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

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IN THE DISTRICT COURT
AT ROTORUA

I TE KŌTI-Ā-ROHE
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE

CRI-2021-063-002880
CRI-2022-063-000500
[2022] NZDC 3341

THE QUEEN

v

NGATIRANGI TUKIWAHO

Hearing:	25 February 2022
Appearances:	S Smith for the Crown M Dorset for the Defendant (via VMR)
Judgment:	25 February 2022

NOTES OF JUDGE M A MacKENZIE ON SENTENCING

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[1] Mr Ngatirangi Tukiwaho, you appear for sentence today in relation to three sets of unrelated proceedings. The first set of charges is a charge of assault with a weapon. That incident happened on 17 March 2021. Then there is a second unconnected incident which involved you seriously assaulting your [young child]. This happened in September 2021 when you were on bail. Arising from that incident, you have pleaded guilty to charges of injuring with intent to cause grievous bodily harm, threatening to kill and escaping custody. The third set of proceedings are

Correction's charges. You have previously pleaded guilty to two charges. Those charges are breach of the intensive supervision sentence and breach of community work.

[2] I start with the March 2021 incident which gives rise to the assault with a weapon charge. On 17 March 2021, you and your whānau members were accosted by three intruders at your home. One of the intruders, a Saxon Liddington, used to live at the house and had taken the view that people living at your house had wrongly retained some of your shoes and devised a plan for someone to drive him to Tūrangi so he could assault and rob his former housemates.

[3] At about 5.00 pm on 17 March 2021, the three intruders came to your home address in Tūrangi. They were armed with steel pipes and wearing bandanas to hide their appearance. They came into your home through the rear door and into the lounge. They located someone lying on the couch. This was [person A]. Without hesitation, the three males seriously assaulted [person A] with steel pipes, hitting him several times to the head, body and legs causing significant injuries. You and your father heard [person A] screaming out and went to the lounge area to investigate the commotion. You and your father located and confronted Saxon Liddington and Randyl Painter in the lounge area. The three aggressors ran from the address and then approached your father in the laundry area and hit him with the steel pipes. He managed to disarm Mr Liddington and Mr Painter who then fled across the road into Crescent Reserve.

[4] You and your father armed yourselves with the steel pipes that were left behind and then gave chase into the reserve. You caught the victim who had stumbled into some bushes along the reserve. You used the steel pipes to hit the victim multiple times to the head, face and arms. Whilst beating him, you forced him to hand over his personal belongings which included the shoes he was wearing and the black Adidas backpack. You threw the contents of his bag into the bushes nearby. You forced him back to the address where he was later spoken to by police.

[5] The victim sustained a number of injuries both as a result of this incident and the earlier assault of [person A]. He sustained a broken wrist, significant bruising to

his left arm, several cuts to his head and bruising and grazes to his arm and shin. He required medical attention.

[6] The Crown acknowledge that they cannot prove whether each injury sustained by Mr Heemi was a result of your conduct or the earlier incident in the home. This is an appropriate concession made by the Crown at paragraph 9 of their written submissions. As the Crown notes also in their submissions, the three intruders have been charged with assault with intent to rob. They have pleaded guilty but not yet been sentenced. The Crown are submitting that a stern starting point should be taken for that offending against [person A].

[7] In terms of the assault with a weapon charge, there is no tariff case for this offending. The Court of Appeal in *Hurinui v R*[1] have said that *Nuku v R*[2] provides broad guidance for assault with a weapon. The Crown submits that the assault with a weapon falls within band 2, but given that it did involve excessive self-defence, it could not be at the top of that band. As noted, the Crown concede that Mr Heemi's injuries cannot be safely attributed to the assault as opposed to the earlier offending. As such, the Crown submitted in the written submissions that a starting point of in the vicinity of 18 months imprisonment is appropriate for the assault with a weapon. In her written submissions, Ms Dorset, your counsel, submits that a starting point of 12 months imprisonment is appropriate.

[8] In terms of the aggravating factors, they are as follows:

(a) There was actual violence inflicted.

(b) Though while use of a weapon is part and parcel of the offence, the type of weapon is relevant. It was a metal pole with the ability to cause serious harm.

(c) There were attacks to the head.

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1 *Hurinui v R* [2014] NZCA 290.
2 *Nuku v R* [2012] NZCA 584.

(d) The incident did involve two attackers.

