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

IN THE DISTRICT COURT
AT NAPIER

I TE KŌTI-Ā-ROHE
KI AHURIRI

CRI-2022-009-006013
[2023] NZDC 4254

THE KING

v

HENDRIX JURY

Hearing: 8 March 2023

Appearances: C Stuart for the Crown
N Graham for the Defendant

Judgment: 8 March 2023

NOTES OF JUDGE R J COLLINS ON SENTENCING

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[1] Mr Jury, stay seated. This is going to take a little while. And it is right that it will take some time. I acknowledge it is not going to be an easy time for you to sit and listen. But it is your life that we are dealing with now, and it is your future, and you know that you are going to get a sentence of imprisonment and that is a serious matter. I am going to do my best to explain to you this sentence and why I have come to the decisions that I have.

[2] You are the most important person that gets to understand what I have decided and why. You can then review that with Ms Graham and she will explain to you the options that you have and she might be able to explain a little bit better than I do.

[3] You know you are for sentence on a charge of with intent to cause grievous bodily harm wounding your victim, and that is the shooting matter in Christchurch, and then there are the two charges, one of injuring with intent to injure, that was the second of the prison assaults and the first of those is a charge of assault with intent to injure. The difference there being the assault with intent to injure has a maximum sentence of three years' imprisonment. The injuring charge has a maximum charge of five years' imprisonment.

[4] Now, I have to record the facts on which you are sentenced. I am not doing that to shame you. But that needs to be recorded. It is the basis on which you are sentenced. I will deal with the prison matters first.

[5] You and the co-defendants and the victim, the summary tells me, in February 2022 were sentenced prisoners at Christchurch Men's Prison. The summary says that all of the relevant participants, that is all defendants and the victim, were members of the Mongrel Mob. On Thursday 10 February 2022 at 3.25 pm the victim was in the exercise yard of the Matai Unit with a number of other prisoners. The victim and one of your co-defendants had engaged in an embrace before walking up and down the yard and a short time later, but it was still quite some minutes, the co-defendant engaged in what is said in the summary, a fist fight. Well that is one way of describing it I suppose. Another way of describing it is the co-defendant just launched an attack and knocked the victim to the ground. You and another immediately joined the violence. It says: "Joined the fight." Again, I would not describe it as a fight. "The victim was overpowered and he was backed up against a wall." Someone actually got up and covered up the camera at that point but the camera on the other end and the footage we did get for a time from the closer camera did provide a pretty clear view of what happened. The summary says that: "The defendants," that is plural: "Kicked and punched the victim repeatedly over his head and body for a period of 40 seconds." It says that: "This stopped when prison officers arrived to attend to the victim."

[6] You were fully involved Mr Jury in that attack. You immediately joined in. At one point another prisoner presented his body between you and the victim to shield the victim and you were certainly doing your best to throw blows at his head.

[7] The more serious incident occurred on 27 February, again the same people involved. This went on much longer and the violence much greater. And for quite some minutes the victim was left lying after having been really incapacitated. Whether he had been knocked out I am not sure but he was in bad shape. Yes, others were involved but some of them were trying to stop the violence. You certainly kicked the victim when he was on the ground. That was with quite some force. You kicked him, the summary says: "Several times," before a co-defendant kicked him in the face.

[8] So of a charge of injuring with intent to injure in my view that is clearly category 3 in Band 3 in *Nuku v R* because of the level of violence, the prolonged attack, the victim being outnumbered, he was vulnerable once he was on the ground, and the assaults continued.[1] So that is serious offending and while no doubt he was not keen to make any sort of complaint, he suffered bleeding from his head and mouth, facial contusions, minor facial lacerations and he had pain in both sides of his jaw and cheeks, and anyone that watches the footage will not be surprised that he had those injuries at the very least.

