

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**CRI-2017-009-007802
[2018] NZDC 1237**

THE QUEEN

v

ETHAN JOHN WAUGH

Hearing: 25 January 2018

Appearances: C J Bernhardt for the Crown
P J Doody for the Defendant

Judgment: 25 January 2018

NOTES OF JUDGE A D GARLAND ON SENTENCING

[1] Ethan Waugh, you appear today before the Court for sentencing on a charge of aggravated robbery. Actually, you appeared yesterday for sentencing and I adjourned the case through to today because the Crown provided your counsel Mr Doody with two relevant Court of Appeal decisions at the time of sentencing and I wanted Mr Doody to have the opportunity to look at those cases and consider them on your behalf.

[2] The facts relating to your offending are these.

[3] In the early hours of 15 July last year you and two associates went to an address in [street name deleted], Kaiapoi at your instigation in order to obtain some cannabis. At about 5 am on that day you entered the victim's house through an open window. The victim was in the living area with the door closed. You swung open the door and

struck the victim about the head, knocking him to the ground. You continued to punch the victim about the head, face and shoulder numerous times with a closed fist. The victim estimates that this continued for about three to five minutes until finally he pretended to be unconscious so that the beating came to an end.

[4] You then let your associate into the house through the back door. You and your associate then bound the feet and hands of the victim, leaving him tied up on the floor of the lounge. Your associate left the living room and then made a search of the remainder of the house. The victim fortunately then managed to get his hands free and free his feet and sat on the couch. You and your associate then removed several mature cannabis plants, some cannabis growing equipment, \$180 in cash, the victim's Samsung Galaxy cellphone and keys to the victim's car. You disabled the landline handsets in the house by putting them in the toilet or hiding them.

[5] A third associate who had been waiting in your vehicle then helped you and your other associate load the stolen cannabis plants and equipment into your vehicle and into the victim's own vehicle while you kept an eye on the victim. You then left the victim's address in your vehicle while your two associates followed in the victim's stolen Nissan Maxima vehicle.

[6] The victim waited several minutes after you and your associates had left before attempting to call for help. Because he had no phones in the house he had to go over to the neighbours in order to seek assistance.

[7] As a result of your offending this victim sustained facial fractures, a wound to the side of his head that required stapling, black eyes and cuts and grazes and bruising to his face and shoulder which required him to be hospitalised.

[8] At approximately 8 am on Tuesday 18 July 2017 the victim's Nissan Maxima car was located burnt out on Ferry Road in Kaiapoi. Reparation is being sought by the Crown. The victim suffered a loss of \$1045 in relation to chattels and \$9452 loss in relation to the Nissan Maxima car. I am advised that the Crown does not know who was responsible for setting the car alight, nevertheless this defendant and his associates were the ones who stole the car from the victim's property.

[9] Mr Waugh, when you were asked to comment on your offending you admitted the facts as I have outlined them.

[10] The pre-sentence report writer indicates to me you are 24 years of age. You only had two previous convictions for driving offences in 2014 and 2017. Based on that history you are assessed as being at low risk of re-offending and medium risk of causing harm to others. During the remand period you engaged in intervention for drug dependency beginning with a detoxification period at Thorpe House and then you went to the residential programme with the Salvation Army. Unfortunately you were stood down from that programme for reasons that I will explain in due course but I am told you would be able to start if you were not imprisoned in February of this year. Given the seriousness of the charge the probation officer acknowledges that the starting point has to be imprisonment. He rather optimistically suggests that home detention might be considered.

[11] I have read the letters that have been filed in Court from the Salvation Army, from the Strength-to-Strength organisation. I have read the letter from your general practitioner and I have read the letter that you have written which is an enlightening letter about your background, your personal circumstances, including your issues with drug addiction and I also note the personal circumstances in relation to the loss of your father.

[12] In sentencing you I bear in mind the purposes of sentencing which first of all are to hold you accountable. I also need to denounce your conduct on behalf of the community and impose a sentence that not only deters you from re-offending but one which deters others.

[13] The principles of sentencing that I take into account are the gravity of your offending. I need to bear in mind the seriousness of this offence by comparison with other offences. I need to ensure that the sentence that I impose is consistent with sentences imposed on other offenders for like offending. I also bear in mind that I should impose the least restrictive outcome appropriate in the circumstances.

[14] Both counsel have filed written submissions and have given me some sentencing cases which I have read. Both counsel have made oral submissions in Court that I have listened to.

[15] The Crown's submission is that a starting point in the region of seven to nine years' imprisonment is appropriate in this case. On the other hand, Mr Doody submits that a starting point in the region of three and a half years' imprisonment is appropriate based on the cases that he has placed before me.