[9] In the written submissions provided by both the Crown and the defence, neither have referred to any cases which might assist the Court in selecting the appropriate sentence starting point. I have had regard to *Hurinui* where the starting point was 18 months imprisonment. In *Hurinui* there was a confrontation between people at two neighbouring addresses. A fight broke out between several people and Mr Hurinui hit the victim to the head with a baseball bat which resulted in a significant injury with 15 stitches. The starting point of 18 months imprisonment was upheld on the basis that it was appropriate due to the use of a heavy weapon, attacks directed to the head and the fact that it resulted in a serious injury.

[10] I consider that but for the issue of excessive self-defence, I would have adopted a starting point of at least 18 months imprisonment, potentially more, having regard to the aggravating features I have referred and after taking into account *Hurinui* as a crosscheck. But given that there is excessive self-defence involved here, I consider that a starting point of 18 months imprisonment is too high. Therefore, I adopt a provisional sentence starting point for the assault with a weapon charge of 12 months imprisonment.

[11] I turn to the second incident which involves primarily the violence towards your [child]. In terms of the facts, at the time of the incident on 28 September 2021, you were the sole caregiver of your [your child]. [Your child] was aged [under five] years old at the time. [Your other child] was also present. [Your other child] is aged [under five] years old. You and the children were living with your mother at the time.

[12] This incident happened on 28 September 2021. When I say this incident, it related to the serious violence you inflicted on [your child]. You were at home with the children. You left the home at about 10 o'clock to walk to the address of another whānau member. You became angry with [your child] for going to the toilet on the floor at the house. You yelled and swore at [your child], calling him a "fuckin little cunt" for toileting on the ground. You texted your mother saying, "Can you come and get your moko before I fuck him up," but that is exactly what you did. You physically assaulted [your child] in front of [your other child]. The assault was, as described by

the Crown, unprovoked, cruel and gratuitous. You physically slapped and struck [your child] to the head multiple times. You struck him about the face, his temple and both of his ears. You grabbed and twisted [your child]'s ears. You twisted and at the same time digging your fingernails in so deeply that it caused a laceration to the back of his ear. At some point during the assault, you rammed [your child]'s head into the kitchen sink which had a cloth hanging over the edge. You stomped on [your child]'s right buttock with enough force to cause the imprint of your shoe to be clear in the bruising that appeared shortly after the attack. The impact of you stomping on [your child] caused deep bruising also to the other side of [your child]'s body.

[13] After the assault, you put [your child] in the toilet where he was found by family members who had returned home. That was a cruel action on your part because you did not go and seek medical help for [your child]. You called your sister to come and collect [your child]. During the call, you continued to swear and yell at [your child], calling him a "fuckin little cunt". Your sister and partner arrived to collect [your child] at your request. While putting [your child] in the vehicle, he was crying and you slapped him hard on the top of his bare legs while shouting at him to stop crying and "shut the fuck up". Your sister took the children home and after seeing the state of [your child], contacted your mother expressing concern about the injuries that were evident on [your child]. Police became involved. That is very much to the credit of your whānau who did not try to cover it up.

[14] Police located you at home. You refused to come to the door and present yourself though you eventually did. You were told you were under arrest for the assault on [your child]. You acknowledged you were under arrest but you ran from the arrest and constable on foot. You were not able to be located. Whilst you were on the run from the police, police conducted numerous inquiries to locate you. Two days later, you presented yourself at the Taupō Police Station when you were arrested.

[15] While you were evading police over that two day period, you sent a number of text messages to [your mother], saying you were going to kill her for involving the police.

[16] As a result of your assault on [your child], he suffered a number of injuries. These included significant bruising to both his left and right cheeks, including multiple abrasions to both sides. There were abrasions to the skin of his left eye and a burst blood vessel to this eye. There were a pattern of abrasions across the top of his forehead. [Your child] sustained significant bruising and a graze to both his ears and a laceration to the back of his right ear. He suffered a deep bruise to the left side of his torso, approximately two inches in size. A large area of bruising to his right buttock was evident which was so forceful it resulted in bruising in the pattern of the sole of the shoe you used.

[17] In explanation, you made some admissions, refusing to state how you caused the injuries but admitting that they were caused by you.

[18] You have previously appeared before the court. In January 2021, you were sentenced to supervision, community detention and community work for an assault on [your partner]. You were convicted and sentenced for a charge of strangulation.

