

**IN THE DISTRICT COURT
AT TAURANGA**

**CRI-2016-087-000052
[2016] NZDC 5358**

NEW ZEALAND POLICE
Prosecutor

v

LEXTON JOE TAI
Defendant

Hearing: 24 March 2016
Appearances: Sergeant H Murphy for the Prosecutor
R for the Defendant
Judgment: 24 March 2016

NOTES OF JUDGE A-M J BOUCHIER ON SENTENCING

[1] The defendant faces a charge of with intent to injure, injuring a person; a charge under s 189(2) which carries a penalty of up to five years imprisonment. Restorative justice was tried but could not take place because the co-ordinator could not co-ordinate the victim in this matter.

[2] The summary of facts in this matter is this; at a party which is said to have been held to celebrate the birthday of a cousin of the defendant, the party started in the early afternoon and went through to the night. At about 3.00 am the victim, (a 24 year old male), arrived with several others. There were up to eight to 10 people drinking and all heavily intoxicated. Some people had gone to bed.

[3] The victim who did not know any of the other persons at the house apart from his uncle quickly and apparently fell out of favour with the other persons due to his heavy state of intoxication and the way he was conducting himself, knocking on a

ranch slider door. Whilst the victim and the cousin were talking to the defendant, the cousin was able to calm the defendant down because he appeared to be getting agitated.

[4] Then the victim wanted to go to the bathroom, stood up and deliberately tipped over a table breaking a number of bottles and glasses, made a comment that was not particularly well-mannered at all and probably offensive, and then stated to one of the women who was going to clean up the mess, "Yeah, clean my shit up." This caused the defendant to become agitated again and there were attempts to get this person (the victim), out of the way and then the victim removed his penis from his pants and exposed himself to the six or so persons left and made other offensive remarks.

[5] The defendant then punched him to the face with a closed fist. This punch all but knocked him out. The defendant then transferred a glass spirit bottle with a heavy base to his right hand and swung it like a baseball bat at the victim's forehead which he hit causing a laceration to the top of his head.

[6] As the victim slumped down a car that he was standing by, the defendant punched him three more times with upper cuts. Two party goers grabbed him and pulled him away telling him what he had done was enough. The victim tried to stand up. The defendant broke free from those holding him, ran at the victim and with a full-force kick, smashed him once in the mouth.

[7] The defendant then, when the victim fell over onto his side, he was kicked twice more in the body area (this is when the victim would appear to be on the ground), before he was again pulled away.

[8] The defendant has previous convictions. They are as follows: November of last year, disorderly behaviour and possession of an offensive weapon. Earlier in 2015, two convictions for contravention a protection order, assaulting with intent to injure manually and then there was a breach of Court release conditions, another contravention of a protection order in 2014 along with assault with intent to injure, failure to answer bail the same year. Two male assaults female.

[9] In 2012, two common assaults. In 2011, assaulting with intent to injure. Going back to 2010 a number of matters including breach of release conditions, breach of conditions of intensive supervision in 2010, injuring with intent to injure along with the breach of community work and two breaches of home detention.

[10] In 2009, male assaults female and assault with intent to injure. Then going back over 2008 and 2009, other matters which are not really related to violence other than a very minor one of speaking threateningly.

[11] So, a serious list of previous convictions for violence and not just lower-grade assaults, but assaults which are further into the upper-grades such as assault with intent to injure and injuring with intent to injure.

[12] The summary of facts I have gone over. I note that the victim impact statement is not all that full, but it does note that the victim has two front teeth missing and had to have seven days off work. The possible cost of fixing the missing teeth is around \$3000. That would of course be half-covered by Accident Compensation Corporation.

[13] In considering the submissions of the defence, I look first at the pre-sentence report. What that tells me is the defendant is aged 24 so he is still youthful. It notes his previous convictions noting about 35 percent of them being most for violence and most of which occurred in the last five years, and it is said that his current charge evidences an escalation of the seriousness of his offending behaviour.

[14] His offending is aggravated by his reoffending while subject to active sentences of Court release conditions which ends on 22 September 2016 and supervision which ends on 25 November 2016, community detention which ends on 26 May 2016 and community work. As at February, he had completed a considerable amount (nearly all) of his community work and would have completed it within the required time.