[9] For reasons which no one has explained to me, and given the authorities had that footage, for some inexplicable reason you were not charged for some months with those matters. One charging document was, well they were both filed in the Christchurch District Court on 7 October 2022. That was some weeks after a warrant had been issued for your arrest on the next matter which I now come to.

[10] The summary in that regard says that you and the victim were not known to each other. It says that on Tuesday 30 August at 11 am the victim was at an address in [street 1] in Linwood. The address is known as what is described as a synnie house which sells synthetic cannabis to users through an obscured window at the address. Shortly after 11 am, I think really about 11.09 am you arrived outside the address in a Toyota Crown motor vehicle. You got out of the car carrying a firearm. You walked down the eastern side of the address to the rear of the property. You went to the window where the synthetic cannabis sales occurred and you knocked to initiate a sale. You put a firearm through the window and discharged the firearm at the victim who

[1] *Nuku v R* [2013] 2 NZLR 39.

was walking to the window. The projectile penetrated the victim's right upper thigh, passing right through before completely passing through his upper left thigh. You ran from the property and entered the vehicle before driving off.

[11] The victim made his way to a small park on the corner of Hereford [street 1] and [another street] before emergency services were called. The summary records that as a result of the incident the victim suffered significant trauma to both upper thighs. He has filed a victim impact statement which I intend to read part.

[12] He said:

> My injury as a result of the gunshot has had a significant effect on all aspects of my life. I struggle to go out in fear for my safety and wellbeing. I am scared all the time and struggle with trusting people, thinking I am going to be hurt from them. I do not sleep well as I have flashbacks frequently to this day. The bullet went right through my left thigh and lodged in my right thigh. I had to spend two days in hospital recovering. I had no choice but to leave early as I live alone, to look after my dog. There are fragments of the bullet remaining in my thigh that cannot be safely removed. Because of this I have pain from my injury 24/7. It is not easy sitting for any length of time. I have nerve damage in my leg. I cannot walk long distances without rest and I have to take medication which includes Tramadol and Panadol daily to try and get some pain relief. My mental health has suffered in many ways as well. I have depression and have been prescribed medication for this. I have had thoughts that I wish he had made a better job at shooting me and I did not survive my injuries. My confidence along with my physical wellbeing has completely shattered to the extent that I can no longer do the activities I enjoy like swimming at the beach, running with my dog and other physical activities because of the pain and people staring at me and my scars.

[13] Mr Jury, you have got a number of previous convictions. The sentence today is not going to be uplifted for any of those matters. You have been sentenced for those in the past and there is going to be no element today of being punished a second time for those matters.

[14] You have heard quite a discussion. You have sat patiently and courteously. Ms Graham tells me from the bar that you are polite and respectful in all your dealings with her. Dr Gilbert says that you were polite and engaging and cooperative in dealing with him. That just does not add up with what we know you did on all these occasions. But it does give some hope for you. Because really in terms of the future it is your position that is all important today. You are still a relatively young man. Unless things

are turned around yours will be a whole life spent in custody and no one wishes that for anyone.

[15] I have read the submissions of all the lawyers involved. I have read the pre-sentence report. I have read Dr Gilbert's report and counsel and Mr Stuart have provided a number of cases and I am not going to go through those because we cannot fairly expect them to particularly mean anything to you.

[16] But why we have regard to the other cases is to get consistency as far as we possibly can. And the Supreme Court has had quite a bit to say about that recently in what will become a famous case that will go by the name of *Berkland v R*.[2]

[17] In terms of the starting point Mr Jury, you need to know that, for say exactly the same offending or very similar offending that might happen in Invercargill or Auckland or New Plymouth, the same starting point would be taken regardless who pulled the trigger or who punched and kicked. So you are being dealt with fairly and in the same way as anybody else. Then after setting that starting point I get to take into account matters which are personal to you which either increase that starting point or decrease that starting point.