[19] In relation to the second unconnected incident, the lead charge is injuring with intent to cause grievous bodily harm. *R v Taueki*[3] is the applicable guideline judgment but I do need to take into account that *Taueki* itself addresses offending involving a 14-year maximum penalty. The charge currently before the Court as a 10-year maximum term of imprisonment.

[20] In the written submissions, the prosecutor addressed the aggravating features of that incident. Ms Smith today draws my attention to s 9A of the Sentencing Act 2002 which I must take into account given [your child]'s age. Ms Smith submits that I must have regard to [your child]'s very young age and consequent vulnerability, as well as the fact that this offending involved a significant breach of trust.

[21] I consider that the following aggravating features are present:

(a) This offending involved a gross breach of trust. It is difficult to imagine a more serious breach of trust. You are [your child]'s biological father.

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[3] *R v Taueki* [2005] 3 NZLR 372.

You are supposed to love, nurture and take care of him rather than physically abusing him.

(b) I consider that [your child] was a vulnerable and defenceless victim. That is because he is a child, but more importantly, he was aged [under five] years old. He was entirely unable to do anything to protect himself.

(c) I agree with the Crown submission that this was an unprovoked, cruel and gratuitous attack. It was a completely over the top response to the fact that your child, [an under five]-year-old, had gone to the toilet on the floor. You used your [child] as a punching bag.

(d) I consider that the fact that the incident involved an attack to the head to be an aggravating feature.

(e) While the injuries are not long-lasting, in the context of [your child]'s age, I consider that nevertheless they were serious.

[22] In terms of where this fits within the *Taueki* bands as adjusted, the Crown submission is that this is offending which falls within the bottom of band 2. I accept that this was impulsive offending, but the gross breach of trust and [your child]'s extreme vulnerability mean that I do consider that it falls within band 2. In some respects, it does not fall squarely either within band 1 or band 2 of *Taueki*. Whilst I must take into account the aggravating features set out in s 9A of the Sentencing Act, those features also are referred to in *Taueki* itself as aggravating features. *Taueki* itself says that vulnerability is a factor to be taken into account. An example of vulnerability is where the victim is a child. *Taueki* itself also refers, when considering vulnerability, a breach of trust is involved when the offender has the care of children.

[23] Again, neither the Crown nor the defence have referred the Court to any cases as a crosscheck for where the starting point might sit. The Crown's position is that a starting point of four to four and a half years imprisonment is appropriate, taking into account the aggravating features but acknowledging that grievous bodily harm has not

been the result. On your behalf, Ms Dorset submits that a sentence starting point in the vicinity of three to three and a half years would be appropriate for the assault on your son.

[24] Ms Dorset's submission at paragraph 7.4 of her written submissions is based on the extreme vulnerability of [your child] and taking into account the need to adjust the *Taueki* bands. I do not understand Ms Dorset to disagree that this is the bottom of band 2.

[25] I have not been able to locate any comparable cases involving children, but I have located a Court of Appeal case *McGlaughlin v R*.[4] In that case, the victim had been staying at Mr McGlaughlin's home. She was asleep in bed. The defendant came into the bedroom, pulled her out of bed by her hair and took her out into the hallway where he repeatedly punched and kicked her head and upper body. During the assault she lost control of her bladder. She received a number of bruises on her forehead and some other injuries. The starting point upheld by the Court of Appeal was two years and nine months imprisonment which the Court of Appeal observed at paragraph [55] as being a low starting point. Of course, that case is markedly different from the current case but involves the same offence and injuries that, while were concerning, were not ultimately life-threatening. The starting point in that case would indicate that a starting point of three years imprisonment is simply too low.

[26] When taking into account aggravating features, it is not a matter of simply identifying aggravating features and counting them up, as was noted in *Orchard v R*.[5] It is a matter of judges making an evaluative assessment of the seriousness of any particular aggravating features. I consider here that there are three features which I consider to be seriously aggravating. They are the gross breach of trust, the vulnerability and defencelessness of [your child] and finally, that it was an unprovoked gratuitous attack on someone who had no chance at all.

[27] On that basis, I adopt a provisional sentence starting point for the injuring with intent to cause grievous bodily harm charge of four years imprisonment. I do not think

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4 *McGlaughlin v R* [2014] NZCA 547.
5 *Orchard v R* [2019] NZCA 529.

the starting point is as high as four and a half years, but nor do I think it is as low as three to three and half years imprisonment given those aggravating features that I have detailed and given the seriousness of the three features I identify as being seriously aggravating. The two features which particularly trouble the court are the breach of trust and [your child]'s vulnerability.

