

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

NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS, OF COMPLAINANT(S) PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

**IN THE DISTRICT COURT
AT MANUKAU**

**CRI-2016-092-000391
[2017] NZDC 26655**

THE QUEEN

v

JAMES CRICHTON

Hearing: 22 November 2017
Appearances: N Chisnall for the Crown
H Vaai for the Defendant
Judgment: 22 November 2017

NOTES OF JUDGE C S BLACKIE ON SENTENCING

[1] James Crichton, you are here for sentence today on a number of charges which include sexual violation by unlawful sexual connection, injuring with intent to injure, assault with intent to injure and common assault.

[2] The facts relating to these charges go back to [date deleted] 2015. On that particular day, the complainant who is a young man in his twenties but with an impediment, [medical details deleted], went to meet a friend at [a restaurant in Auckland]. He got there at about [time deleted – early morning]. He met the friend but also observed in his vicinity you together with a number of others who had obviously been drinking and the complainant thought that it might be a good idea to

put some distance between you and your friends, so he crossed over to the opposite side of the road and was in the vicinity of [a health clinic]. At that stage, you approached the complainant and asked for a cigarette. He gave you a cigarette because he thought that by doing so, you might then simply leave him alone, but then your associates also approached him, standing behind you, and you told the complainant to follow you. He did so because there were so many people standing behind and he was obviously concerned. He tried to pace himself to outpace you and carry on in the direction of his home but you grabbed him and you pulled him into a dark area off the carpark of the [health clinic]. You pushed him over causing him to fall back onto his back. He tried to get up but you forced him to stay on the ground. You then dropped your trousers, you grabbed this complainant by the hair, you forced your penis into his mouth and you gripped his hair very tightly so that his head and mouth in particular were against your genital area. You then ejaculated into his mouth. Having done so, you walked off and re-joined the rest of your friends.

[3] But that was not the end of it as far as the complainant was concerned. When he got up, he tried to run away. One of your associates threw a bottle at him which hit him as he ran. You and Mr Lui, who I have also dealt with today, then started to run and join a chase, along with others, after him. He was tackled to the ground where he was punched to the head, not by you but by others in your group, but you caught up and then you started to kick him in the body with your right foot. It is not clear to me whether your foot had a boot or a shoe but it would be unusual to be out at that time of night without some form of footwear. Mr Lui, who I have also dealt with today, kicked him as well. Then at a later stage, you ran up to him again, drew back his right leg and you delivered another kick to the back of his head. He was kicked also by you a number of other times. He was simply left there unconscious. As a result, when he was subsequently treated for his injuries, he was found to have [details of injuries deleted].

[4] He tells the Court in a victim impact statement that he had to go to hospital but even after he was discharged from hospital for treatment for his injuries, he still had soreness to his upper-body, head, face, arms and legs, he said, for a long time. They were all pulsing with pain, he describes. He says his face was swollen for a couple of days, he could not talk properly, he had to open his mouth in a particular way to make

his words come out so he did not slur. He says that his vision, that is his ability to see, was impaired as a result of the beating that he got and he felt as though he had been punched in both eyes and both were closed. He could not work properly at the normal pace when he was able to resume work, he had to limp around the house and he had to use his hands to apply pressure to both sides of his leg to reduce the pain as he walked.

[5] Although he is now healed, he tells the Court, from the injuries that he suffered on this particular night, he has got ongoing psychological effects. He feels scared to go out at night unless he has someone with him because he is concerned that he would be attacked. He enquires as to why he should have been attacked. He had done nothing wrong. He was simply there to meet a friend but he was attacked by a gang of youths of which you were obviously the ring leader. You were the person who commenced the violence against him by this sexual violation which can only be described as the most disgusting act that you could perform in a sexual fashion against another male. The violation of him, a male, is akin to the sexual rape of a female because that is what it was.

[6] Mr Crichton, it is against that background which I have to sentence you today. For legal reasons, it has taken a long time, since December 2015, for this matter to finally come before the Court. There were legal complications as far as your case was concerned which went to the Court of Appeal. As a result of the Court of Appeal hearing and a re-jigging of the charges that were laid against you, you have eventually pleaded guilty to the charges for which you now appear for sentence.

[7] You have probably heard your lawyer tell you what principles the Court has got to adopt when it deals with sentencing. First of all, you are seen to be accountable for what you have done and you are accepting responsibility. I have got to take into account the interests of that victim who was grossly violated and beaten. I have got to take into account the need to impose a sentence on you which will be seen as a deterrent so you will not go around doing this sort of thing to anybody else, no such offending of a similar nature or of any nature, and perhaps as importantly, a deterrent to others who might think that they can get together in a gang, have a few drinks and

that a vulnerable member of the community minding his own business is subject to this type of attack, indignity and resulting injury.

[8] The people of New Zealand are entitled to be safe on the streets of New Zealand and it is not likely to be the case when people like you are around unless this type of offending can be properly deterred. We would like to think that one day, one day, the streets of South Auckland will be safe and so far, you have not made a contribution in that direction.

[9] I am required to look at offending of a similar nature where the Courts have imposed sentences, and in that regard, both your lawyer and the Crown lawyer have made submissions in writing and have spoken of those submissions today.

