

EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN DELETED.

**IN THE DISTRICT COURT
AT DUNEDIN**

**CRI-2016-012-002098
CRI-2017-012-000651
CRI-2016-012-002128
[2017] NZDC 10448**

THE QUEEN

v

**[EMMA BIRCH]
[ABBY SUTTON]**

Hearing: 17 May 2017

Appearances: M Grills for the Crown
B Kilkelly for the Defendant [Birch]
M Phillips for the Defendant [Sutton]

Judgment: 17 May 2017

NOTES OF JUDGE K J PHILLIPS ON SENTENCING

[1] Ms [Birch] and Ms [Sutton], you are before me for sentence today on matters that are alarming by their very nature really. The victim of the violent offending, a woman aged [age – early 50s – deleted] years of age is Ms [Birch]’s mother. That is particularly aggravating, both as to age and relationship.

[2] Secondly, Ms [Birch], your [age deleted] child was present throughout the events that took place on 13 August at this house in Green Island. That too is particularly aggravating. It is very clear from the researchers work that children that see and are there when there is serious violence have a very high chance of becoming seriously violent themselves.

[3] I understand you Ms [Birch] had been living with your mother, the victim. Ms [Sutton], you are a friend of Ms [Birch]'s. I understand that you had very little to do with her mother before this occasion. I understand that you became involved in this because you were going to Ms [Birch]'s mother's house, where she was living, to move Ms [Birch]'s gear away.

[4] On 13 August following texts between you, Ms [Birch] and your mother, and after other matters had arisen, she decided, Ms [Birch], that she did not want you to live with her any longer. She put your belongings (and I think your two dogs) outside in the front yard to be picked up by you. You needed to find somewhere else to live.

[5] The two of you arrived at the address at about 6 o'clock. I understand Ms [Sutton], you did what you thought you were there to do initially. You went and started getting the gear organised from the yard to your car. But that is not what Ms [Birch] did. I do not think that was what Ms [Birch] was there for. She went to the front door. The front door was opened by her mother. Ms [Birch], you pushed past her in a way and in a manner that knocked her to the ground. Your mother is lying on the floor. You begin to punch her about the head. As I say, Ms [Sutton] you are outside putting these belongings into the car. Ms [Birch]'s mother gets up and goes into the lounge. Then you come in. You then get involved Ms [Sutton] to your total discredit in my view, because when the victim tries to ring the police because of the attack upon her by her daughter, you take her phone from her.

[6] Ms [Birch] then, when her mother attempts to use another phone to ring the police, took that phone from her. Your mother is then pinned in a seated position in the lounge. I understand that each of you is on either side. You, Ms [Birch] I understand to the victim's left and you, Ms [Sutton] to her right (I think they are the positions). You begin to punch her in the head. The two of you. When she tries to stand up, you push her down. You are being told (both of you) to leave by the victim in no uncertain terms, but the attack continues.

[7] She manages to get away. Ms [Sutton], to your credit you then stopped. Ms [Birch] you do not. She, your mother goes into the kitchen. In the kitchen you

knock her to the ground. She is trying to get up. You keep putting her on the ground and that continues. You then pick up her puppy. A puppy you know your mother cared for greatly. You said you were going to break its neck. You had gone there in my view Ms [Birch] with a major intention to do what you were doing. You have taken your six year old [child] with you. [Your child] was seeing all this happen to [their] grandmother by [their] mother.

[8] I have a victim impact statement from the victim, describing the dizzy spells she experiences and the bruising. It is interesting to note. She had cuts Ms [Sutton] to her right hand, to her back and the top of her right ear. Your side, from where she was seated. She also had grazes to the back of her head and her forehead. As I understand it Ms [Sutton], when you were spoken to, you denied striking the victim. You Ms [Birch], looking for an escape denied the facts and said the victim had attacked you. Then you changed your tune and said that it was all Ms [Sutton]'s fault, not yours.

[9] Finally, both of you pleaded guilty. But the problem then that I have Ms [Birch] in your sentencing is that you were on bail; you were having difficulties with drugs. I accept and I will come back to it, what Mr Kilkelly says about that. You were a major addict and on serious level drugs.

[10] On 18 January last you were being held in police custody. I assume, relating to a breach of bail or something of that kind. You needed medical attention. An ambulance was called. You were being transported to the hospital for testing. [The constable] accompanied you. You were led to your room in the Emergency Department but you wanted to leave. [The constable], as was her duty, attempted to dissuade you from doing that. You said you would punch her in her head. You began to struggle. She put her hand on your wrist, her right hand on your shoulder to keep you in the bed. You were yelling abuse towards her. You stretched out and deliberately kicked upwards with force into the right side of the constable's face, into her head, and struck her around the ear area. You had to be restrained down. The constable suffered a swollen right ear, pain to the head and neck area.

