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

IN THE DISTRICT COURT
AT DUNEDIN

CRI-2017-025-001823
[2018] NZDC 3995

THE QUEEN

v

DIEGO MARQUES

Appearances: C Ure for the Crown
S A Saunderson-Warner for the Defendant

Hearing: 28 February 2018

NOTES OF JUDGE K J PHILLIPS ON SENTENCING

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[1] Diego Marques, you are before the Court this afternoon on five charges of aggravated wounding. On each of those charges, you are liable to a maximum term of 14 years' imprisonment. There are also five charges of using a document to gain a pecuniary advantage.

[2] I have been assisted by the submissions I have received from Ms Ure as Crown counsel and your counsel, Ms Saunderson-Warner. Some of each of those submissions I accept. Some I do not.

[3] What is clearly apparent is that you, as a guest in this country from Brazil, decided to use what is described to me as a gay dating application called "Grindr", using a false name and then obtaining details of the people you met, their bank cards, their PIN numbers and then using a drug in drinks that you were having with them, stupefying them. When they were overcome, comatose, you took their bank cards and used them. Combined all together, in my view, it is serious offending. The element of risk I have to assess, in my view, is high. As I read the background details in relation

to the drug you used, you are just extremely fortunate that the following morning on each of these occasions these men were able to wake up.

[4] On [date deleted] of last year, you met victim 1 in [location 1]. At that time, the victim used a bank card to buy some takeaway food. You got details of his PIN number. You then persuaded that victim to take you to his home. Inside his home you put Clonazepam into his drink. (You had already powdered it up.) The victim fell into a comatose state. You took his Eftpos card and used it to obtain $2480. You said you needed it to be able to live but I also note that four days later in [location 1], there was another person you met through "Grindr". You went to a fast-food outlet. You got his PIN number. You went to his home. You put Clonazepam in his drink. He becomes comatose. You take his debit cards and use them with the PIN number you had obtained taking $960. On [date deleted], you met the next victim. You again met him through the use of the "Grindr" app you had. You were a guest in that victim's home for three nights. Again through the card being used by the victim to obtain food, you got the PIN number. Once you had that, you put the drug into his wine. He becomes comatose. You took his cards. On one occasion you took $2000. You then did 59 cash withdrawals. You used it to get an airline ticket, taking $4642.29.

[5] Having "scored" what I have just set out, by [date deleted] 2017, (no great period of time), you were in [location 2]. You used the "Grindr" application again. The victim used his card in a store. You got his PIN number. You put the drug into his wine. He has no recollection of what happened until the next morning. You took the Visa card. Fortunately for that victim, somehow or other you messed up the numbers. After a number of times trying to get the PIN through, the card was seized by the machine. On [date deleted] at [location 2], again using "Grindr", you were in a food bar with another victim. You tried to get the PIN number. You were unsuccessful. When the victim used it later in a supermarket, you did get it. You drugged that victim. He went into a deep sleep. When he awoke he found his cards were missing. There, you took cash of $1920. You spent $2260 online to buy things you wanted to have from Apple.

[6] When you were questioned, I accept what Ms Saunderson-Warner says, you admitted what you had done. Then you made comments that the victims had caused you "pain" and you wanted them to "…burn in hell…" is how you put it.

[7] I note the Crown says a course of conduct is clearly established on the facts of the matter and in the sentencing exercise I have to now undertake, concurrent sentences are appropriate. That I should use that victim in [date deleted] on charges number 5, 6 and 7. Ms Ure's submissions are that it was highly premeditated; the victims were vulnerable and there was a breach of trust. When I have regard to this type of offending and use the *R v Taueki*[1] banding approach, the Crown says the violence aspect is at the lower end but that a starting point of some four years is appropriate with an uplift for the other card offending of six to seven months. In the end overall, the starting point in the view of the Crown, should be somewhere in the vicinity of four years seven months, with further uplifts for the other offending, particularly relating to the issues of breach of trust and vulnerability.

[8] Ms Saunderson-Warner takes a totally different approach. She says that you were isolated, lonely and frustrated, and your offending was as a result of this frustration and that I should note the victims made a full recovery. The total reparation being sought is over $10,344, was perhaps not as significant as claims for reparation that are made. She notes the totality approach that she submits I should take and that there are matters of some premeditation and some vulnerability. Under some pressure this afternoon she agreed the premeditation was high but did not accept vulnerability to a high degree. She says that in her view overall, the starting point would be three-and-a-half to four years. With significant credits for guilty plea, your cognitive limitation and those credits amounting to some 50 to 55 percent, she sees a sentence of two years or under.

[9] The Pre-Sentence report describes the offending as coming from feelings of frustration and fear. You have been held in an at-risk unit at the prison. The fact you have no funds, you have no contacts and your risk is moderate to high, it appears you

[1] *R v Taueki* [2005] 3 NZLR 372, (2005) 21 CRNZ 769

will have difficulties in serving a sentence because of where you come from. I note the matters detailed in the Pre-Sentence report.

[10] I here have duties under the Sentencing Act 2002 to hold you accountable. I must denounce and deter this conduct. I have to protect the community overall as well. That is the reason why the only result that can be here today is a lengthy term of imprisonment.

[11] I consider the offending overall to be serious and grave offending in the terms of s 8(a) and 8(b) Sentencing Act. I note the impact on the victims. I will come back to that. I have to take into account the matters Ms Saunderson-Warner brought to my attention about the fact of where you come from and that as you do not have contacts, a sentence of imprisonment could be more severe on you than on many others.