[10] The Crown suggest to me that if I take into account the principal case that deals with sexual offending, particularly sexual offending against women, that of *A v M*,¹ that the starting point for your case should be in the vicinity of seven years' imprisonment for the sexual violation. That is in the vicinity of what the Court would impose if it had been the rape of a female, but as I have already said, the holding of a man down, holding his head against your genitals, having oral sex with him, that is with his mouth to the point of ejaculation, is akin, in my view, in all respects, to the sexual violation of a woman, a disgusting act.

[11] The Crown then say that there should be an uplift from that starting point of a further year to account for the injuries that the defendant suffered in respect of the assaults that you carried out on him. Particularly significant is that there were kicks to the head and there were kicks when he was down on the ground. This is not someone who was standing up resisting. This is someone who is in a helpless position being attacked by four separate people. Yes, it might be staunch for you but it is gang attack, group attack, not one-to-one. His chance of getting away, protecting himself, was zero. You and your mates held all the cards. The Crown suggest that there should be an uplift for that particular aspect of the offending by a further three years, which gives a starting point of 10 years' imprisonment.

¹ *A v M* [1991] 3 NZLR 228

[12] Your counsel has submitted that the starting point should be far less; five years for the sexual violation, with only an uplift of one year for the subsequent assaults.

[13] Well, in my view, the starting point of five years for the sexual violation is totally inadequate. It does not reflect on the seriousness of the violation that you inflicted on this man. I adopt, therefore, the starting point for the sexual violation of the Crown which is seven years' imprisonment. However, I do accept that I have to look at the situation in its totality and, in my view, the Crown submission of a further three years for the assaults would place the ultimate sentence in too high a range. I consider the appropriate uplift for the two other assaults, having looked at the incident as a whole on this evening, to be of one year and, therefore, the total starting point for your sentence today will be one of eight years' imprisonment.

[14] The question now arises as to what issues I can take into account in mitigation. Your counsel points out, and it is accepted to some extent by the Crown, that you are a young offender. At the time of this incident in December 2015, you were aged 18 years. I understand that you are now 20 years or are certainly approaching 20 years. Nevertheless, you were 18 and it is well recognised by the Courts that persons of that age do not have the maturity to deal with issues that confront them in the same way as adults of a later age. Also, it is accepted by the Courts that because of that lack of maturity, that too long of a sentence can have adverse effects on one's ultimate ability to rehabilitate, but there is a limit that I can take into account for a defendant's age. It is of no assistance to the complainant that he is beaten up by someone who is only 18. It is of no difference to him whether it is somebody of a much later age. But I take it into account and I am prepared in your case, looking at the situation overall, to give you a discount of 25 percent for your age. That would reduce the sentence from eight years to six years.

[15] I now look at the question of your guilty plea. Some might say that came very late in the piece, having regard to the fact that the offending and the charges go back to 2015. However, as I say, there have been legal issues that had to be traversed in the meantime and that your guilty plea did follow once those legal issues had been adequately resolved. I am prepared to give you a discount the same as I would have done as if you had pleaded guilty in almost the first instance. Again, that will be 25

percent. A 25 percent reduction on a six year sentence reduces it four years and two months' imprisonment.

[16] There are other issues which I am urged to take into account. Apparently, other than this offending, and I am concerned in one aspect of the offending, you are well thought of by members of your community. I have received a number of references, hand-written references, by people who are close to you and I have received a reference from the bishop of your church. You are a churchman, you go to church on Sundays. You obviously follow in your day-to-day life, or supposedly follow, Christian principles. It surprises me, therefore, that for someone who adopts Christian principles to be involved in this type of offence. But it seems that on a day-to-day basis, you are a relatively valuable member of the community and that has been taken up by those who have seen you at sport and there have been chances or a possible chance of your following a career in rugby league and playing both for overseas clubs and possibly even for the New Zealand National Team. Unfortunately, your behaviour to date has got in the way of those possibilities, so although I may have been in a position to give you some form of greater discount on behalf of what one might call otherwise good character, I am afraid that is neutralised somewhat by two issues. First of all, that you have a previous conviction for a serious offence, that of robbery, and you are described by the probation officer as having a propensity for violence. In other words, that you are a risk to the community and that has got to be taken into account. Therefore, I am prepared to give you a total discount from the eight year starting point of 50 percent overall, and that will round off the ultimate sentence to one of four years' imprisonment.

[17] Therefore, in respect of the charge of sexual violation, having been given the three strikes warning, you are now sentenced to four years' imprisonment.

[18] In respect of the other charges, they require a separate sentence to be imposed. On the charges of injuring with intent, that will be a two year sentence. The assault with intent to injure, an 18 month sentence, and the common assault, a six month sentence. That is basically for record purposes only because all of the sentences will be incorporated in the four years overall. In other words, the sentences will be served concurrently. As I say, you have been given the three strikes warning and unless there

are any other issues to be raised by either counsel, that will conclude what remarks I have to say.

[19] Before you go though, Mr Crichton, of course, I am aware of the number of family members that you have present here in the Court to support you. That is a very comforting thought as far as the Court is concerned because you have got to serve the time which I have indicated, but at least the Court knows that when you are released, there are people in the community who support you and no doubt will encourage you in much more worthwhile pursuits in the future than you have indulged in obviously in the past. One will be to control your drinking, secondly, to control any aspects you have in respect of violence and thirdly, perhaps, to guide you back on the path that you embarked upon towards being a proper, respectful sportsman so that you can advance your career.

C S Blackie
District Court Judge