[15] It is said that to the probation officer he accepted responsibility for his offending which he believed was an impulsive response to a stranger's disrespect in

his whānau's boundaries. He did express remorse for what he did to the probation officer.

[16] He is assessed as high-risk of reoffending in a similar fashion in an assessment corroborated by a departmental psychologist and the probation officer notes that it goes without saying that a term of imprisonment is the inevitable starting point. However, the report says, "Should the Court arrive at an end sentence of 24 months or less, then an adjournment for at least four weeks is requested so he could be assessed as to suitability for the Tai Aroha programme."

[17] He acknowledged that he had a problem with controlling his anger and indicated that he wished to address it. He asked about the residential programme and asked how he could be considered for such. He has previously reported attending a Living Without Violence programme in the past and then the programme is referred to in the report.

[18] He was assessed as having the ability to comply if and when he wants to, but he has prior convictions which evidence a non-compliant attitude and the probation report details the convictions which I have already mentioned. But it does say that more recently he engaged with a departmental psychologist and completed most of the required sessions.

[19] He is assessed, as the report said, at very high-risk of reoffending in a violent manner and it has escalated in situations where he is under the influence of alcohol or illegal drugs. He is assessed as being at high-risk of harm to others, particularly to females.

[20] The probation officer has said today that the Court could consider if he were given a sentence which came within the realms of home detention, an option to apply at a later stage for home detention.

[21] A letter has been placed before me from the defendant. He says that when he has been in prison this has cleared his head of any substances and he is on a positive

path to regain his life. He is 25 years old now and he feels that he can achieve this goal that he has set.

[22] In submissions the defence have been at pains to point out the provocative behaviour of the victim in this matter. They have referred the Court to the relevant purposes and principles of sentence in ss 7 and 8 and also submit that the Court may take into account the defendant's willingness to attend a restorative justice which could not of course take place, not with anything to do with him.

[23] The guideline judgment of *Nuku v R* [2012] NZCA 584 is referred to and the aggravating features. Those aggravating features are set out. I have said to defence counsel that I considered that there were at the very least, the following aggravating features; serious injury, which counsel has taken issue with, and referred the Court to the relevant section of *R v Taueki* [2005] 3 NZLR 372 (CA) detailing serious injury, and I accept that the injuries shown here were certainly in no way life threatening and perhaps that the detailing of the injuries in the hospital report show something less than serious injury.

[24] However, I am still of the view that extreme violence is involved here. As I have been at pains to note the factors in the summary of facts which I consider are extreme violence, and the use of a weapon (an alcohol bottle with a heavy base), and that was used on the head, and so the attacking the head being another aggravating factor, and of course, also whilst not mentioned in the categories referred to in *Nuku v R*, the kicking of a person, and secondly, kicking of a person when that person is down, I regard as being added factors. But one must not double count; I accept such matters.

[25] One could say that the victim was somewhat vulnerable being drunk, but again I temper that with his own behaviour which I do certainly accept was disgraceful in the circumstances, but it could also be considered that the defendant's actions were vigilante actions. I said, "could be considered."

[26] Therefore accepting the defence say that his previous convictions for violence warrant an uplift, and accepting that he was serving a sentence at the time,

the mitigating factor is that he is remorseful and he has pleaded guilty at an early opportunity. I accept that he has pleaded guilty at an early opportunity. I fully intend to give him the full 25 percent.

[27] As far as remorse is concerned, as I have mentioned, remorse described in *R v Hessel* [2009] NZCA 450 must be extraordinary remorse, and the remorse which is evident here is not in my view in that category.

[28] I am of the view that a start-point here considering the aggravating factors is a start-point of three years' imprisonment. I give what I consider to be a very modest uplift for his past convictions for violence of three months. Applying a 25 percent discount, the sentence then comes down to two years and four months.

[29] I have considered defence counsel's submission that having been in custody for three months, that the matter were remanded for an extra month to look into a rehabilitative sentence, that that may well bring it into the area of home detention. I am of the view however, that given the facts here that any other sentence short of imprisonment is inappropriate and the rehabilitative factors must be taken into account by the Parole Board.

[30] On the oral application to cancel all of the sentences which he currently faces, which are detailed in the report, they are cancelled.

A-M J Bouchier
District Court Judge