

**IN THE DISTRICT COURT
AT WHANGAREI**

**CRI-2017-088-002742
[2018] NZDC 4164**

THE QUEEN

v

TIPENE JAMES HOWARD

Hearing: 2 March 2018
Appearances: K MacNeil for the Crown
W Puriri for the Defendant
Judgment: 2 March 2018

NOTES OF JUDGE K B de RIDDER ON SENTENCING

[1] Mr Howard, you have pleaded guilty to one charge of assault with intent to rob, one charge of unlawful possession of a firearm, and today you have also pleaded guilty to some lesser police matters, disorderly behaviour, resisting a constable, failing to answer District Court bail and breach of prison release conditions.

[2] The charge of assault with intent to rob is one of the charges that is covered by what is now known as the three strikes legislation and I am required to give you a warning as to the consequences of a conviction for another serious violence conviction, and this of course, given that you have already received a previous warning, this is now your final warning. It is somewhat lengthy, but I am required to go through it, but the short point for you is that you will be given a written notice outlining these consequences, which are simply this.

[3] If you are convicted of any serious violent offence, other than murder or manslaughter, after I have given you this warning, then you must be sentenced to the maximum term of imprisonment for each offence, which will be served without parole or early release unless that would be manifestly unjust.

[4] If you are convicted of manslaughter committed after this warning, then you will be sentenced to imprisonment for life and you must be ordered to serve at least 20 years' imprisonment unless the Judge considers that would be manifestly unjust to do so, in which case a minimum of at least 10 years' imprisonment must be ordered to be served.

[5] If you are convicted of murder after this warning, then you will be sentenced to imprisonment for life, which you will serve without parole unless that would be manifestly unjust to do so, in which case the Judge must impose a minimum period of at least 20 years' imprisonment, again unless that would be manifestly unjust, in which case the Judge must sentence you to a different minimum period of imprisonment.

[6] Finally, if you are sentenced to preventative detention, you must serve the maximum term of imprisonment of the most serious offence you are convicted of, unless a Judge considers that would be manifestly unjust. As I have said, you will be given a written copy of that warning.

[7] As far as the facts are concerned, at about quarter past one in the morning of [date deleted] September, the complainant and some friends were heading south on [street name removed] after having been in the CBD [celebrating]. You were sitting in a vehicle on the same side of the footpath that this group were walking. You came into possession of a sawn-off 12 gauge shotgun.

[8] As the group approached on the footpath, you got out of the vehicle with a firearm, rested it on the roof of the vehicle. You cocked the weapon and pointed it at the victim with your finger on the trigger. You then demanded of the victim in a menacing tone where his liquor was, twice.

[9] When the victim told you that he did not have any alcohol, only coke and a mobile phone, you told the group to, "Get out of here," whereupon the victim and his friends ran off and of course called the police.

[10] When spoken to by the police, you stated you did not own a firearm and only handled it when passed it by your associate. You stated you did not remember pointing a firearm at anyone, but might have wielded a steering lock at some point. The probation report, which I will refer to shortly, gives a bit more insight into that unusual explanation you gave to the police.

[11] Of course at the time of this offending, you were on release conditions from a sentence of imprisonment that had been imposed upon you on 30 November 2016. There is a victim impact statement on file. It is very short and brief and to the point. The victim was clearly terrified by the fact he had what, to all intents and purposes, as far as he was concerned, was a loaded firearm pointed at him, and not surprisingly at the time he prepared this report he expressed considerable concern about being out and about in town at night.

[12] I have already referred to the probation report and tellingly early on in that report, speaking to the report writer, you explain that you do not remember anything about that night. You were high on synthetic cannabis, prescribed medications and alcohol, and this of course is relevant, given your demand of the victim. You thought he may have more alcohol which you could take off him and consume that night.

[13] The rest of the report goes into your considerable history and your own personal background, but in particular goes into some comment about what might be some appropriate programmes for you whilst you are serving the inevitable period of imprisonment that must be imposed.

[14] Those proposed programmes, plus the remorse that you have expressed in this letter you have written to me, paint at least a hopeful picture and not perhaps the bleak one that Mr Puriri referred to as being a possible outcome for you. So hopefully what you have said in this letter, particularly when you realise now the amount of time that you have spent in prison in your 37 year old life, hopefully that, plus the programmes,

might finally break through this persistent pattern of offending which regrettably runs to now some 25 pages of previous convictions, extending back a considerable period to 1995 when you first appeared in the Youth Court. Regrettably, you have now been appearing regularly in Court for some 23 years.