[18] There is nothing about you today which is going to increase the starting point. It is a matter of where that starting point gets reduced. I am not going to name all the cases that counsel have referred to with one exception. The Crown says that for the shooting charge the starting point should be one of nine years and supports the argument that they make in that by the cases that they refer to. Ms Graham says it should be no more than eight.

[19] The Crown says that then that nine years should be uplifted by two and a half years for the violence on the two occasions in prison which gets to an adjusted starting point of 11 and a half years. And Ms Graham says, well, it should be no more than two and that she says the top available adjusted starting point to be one of 10 years.

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[2] *Berkland v R* [2022] NZSC 143.

[20] In the case of *R v Amohanga* the court there took a starting point of 10 years.[3] I see that there is little difference between that case and your case. It is said that *R v Amohanga* was more serious because the bullets were discharged into the abdomen, the stomach area of the victim and that that is less serious than in your case. I am not sure I accept that. It would have been a matter of luck in your offending that it was not a far worse outcome. A matter of luck that bullet fragments did not go into the lower spine. A matter of luck that it did not enter or sever the femoral artery. If you hit the femoral artery, the main artery running down through the thigh, it is probably doubtful that the victim would have survived.

[21] But you are not to be sentenced Mr Jury on what might have happened. You are to be sentenced on what did happen. All I am simply saying is that I am not sure that I accept that what occurred here is less serious than *R v Amohanga*.

[22] So in all the circumstances I am not going to set the starting point higher than the Crown submitted. The starting point for the shooting will be nine years' imprisonment. However, for the violence in the prison your involvement in the second attack in my view is clearly in Band 3 in *Nuku v R.* If that was the only charge you were here for today, my view is I would take a starting point of three years for that, with all the aggravating factors of the brutality of the attack, the extent of the injuries, that the victim was completely outnumbered and the blows to him when he was already defenceless on the ground.

[23] The first attack would probably on its own justify a starting point of a year and a half, given that in both matters it is aggravated by the fact that he was also a prisoner. He had nowhere to go. The State through the courts had put him in a position where his liberty was taken away and the State has an obligation to protect people who the State has incarcerated.

[24] In any event, on a totality basis the uplift I am going to impose is one of three years and that takes the adjusted starting point to 12 years.

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[3] *R v Amohanga* [2021] NZHC 1121.

[25] I come then to the question of what then reduces it. What for you is the value of your guilty pleas based on the maximum discount the Supreme Court says that you can get of 25 per cent. The whole point of *Hessell v R* in the Supreme Court was all about whether timing and timing alone determined how much discount.[4] Under the Court of Appeal decision in *Hessell v R* you would have got the maximum discount. But the Supreme Court said that in a whole process where the judge has to evaluate the worth of the guilty pleas, a number of factors have to be taken into account, not just timing. And, significantly for today the Supreme Court says that the strength of the Crown case is something that has to be taken into account.

[26] Now on all of these charges, either of your own decision or whether it is in combination taking appropriate advice, you have pleaded early but realistically there was no choice. The video footage of the assaults in the prison are conclusive. And, once the video footage from [street 1] in terms of the shooting is put together with what is known happened to the victim, you were easily identified and you had no possibility that you could have successfully defended that charge.

[27] So in those circumstances I am still going to set the discount for a guilty plea at a high amount but it is not going to be the maximum and the discount for the guilty pleas will be a bit more than 20 per cent but not as much as 25 per cent. I will set that at two and a half years from the starting point of 12 years so that brings the sentence back to nine and a half years' imprisonment.

[28] I then come to the really difficult part of the sentencing and what consideration is being given for your life. And Mr Jury, it is not to criticise family members, it is not to criticise whānau. I do not know if I will live long enough that we get to the day where the Mongrel Mob is seen as a vehicle for good in this country. The justification for the Mongrel Mob is that because of colonisation and urbanisation and the whole breakdown of traditional Māori structures and lifestyles that those forces forced young men in the 1960s into the Mongrel Mob. Because there they found belonging, there they found support and that those were the reasons for the creation of the group. In

[4] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

fact Dr Gilbert sets all of that out far more fully and far more powerfully in the report that he has written for you.