[28] In terms of the balance of the offending relating to the September 2021 incident, I do consider that there needs to be an increase in the sentence to reflect that offending. In terms of the threatening to kill, while I accept that Mr Tukiwaho was not in a position to carry out that threat, it was made in the context of him threatening his mother about the fact that he was going to kill her because she had involved the police, which of course was the appropriate thing for her to have done in the first place. It was clearly designed to intimidate her and potentially to step back from pressing for the police to be involved in this matter.

[29] In relation to the escaping custody, I consider that this does need to attract an increase as well. That is because you were on the run for two days, you were actually on bail at the time that this incident occurred and the fact that you handed yourself in does not lessen the seriousness of the fact that you decided to go on the run and evade police. The police made concerted efforts to locate you during the two days that you were on the run and taking into account the threat to kill your mother and the fact that you escaped custody, I consider that the sentence does need to be increased by a reasonably modest amount to take those factors into account. I increase the sentence by six months to take the threat to your mother and the escaping custody into account.

[30] In terms of your mother, that again involved a breach of trust and the available inference is that you not only were angry with her but were somehow threatening her for involving the police which in my view elevates the seriousness of that particular threat. So, the provisional sentence starting point for the assault on [your child] and the other two charges is four and a half years imprisonment.

[31] In terms of the Correction's charges, a concurrent sentencing approach is appropriate in the circumstances, bearing in mind totality. Those charges involve you being non-compliant with those sentences. Of concern is the fact that you were

non-compliant with the supervision sentence because that was a sentence designed to assist you and clearly you needed some assistance with respect to your thinking about violence.

[32] Adding those two sentences together would result in a provisional sentence of five and a half years imprisonment. I agree with the Crown submission that a cumulative approach is warranted because the two sets of offending in March and September 2021 are unrelated. The totality principle applies. However, I must stand back and determine whether a totality adjustment is required to ensure that the sentence is not out of all proportion to the overall gravity of the offending.

[33] Ms Smith, for the Crown, acknowledges that a totality adjustment of somewhere between six to eight months imprisonment may be appropriate. I adjust the sentence downwards for totality by six months. So that would mean a provisional sentence starting point of five years imprisonment for all the offending. That addresses the first step of the sentencing exercise.

[34] I turn to the second step of the sentencing exercise which is to decide whether and how to adjust the sentence in relation to the guilty plea credit in combination with personal factors, whether those personal factors are aggravating or mitigating.

[35] In terms of the guilty plea credit, there is no dispute that Mr Tukiwaho, you are entitled to the full 25 per cent for your guilty plea. It was entered at an early opportunity.

[36] In terms of personal factors, while you do have the strangulation conviction, the sentence does not need to be increased to take that into account. To do so would be to double-count because you received a relatively modest community-based sentence for that incident.

[37] In terms of personal factors which might reduce the sentence, Ms Dorset submits both in her written submissions and her oral submissions that there are a number of factors that the Court should take into account. I will deal with them in turn.

[38] Firstly, there is your age. You are 23 years old. In that regard then, you are not young and I do not consider that any discount is available for youth. Youth discounts are available for young people, but I do not consider that you could be characterised as young so as to attract a sentencing credit. Sentencing credits for youth are typically given when someone is aged under 20 years. There have been cases where there are discounts for youth for a person aged over 20 years, but at age 23 years, I consider that your age is outside the parameters where a credit for youth is available to you.

[39] In terms of other factors, Ms Dorset submits that other factors include remorse and the matters which are set out in the cultural report. In her written submissions, Ms Dorset submits that there could be credits for remorse and capacity for rehabilitation and also the factors in the cultural report.

[40] The Crown take a different view to personal factors and submit that there should not be any discount for remorse because you show no insight and that whilst there are some features of the s 27 report which mean that you had some difficulties in your upbringing, such as growing up in an unstable household, that there is some doubt about a causal nexus between your upbringing in this offending in the round. In that regard, Ms Smith points the court to some comments in the s 27 report in terms of whether in fact you did suffer any physical abuse at the hands of your father. On the other hand, Ms Dorset submits that you are remorseful and that there is a clear nexus between your upbringing and your offending so that a discount in line with say *Waikato-Tuhega v R*[6] should be granted.