[11] Then you aggravated it all again. You said in explanation that the constable “deserved the kick to the head”. You said next time you would “make it more worthwhile” and if you “wearing boots it would have been a different story.” It shows a total lack of understanding about what you had done. In my view, it shows the attitude that you have in relation to matters involving violence. You were on a serious charges involving violence and you were committing another act of which you were totally unrepentant at that time for.

[12] I note what the police officer says in her victim impact statement. Police officers do not normally file impact statements. She has, and says she was hit with force; that you were extremely abusive towards the staff at the hospital over the next four hours and extremely abusive to the police, yelling obscenities. She was upset by those comments you made explaining why you had done what you had done.

[13] As Mr Kilkelly points out, quite appropriately, you have a limited past history of violence. You were still on bail. You were at a [details deleted] safe house. On 7 March you leave that safe house. You take a PlayStation, PlayStation games, speakers, and a cellphone charger from a room at the address belonging to other people. You said you had taken the items. You knew it was wrong but you did it to buy food. That theft caused difficulties to the organisation. The person who owned the goods was a solo mother, her [age deleted]living with her in the safe house, had lost the gifts that were given to [gender deleted] at Christmas.

[14] I acknowledge immediately what Mr Kilkelly said. At relevant times you were in the throes of drug addiction. I note that. I accept it is real. I accept that since you have been in custodial remand you have attempted and successfully, it looks like to me, taken steps to “clean up your act”. I accept that as well. But it is somewhat too late overall in relation to it. A drunken drug induced intent is still an intent. You cannot put your drug addictions in as a mitigating factor, in my view.

[15] The pre-sentence report which I have read is a background check on the matters that are relevant to what I have already mentioned. You being under the influence of opiates; your limited history and the steps that you have taken. You have not had an early life that was pleasant at all. I understand that as well. It was full of difficulty. Indeed you have had difficulties because of your drug and alcohol addiction in obtaining full-time work to a degree where you can get satisfaction out of it, because you are not unintelligent are you? You have abilities which are surrendered to the drug. You are also for sentence because when you were being questioned by the police, a couple of tablets you were taking, fell out of your pocket. In relation to restorative justice, that did not occur. I understand that you were there but that in the end it did not happen. The pre-sentence report overall, when I read it, minimises your role. The transference of blame to [Sutton] will not wash with me at all.

[16] The Crown says Ms [Birch], in relation to you that in respect of the tariff decision of *R v Nuku*¹ there are a number of aggravating factors. The attack to the head; the moderately severe violence; vulnerability of the victim; two attackers. All putting your offending in the top of band 2/the start of band 3, with a starting point of two and a half years. Ms Grills says that you should get another month for having Class B drugs. Overall therefore, with credits of some 15 percent, an end point for your sentence on those charges of 25 months. In relation to the assault of the police officer, a starting point of somewhere in the vicinity of nine to 12 months. With totality and a guilty plea, six months on top of the 25 months.

[17] Mr Kilkelly tells me that in regards to the charge of theft, that being done to get food and drugs. He accepts the aggravating factors. He does not consider home invasion or victim vulnerability, as the Crown does. He stressed to me in his submissions the drug issues that you face; the limited history that you have of offending; the fact your remand in custody has made you healthier, more understanding, and more aware. They are all positive steps. He suggests an end sentence of somewhere in the vicinity of two years.

¹ *R v Nuku* [2004] BCL 1053 (CA)

[18] I go back to both of you. I repeat what the victim says. She says Ms [Birch], you were the primary responsible person for the attack, carrying out most of the violence. She says Ms [Sutton] in relation to you, she thinks you got involved through misguided loyalty, but then you both attacked her together. She has had to go to her general practitioner regularly. She could not afford to take time off work. She was not able to stay at home alone and that continues. She has to get someone to live in so she can feel secure. She put locks on her doors and windows. She thinks she is suffering post traumatic stress disorder. I note those matters.

[19] In relation to Ms [Sutton], the Crown points out the injuries suffered by the victim to the right side of her body. The aim of that is to show that injuries were inflicted by you. Ms Grills discusses the attack to the head; more than one offender; vulnerability – a home invasion. A starting point of nine months, 15 percent credit for a guilty plea. An end sentence of eight months' imprisonment.