[29] So I have to consider today what in all that background material warrants a reduction in your sentence. I accept what Ms Graham says and what you yourself say. You were born into the Mongrel Mob. You had no choice. It was not something that came along in your teenage years. I do not particularly know or aware of your dad. I was much more aware of your uncle who was an extraordinarily intelligent, bright, able man and the tragedy is that in a different life and different circumstances what he may have been able to achieve in life. But he also was an extremely bitter man. He was as bitter as he was intelligent and capable.

[30] The Supreme Court in the case we have been talking about, *Berkland v R*, said this at paragraph [133] when talking about s 25 in particular, not s 27:

> [133] But s 25 is not just about alternatives to incarceration, though that will be its primary focus. It can also be used to facilitate restorative justice processes, to obtain better background information about the offender, to allow a relevant community organisation to work with the offender, or to enable a remand prisoner to successfully complete Department of Corrections rehabilitative programmes. As we will come to, Mr Berkland's is a case in point with respect to the last mentioned option. Even if imprisonment is unavoidable, an offender who demonstrates a commitment to rehabilitation may appropriately receive a reduced sentence.

[31] Then when talking more specifically about s 27 which is where Dr Gilbert's report on you comes before the court, the Supreme Court said this:

> [94] The relevance of an offender's background does not in any way reduce the importance of acknowledging, through sentences, the harm caused by an offender, and particularly the harm to victims. Indeed, provision is also made for the court to hear the perspectives of victims through victim impact statements. There are other sentencing purposes and principles such as deterrence, denunciation and community protection. Where offending is particularly serious these principles will usually be more powerfully engaged. Logically, there will come a point where background, even if it has contributed to the offending, can have no impact. But that will be a matter for careful consideration on the facts of the offence and the offender.

[32] So having said that Mr Jury, I come to the question of the minimum period of imprisonment. Now if parole at one-third would be an inadequate response in terms

of denunciation, accountability, holding you responsible, deterrence, protection of the public, then I can set a non-parole period up to two-thirds of the sentence.

[33] I have thought long and hard about this, and believe me I have. I think that in the normal position where for background matters the court gives a discount for those off the actual sentence, that your case actually is in the category where the Supreme Court says that logically there will come a point where background, even if it has contributed to the offending, can have no impact. So it is not going to have an impact today in that I am not going to reduce the nine and a half years because of your background.

[34] That is not to say that I am ignoring it completely. The Crown has really got a compelling case for a minimum period of imprisonment above one-third. And if I was going to impose a minimum period of imprisonment I would set it at least 60 per cent before you would be eligible for parole. But Ms Graham makes the powerful point today that probably, in all likelihood, the programmes that you need are going to be denied you until you get to the point of being able to make application for parole.

[35] That is all going to be a matter for the Parole Board. What I am going to do is this. Critically for you and your rehabilitation and for the community, is that you do achieve rehabilitation. I do not know if I am being naïve in that or not. The way that you conduct yourself with counsel, with arresting police officers, with Dr Gilbert, gives some hope that you want to live a crime free life where you can interact with people without violence. So the way that your background is going to be acknowledged today is that I am not going to impose a minimum period of imprisonment to maximise the hope of your rehabilitation. Now as I say, it will be for the Parole Board as to when you get parole.

[36] So if you would be good enough to stand now please. On the charge of wounding with intent to cause grievous bodily harm you are sentenced to nine years' and six months' imprisonment. On the charge of injuring with intent to injure you are sentenced to a term of imprisonment of two years, six months. On the assault with intent to injure a term of imprisonment of one year, six months.

[37] All terms of imprisonment are concurrent. The total term of imprisonment is nine years, six months. There will be no minimum period of imprisonment under s 86 of the Sentencing Act 2002.

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Judge R J Collins
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: …14/03/2023