[41] In terms of the issue of remorse, it is a matter of fact and degree. It need not be exceptional but it needs to actually be experienced. It is difficult to assess remorse because there is not much information to consider. The pre-sentence report is rather negative and while I accept that you pleaded guilty at the earliest opportunity, it is not entirely clear from the s 27 report as to whether you are in fact remorseful or whether you actually acknowledge that there are issues which require rehabilitation. Why I say that is that you step back from acknowledging that you have an anger issue. You

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6 *Waikato-Tuhega v R* [2021] NZCA 503.

have never attended an anger management course. You know you were supposed to but it never happened, and what the report writer notes at page 11 is at odds with your actions and the nature of your offending. You assess your anger problems as low. You said, "I did have some anger problems, but it wasn't that bad … out of 10, I reckon I was about a three." In my view, that does demonstrate what the Crown describes as a lack of insight.

[42] The closest expression of remorse in the s 27 report is when it is noted at paragraph 6.3 that you have regrets for the things that you have done. In my view, that is not sufficient to warrant a credit for remorse over and above what is part and parcel of the guilty plea credit.

[43] In terms of the s 27 report, it does indicate that you had a far from optimum upbringing. An interesting issue is that you say you have been told by family members that you were beaten by both your mother and father but you did not recall any specific incidents of your mother's abusive behaviour. Also you say at page 10 that you do not recall much about being beaten by your father. You say you were pretty young but some of the whanau have told you that: "Farrk, when I saw your mum and dad smack you it was like, 'whoa' …," and also that despite the violence, you felt like your father loved you. It is difficult to know whether you have actually any experience of being physically assaulted by your parents or whether this is something that others have reported. Clearly though, you were exposed to your father's violent behaviour towards your mother. You left the care of your parents and went to live with your grandparents at age 11 which does in fact seem to have been a reasonably positive experience, apart from difficulties in integrating at school. Refreshingly, you acknowledge that you do not have any particular issues with drugs or substances.

[44] It is difficult to clearly assess whether there is actually a causal nexus between your upbringing and your violence, particularly your violence towards [your child]. I can say that you were exposed to violence. It is difficult to properly assess your prospects of rehabilitation, particularly given that there is not much insight on your part in terms of whether in fact you have a problem with anger. Hopefully, you start to understand that you do have a problem with anger and it is a big problem with anger.

[45] In terms of rehabilitation, also relevant is your poor response to the supervision sentence. The pre-sentence report says in effect that you were not really all that motivated or interested in rehabilitation and raised issues about your obligations to the children for reasons not to undertake the rehabilitation.

[46] I, in this case, do not think that 15 per cent is available to you in terms of the s 27 report factors as Ms Dorset has submitted. At most, I consider that there could be a reduction of in the vicinity of 10 per cent to reflect the factors in the s 27 report because I do acknowledge that there are difficulties in your upbringing. You were clearly exposed to violence, but the nexus is a little uncertain but clearly I accept that there was normalisation of violence if you saw or were exposed to your father beating up your mother.

[47] I do not think that there are any other adjustments available for matters of a personal mitigation for the reasons I have outlined. I am not sure what the prospects of rehabilitation are or how motivated you are and I do not think that remorse is evident to the point where it is tangible and a discount should be granted.

[48] So, therefore, the credits for the guilty plea and personal factors amount to 35 per cent.

[49] So, the sentence structure is therefore a starting point of five years imprisonment as adjusted for totality for all the offending. There is no increase, as I have said, for your previous history. The sentence is reduced by 35 per cent or 21 months to take into account the guilty plea credit and those personal factors. That results in an end sentence of 39 months imprisonment which is three years and three months imprisonment.

[50] I impose the sentence in the following way:

(a) In respect of CRN ending 1709, which is the charge of injuring with intent to cause grievous bodily harm, I will record a sentence of two years and three months imprisonment.

(b) In relation to the charge of escaping custody, CRN ending 1708, I record a sentence of three months imprisonment, which is concurrent, which means at the same time.

(c) In relation to the threat to kill your mother, which is CRN ending 1710, I also impose a concurrent sentence of three months imprisonment.

(d) Then in relation to assault with a weapon, there is a cumulative term of 12 months imprisonment. It is cumulative on CRN ending 1709, the injuring charge. So that takes the sentence to the three years and three months imprisonment.

(e) In relation to the Correction's matters, on each of those charges, I impose a concurrent sentence of one month's imprisonment.

[51] Mr Tukiwaho, the sentence is three years and three months imprisonment, so your release conditions will be set by the New Zealand Parole Board.

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Judge MA MacKenzie
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 14/03/2022