[20] Ms Phillips, in very detailed, considered submissions, submits community detention to be appropriate. The issues I have had to question her about today she has answered. She says that you Ms [Birch] were attacking the victim and Ms [Sutton] went in and tried to snatch the phone but then got involved in the violence. The issue for Ms [Sutton] being put on the basis that Ms [Birch] was the main offender. Albeit there are these aggravating factors and they are at the upper end, it is a "one off"; you had poor health; were on the methadone programme – you have difficulties with community work, which makes it more difficult for you. I note the reports I have, show that you at 46 years of age, would be willing to pay emotional harm reparation, but of course cannot do so. I note what you said to the probation officer about going inside to "break up the altercation", which you and I know is not correct. I give you credit however when I assess it all, that you did not partake in the further matters in the kitchen as you had walked away, probably realising what you had done.

[21] I have read a lot about the both of you. I do not intend to go over the facts again Ms [Birch] but overall this offending, as I have said, is somewhat unbelievable, whether drug induced or not. You were in a total rage and uncontrollable. The fright, the fear, the pain, the anguish suffered by your victim is

difficult to put into words. I think she had difficulty in her victim impact statement. But there is no doubt there was a major impact upon her and will continue to be. We are yet to see the impact of it all upon your son, who was viewing it from being right there. I note that the victim in relation to it was brutally assaulted, in my view, by her daughter. I note in relation to the police constable looking after you, she was kicked and abused. And albeit she is a police officer, she does not have to accept that as part of her job. I consider also that you were in the grip of drug addiction. I note that you were going 'cold turkey' in prison. I think you require ongoing treatment and no doubt the Parole Board will as well, when you meet the Parole Board.

[22] I look at your role Ms [Sutton]. I go through it in detail. I consider overall that the starting point that is appropriate for your charge of assault under the Crimes Act 1961, with a maximum sentence of 12 months, is eight months' imprisonment. I consider that you are entitled to have taken into account a guilty plea credit of some 15 percent to bring it down to six months. I consider that you probably should go to prison for a period of six months. I have been persuaded in reflection however, taking into account your health difficulties and your good character, at the age of [age deleted] (middle age if I can say that) that you should be given an opportunity. I do so. You will be sentenced to four months' community detention starting on Friday, 19 May at [address deleted], Dunedin. You will be curfewed to that address at 7.00 pm each Friday through to 7.00 am on the Monday. You will be there at that address over the weekend for a period of four months. As a purely punitive element of your sentence, you are sentenced to 150 hours of community work. I note, I take it into account, in assessing that number of hours that you have health issues. You will find it difficult and I have brought them back accordingly. You were not a bystander, you were a participator.

[23] Ms [Birch], you were the instigator as the lead offender. When I have regard to the matters that are detailed in the Crown submissions to me, I consider that Ms Grills is correct. I think that the appropriate starting point, of being a matter involving the top of band 2, bottom of band in *R v Nuku*, should be two years and six months. In relation to the assault on the police officer, you have heard the discussions I have had with Mr Kilkelly. I consider there that the starting point for

that charge would have been 12 months' imprisonment but overall I have to allow for totality, that reduces that starting point a further six months. There is a further one month for the possession of Class B narcotics.

[24] I consider that there is some difficulty in assessing guilty plea credits in your case. I look overall at that because the assault in reality, although you pleaded not guilty initially, you pleaded guilty reasonably quickly. In relation to the assault on your mother and injuring with intent to injure, there were very late pleas. I have decided to allow credits however for that, at the rate of 20 percent, which is I think higher than what you could have expected and would be much higher than what Ms Grills would indicate is appropriate. But I take into account all of the matters. I take into account the theft charge as well.

[25] And in the end it works like this in reality. The offending involving your mother is a starting point of two years six months' imprisonment. The offending involving the police officer is a starting point of six months, cumulative on that. There is one month cumulative in relation to the drug possession; one month cumulative in relation to the theft. I give you as much credit as I can – 20 percent for your guilty pleas. I give you a further credit in relation to the fact that this was drug induced and the steps that you have taken whilst you have been in prison. I, in the end, have decided that you should go to prison for two years and four months. I impose that sentence on the charge of injuring with intent to injure. On the charge of assaulting a police officer with intent to obstruct, you are sent to prison for six months, to be served concurrently. On the theft, you are sent to prison for a period of one month. I make an order for the return of all recovered property. On the charge relating to the possession of Class B drugs, you are sent to prison for one month.

[26] There is one matter I did not attend to. Ms [Birch], I am satisfied here that in convicting you on the charge of injuring with intent to injure, you are convicted of a domestic violence offence in the terms of the legislation, which involves the use of violence against a person to whom you have been in a domestic relationship. You were living with your mother. Of course she is your mother. I am satisfied there is no protection order made against you for the protection of her. The victim of the offence wishes to obtain a protection order. I think overall here, taking everything

into account, a protection order is necessary for her protection. Accordingly, in the terms of s 123B Sentencing Act 2002, I make a protection order against you in favour of the victim.

K J Phillips

District Court Judge