, then it is only luck that the person survives that.

[30] You are assessed as high risk of re-offending due to the nature of your offending and high risk of harm to others. You will see the Parole Board, they will be responsible for release conditions and also any residential programme that you may have to offer. I will come to that in a moment.

[31] I arrived at an end sentence of three to three and a half years' imprisonment. So, four years and eight months equals 56, less 25 percent is 14 months, which comes down to 42 months' imprisonment which is the higher end of the range that I have mentioned. The Crown seeks a protection order under s 123B and that is not opposed. It is appropriate to impose that because it is serious domestic violence and there is no protection order currently in force. Given your history, she needs that protection.

[32] The final words from me to you, Mr [Waters]. One of the privileges that I have when I am not sitting as a Judge is to sit as a member of the New Zealand Parole Board. I have done that for as long as I have been a Judge. I have also seen many young men go to prison who fight the system. I have seen other young men who embrace the treatment that is offered. The treatment is hard to get. If it is offered, take it.

[33] Do not incur any misconducts. Do not incur any IDU's and be frank and open with the people who are assessing you. Do not get sucked into the mentality of others who want to drag you down. There will be people there who, for their own reasons, will want you to serve your own term. That is something you will need to resist and something that you will need to protect yourself against. I know these things to be true.

[34] So, keep up the contact with the positive people in your life. Do not get drawn down by the negatives. Take that treatment and then hopefully you will come out. You have a very long life ahead of you and that can be a positive and offence-free life.

[35] I believe, Mr [Waters], that the discounts that I have provided to you overall are generous and the sentence I am going to impose will be at the top of that end of the range; it will be three years and six months' imprisonment. However, you do see the Parole Board at one third. How long you serve is a matter for you and whether the end sentence is three years or three years six months, it is actually that first third and what you do subsequently that is very important.

[36] I am going to impose the sentence in the following way because of the difficulty of sentencing on matters like this, I hope I have my maths right and it is logical but I am looking at the total overall conduct. I am going to impose 15 months' imprisonment on the threatening to kill, then I am going to impose six months' imprisonment on each of the representative charges of male assaults female. They will all be cumulative with each other. I am going to impose three months on the final male assaults female. I will not be imposing any sentence on the breach of parole, on that you will be convicted and discharged.

[37] So that comes out to a total sentence of three and a half years' imprisonment. I wish you well with that sentence Mr [Waters]. Thank you counsel for your assistance. I make the final protection order.

[38] Please stand down.

M A Crosbie
District Court Judge