[16] This is obviously a serious offence because Parliament has prescribed a maximum penalty of 14 years' imprisonment. The tariff case for aggravated robbery is the decision in *R v Mako*¹. In that case the Court of Appeal gave guidance on invasive robbery cases at paragraph [58] of the judgment. The Court said:

[58] ...Forced entry to premises at night by a number of offenders seeking money, drugs or other property, violence against victims where weapons are brandished even if no serious injuries are inflicted, would require a starting point of seven years or more. Where a private house is entered, the starting point would be increased under the home invasion provisions to around 10 years.

[17] The aggravating features of your offending in my view are as follows:

[18] First of all, in this case property was taken valued in the region of \$10,500. Most of that has been covered by insurance and so the victim has only suffered a direct loss of \$500 being the insurance excess. Actual violence occurred in this case with you punching the victim multiple times to the head, face and shoulder. There was a detention of the victim whereby the victim had his hands and feet bound which must have been quite frightening for him. Serious injuries were caused to the victim by way of a facial fracture, a wound to the face and bruising to the facial area. He required hospitalisation. This offence did involve home invasion, namely, into the victim's private dwelling house. This offending was premeditated. You targeted the victim's house specifically because you knew that there was cannabis there.

¹ *R v Mako* [2000] 2 NZLR 170 (CA)

[19] I am advised that one of your co-offenders has appeared in the Youth Court jurisdiction on a charge of aggravated robbery and is yet to be sentenced. Another of your co-offenders the Crown accepts was not involved in the home invasion and the Crown accepts did not know what was happening inside the house. He has been charged as a party to burglary. He, I understand, was waiting in your vehicle outside and he helped load stolen goods into your car. Somewhat surprisingly I have to say, the police accepted diversion for him.

[20] I have considered a number of cases involving sentencing for aggravated robbery referred to me by counsel. First in relation to your counsel Mr Doody, he has referred decisions of the High Court in *Nathan*² *Williams*³ and *Bullen and Jackson*⁴ to the Court. Those cases, however, are not cases of invasion robberies as was contemplated by the Court of Appeal and so I do not find those cases helpful. I have, however, been referred to recent decisions of the Court of Appeal in relation to invasion robberies, namely, *Hemopo v R*⁵ and *Kerr and Jones v R*⁶, both of which have provided more helpful guidance.

[21] In *Hemopo* the starting point of nine years' imprisonment was upheld. That case involved a very similar level of offending, including a home invasion, actual violence was used and the victims were detained. While it did involve two victims and a knife and a bat found at the address were used as weapons, on the other hand the victim in the present case suffered more serious injuries indicating that the level of violence was more severe than in *Hemopo*.

[22] In *Kerr & Jones*, a starting point in relation to the primary offender of 10 years was taken. That was in relation to Mr Kerr. In relation to Mr Jones who played a lesser role, a starting point of nine years and six months' imprisonment was taken. The Court of Appeal considered that a starting point of eight and a half years' imprisonment was appropriate for Mr Kerr and eight years' imprisonment was appropriate for Mr Jones because there was a lack of premeditation, there was no home invasion in that case

² R v Nathan [2017] NZHC 806

³ R v Williams [2017] NZHC 776

⁴ R v Bullen and Jackson [2017] NZCA 615

⁵ Hemipo v R [2016]

⁶ Kerr and Jones v R [2017] NZCA 498

given that the offenders were invited into the house and while a machete was brandished, there was only low level violence and threats of violence. In that case at paragraph [53] of the judgment the Court noted as follows:

[53]...Counsel for Mr Kerr also referred us to this Court's decision in *K v R*. In that case three offenders broke into a private property and assaulted the victim by punching him repeatedly in the head. They stole approximately \$7000 in cash and left the victim in handcuffs and with a broken arm. A starting point of 10 years' imprisonment was upheld.

[23] In the present case, bearing in mind that this offending involved in particular, premeditation, a home invasion, detention of the victim and a serious level of violence and injury, in my view the appropriate starting point is nine years' imprisonment.

[24] Turning now to consider the aggravating and mitigating factors personal to you.

[25] In terms of aggravating factors there are two minor traffic convictions in your previous history. They certainly do not justify an uplift in the starting point. In mitigation first of all I consider you to be a first offender putting the traffic convictions aside. Having read your letter and the information in the pre-sentence report I see that unfortunately this offending is yet another case that appears to be driven by an addiction to methamphetamine after an offender has moved on from a cannabis habit. You have taken initial steps to address your addiction which is to your credit. You went to Thorpe House to detoxify and then you commenced the Salvation Army Bridge Programme. Unfortunately, however, you were discharged after you admitted bringing and using methamphetamine on the grounds of the bridge programme.

[26] Having regard to the fact that you are to all intents and purposes a first offender and also having regard to your personal circumstances, I allow a reduction of 18 months on your sentence. Secondly, I give you full credit for your early guilty plea. That entitles you to a further reduction of 23 months.

[27] The result today, Mr Waugh, is that I sentence you to a term of five years and seven months' imprisonment. I make no order for reparation. I have taken that into account in assessing sentence.

A D Garland
District Court Judge