[12] Your victims have written Victim Impact statements which in reality come, in my view, to the same end position. The victims wake the next morning feeling ill and find their cards are missing. They describe you as "plausible", that you "conned" them, and they consider you were motivated to cause them loss. One describes the humiliation, the violation and being saddened by the whole experience. They have been taken advantage of; it caused stress; they are concerned because of your actions and the time spent with the stress and that the losses fall really a bit by the wayside. They did not expect to be robbed by you. They thought they were doing right by you in trying to find you work and trying to look after you. Now that is replaced by feelings of anger. You have had a lasting impact upon these victims. Of course you have had a lasting impact upon their banks who have had to make good the losses you occasioned. In reality, there is very little hope of getting reparation paid.

[13] I accept at once you come to the Court with good character and you have no prior convictions.

[14] I have read about the drug Clonazepam. Ms Saunderson-Warner says it was prescribed to you for your Mental health issues. I do not know about that. What I do know from my reading is that when it is mixed with alcohol it can lead to cardiac arrest and death. It can take a long time for it to be excluded from the body. The impacts on

people who are not used to taking the drug can go on for a considerable period of time because it has a very slow elimination rate from the body.

[15] I assess your sentencing on the basis that the aggravating factors of it relate to the premeditation. I think you carefully planned what you did to each of these victims, that it was a thought out process and structure and that you selected your victims carefully. You prepared by crushing and taking the drugs to their homes, knowing the nature of the drug and you carried out the stupefication after obtaining their PIN numbers for their credit cards, to obtain their credit cards and use them. I consider overall, when I have regard to the whole matter, that your premeditation of your criminal conduct was high.

[16] It may very well be right, as Ms Saunderson-Warner stresses to me, that these victims invited you into their homes and the vulnerability of them, she would say therefore, is not high. She accepts there was a breach of trust. When I have regard to it overall, we have people who make the contact with you because they thought you were of a like mind to their own. They were enjoying having you as company, were prepared to offer their home to you and their resources. You answered that, because they were that vulnerable, by putting a drug into their drink and then when they were comatose, you take their credit cards and use them. I consider the vulnerability, not that they were there drinking alcohol and that it just happened. I do not think that they could ever foresee what was going to happen. They were highly vulnerable. They invite you into their home. The trust you. They like you. They find you a person that they want to be with and you were sussing them out all the way through. There is, in my view, a breach of trust to a high degree.

[17] I looked at the matter as to where it should fall within the bands. I have to say I gave consideration to it being at the bottom of band 2 in *R v Taueki* but I noted that both counsel, experienced as they are, mentioned in their submissions the degree of caution the Court has to exercise in applying the bands. I accept the Crown submission of band 1 of *R v Taueki* but I consider that it is towards the top of the band. It may be argued there was no lasting impact but there was an inherent risk and danger with the drug combined with alcohol.

[18] I consider the submissions I have received. I consider for the charge under 3416, which I will treat as I am invited by Ms Ure as the head or lead offence, the stupefying of the victim [name deleted], an appropriate starting point is four years' imprisonment. In relation to the matter I deal with it as the head or lead charge of the stupefying, I consider overall when I have regard to that, I add one year for the other victims of the stupefication. I consider an appropriate starting point overall for that offending under s 191(1)(a) Crimes Act 1961 to be five years. In relation to the use of the cards, that is an aggravating factor. I take note of the way it occurred, I consider that overall should uplift the five years by eight months, to five years and eight months, but as I am adding them together, I allow for totality and arrive at an overall starting point of five years and six months. There are no personal aggravating factors.

[19] I note then in relation to personal mitigating factors, I consider there is no actual basis to allow for mental health issues. It is self-reported. I do not consider it is made out here that your mental health had anything to do with your premeditated, cunningly planned offending. I note that you are placed in the At-Risk Unit. I realise and accept you have caused some problems within the prison because of your decision to hunger-strike. It is a decision you made. I accept you have good character in New Zealand. In relation to remorse, I think that you have "hindsight remorse". I accept to a degree that you are remorseful but I also note that you were prepared to re-offend in [location 1] and you were prepared to travel to [location 2] and [location 3]. You were not showing any remorse to your victims.

[20] Overall I consider those personal mitigating factors entitle you to a credit of 10 percent. I calculate that as against my initial starting point to be some seven months. You are entitled after that deduction to a guilty plea credit of 25 percent, which by my mathematic calculation brings it overall down to a position of where three years eight months is appropriate.

[21] Ms Saunderson-Warner says you are Brazilian. You are going to have language difficulties within the prison. You are going to be alone. I note the victims did not seem to have any difficulty understanding what you were saying and how you were relating. I note you had the ability to use this "Grindr" application on each of these occasions. I note in relation to one victim you had the ability and knowledge of

English to be able to complete Internet transactions. I do accept you will be serving the sentence of imprisonment in a strange country. Overall, therefore, I make further allowances and stand back and look at your criminal conduct overall. I consider you should go to prison for three years and six months, after having carried out that exercise. I intend to sentence you accordingly.

[22] On the head or lead charge under 3416, s 191(1)(a) stupefication of victim [name deleted], I send you to prison for three years and six months. I order you to pay reparation of $1300. That is to be the proceeds of the [bank branch deleted] account in the name of D Marques Santos. That $1300 is to be distributed by Collections on a pro rata basis to each of the victims who have supplied the reparation sheets that are available. In relation to each of the other stupefying charges, you are sent to prison for two years and six months. On each of the use of a card matters, you are sent to prison for nine months. Those terms will run concurrently.

K J Phillips
District Court Judge