[15] I have had the benefit of written submissions from the Crown and brief submissions from Mr Puriri on your behalf and of course they have both spoken to those this afternoon. Essentially, Mr Puriri does not take any real significant issue with any of the submissions made by the Crown, rather he pointed to discrete factors relating to your own background, to the offending itself and to the process by which you finally entered guilty pleas to these two serious charges and invited me effectively to factor those into the process of sentencing on the basis of the approach set out by the Crown.

[16] In terms of assessing the seriousness of the offending itself, of course there is considerable concern about what appears to be easy access to firearms in the community at the present stage and this appears to be yet another example whereby people are willing to produce sawn-off shotguns in public places. Such weapons have no use whatsoever in terms of shooting purposes. They are inevitably associated with other serious crime, but in terms of your involvement in this, the first point of course is that you knew full well what you had in your hands, despite the fact that you were severely affected by alcohol and other substances.

[17] But secondly and perhaps more importantly, this is not simply a case where you waved it around in the air with an intent to somehow threaten the victim. You actually took the step of resting it on the car roof and pointing it directly at the victim and cocking the trigger, putting your finger on the trigger.

[18] There is no information before me as to whether or not the firearm was loaded. If it was, then the risk of something going horribly wrong was extremely high and that to my way of thinking aggravates the offending, that is that it was not, as I have said, just carrying it by your side or somehow waving it vaguely around in the air, it was directly pointed at the victim whilst you made this demand.

[19] I agree with Mr MacNeil's, for the Crown, submission that I can adopt the Court of Appeal case known as *R v Mako*¹ which talks about how to approach aggravated robbery. This charge of assault with intent to rob carries the same maximum penalty. The only caution I have to exercise is of course at the end of the day there was no theft, which is an essential requirement for robbery. However, that does not take you that far because quite clearly if this victim had been in the possession of alcohol, you had a clear intent to steal it from him whilst armed with a serious weapon.

[20] Having regard to the case of *R v Mako* and the relevant paragraph in that section, which is identified by the Crown being paragraph 59, effectively a street robbery, I am satisfied that a start point would be one of three and a half years. I fix it at that point because firstly of the serious nature of the weapon you had with you, but also because of the way in which you used it or pointed it at this victim.

[21] I have already referred to your regrettable, very long history. A modest uplift for that would be one of six months' imprisonment, taking you to an end period of imprisonment of four years.

[22] I accept that you do now show some insight into your offending and also the effect on the victim, albeit there is limited reference to that in your letter. It is rather by circular reasoning rather than direct appreciation of what you did to the victim, but nevertheless a modest reduction of two to three months should be allowed for that, taking you down to an end sentence of 46 months' imprisonment.

[23] You are entitled to have recognition for your guilty pleas. They did not come at the earliest opportunity, but nevertheless spared the victim the re-traumatisation of having to come to Court and explain to a jury what happened to him. Something in the order of 20 percent in my view is appropriate, albeit perhaps slightly on the generous side. That would be one of nine months, taking you down to an end sentence of 37 months' imprisonment.

¹ *R v Mako* [2000] 2 NZLR 170

[24] Rounding the matter down, and I am now talking of course about the most serious charge of assault with intent to rob, I am satisfied that an end sentence of three years' imprisonment is appropriate. Of course, given the earlier three strikes warning you have already received, then in accordance with the provisions of the Sentencing Act 2002, you will serve the full term of that period of imprisonment.

[25] In respect of the charge of unlawful possession of a firearm, I fix a term of imprisonment of 15 months. In respect of the other police matters, on the disorderly behaviour charge, being fineable only, you are convicted and discharged. On the other three, you are convicted and sentenced to imprisonment for one month.

[26] Therefore on the charge of assault with intent to rob, you are convicted and sentenced to imprisonment for three years. On the charge of unlawful possession of a firearm, you are convicted and sentenced to imprisonment for 15 months, and in respect of the other charges, I have already recorded the respective periods of imprisonment or the conviction and discharge where appropriate.

[27] All of those sentences are to be served at the same time, and finally I have cancelled all of your outstanding fines, leaving you with a clean slate.

K B de Ridder
District Court Judge