IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2017-044-004373
[2018] NZHC 2510

THE QUEEN

v

STEAD NUKU

Hearing:	26 September 2018
Counsel:	KA Lummis for Crown AS Bloem for Defendant
Judgment:	26 September 2018

SENTENCING REMARKS OF DOWNS J

Solicitors/Counsel:
Crown Solicitor, Auckland.
AS Bloem, Auckland.

Introduction

[1] Mr Nuku, you are for sentence on two charges of wounding with intent to injure. Both are third-strike offences. This means I must impose the maximum penalty of seven years' imprisonment. And, I must order you to serve the sentence without parole, unless that would be manifestly unjust.

[2] The Crown also seeks preventive detention. As you probably know, preventive detention is an indefinite sentence.

Facts

[3] You committed both offences at Auckland Prison in Paremoremo. Before I describe them, I address your first- and second-strike offences. All exhibit very serious violence.

First-strike

[4] On 14 July 2015, you and a co-offender assaulted a prisoner in the exercise yard. You had ordered your co-offender to break the victim's arm. When he failed, you intervened. As the victim was lying on the ground, you kicked him. You then wrenched his arm in an arm lock, causing it to break. You also tried, unsuccessfully, to break his legs and other arm. You then left the scene. Your co-offender continued the assault, including by jumping on his head.

[5] Woolford J adopted a starting point of seven-and-a-half years' imprisonment for this offending:[1] one charge of wounding with intent to cause grievous bodily harm. The Judge imposed a sentence of five years and nine months' imprisonment, which he described as involving "extreme violence".[2] All this you already know.

Second-strike

[6] On 19 October 2016—and so 15 months later—you committed your second-strike offences. You and other prisoners acted in concert to assault prison officers

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1 *R v Nuku* [2016] NZHC 254.
2 At [23].

with sharpened implements. The offending was premeditated. Some of the officers suffered significant injuries. You pleaded guilty to charges including wounding with intent to cause grievous bodily harm. Lang J adopted a starting point of five years' imprisonment, which he reduced to an end sentence of three years and 10 months' imprisonment.[3] The Judge made this sentence cumulative on that imposed by Woolford J.

[7] This brings me to your most recent offending, and that for sentence today.

This offending

[8] On 31 October 2017—and so just over a year after your second-strike offences—you approached another prisoner from behind. You had a large metal shank, hidden in cloth. For the uninitiated, a shank is an improvised prison weapon; typically sharpened. You used this to strike the victim to the head. You attempted to do so again, several times. A fight ensued. Another prisoner joined in. Prison officers intervened. The victim suffered five lacerations to his head, ranging from one to four centimetres in size.

[9] You told the writer of the pre-sentence report you committed this offence as the victim had falsely claimed you had taken his CD player. And, you had contemplated a different type of attack, in which you would have stabbed the victim "through the eye".

[10] Less than a month later, you approached another prisoner from behind.[4] Again, you had a metal shank. You stabbed the victim with it repeatedly. While you did so, another prisoner punched and kicked the victim. You stabbed the victim not fewer than 12 times. You inflicted seven wounds to his back; four to his arm; and one behind his ear. You stopped only when prison officers began to lock-down prisoners. You told the writer of the pre-sentence report the victim had taken your biscuits, hence the attack.

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3 *R v Pani-Marsden* [2017] NZHC 2696.
4 On 23 November 2017.

[11] The summary of facts says little about the seriousness of this victim's injuries, other than he went to hospital by ambulance. I assume he suffered no permanent injury. This important aspect should not have gone unrecorded even if the victim wanted nothing to do with the case.

Manifestly unjust?

[12] I must sentence you to the maximum sentence of seven years' imprisonment for each offence.[5] And, I must order you to serve this term without parole, unless that would be manifestly unjust. This requires consideration of the sentence I would have imposed but for the three strikes regime.[6]

[13] Six things make your offending worse, albeit some overlap. First, each offence involved very serious violence. Second, each was premeditated. And, in retribution for a trivial wrong. Third, you used weapons: a sharpened shank. Fourth, you specifically attacked the head, including by stabbing behind the ear. Fifth, you continued with the second attack after another assailant joined in. Sixth, you committed both offences in prison while there for very similar offending.

[14] This puts you within what the lawyers call "band three" of a guideline decision of the Court of Appeal.[7] In this band, starting points up to the maximum penalty are available for especially serious offending. The Crown submits the overall starting point would have been six to six-and-a-half years' imprisonment. Ms Bloem advances a slightly lower range; five-and-a-half years to six years and three months' imprisonment.

[15] I would have adopted a six-year starting point because:

(a) Your offending is near to the most serious of cases governed by the offence of wounding with intent to injure.[8]

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5 Sentencing Act 2002, s 86D(3) and (6).
6 *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [108]–[109].
7 *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39 at [38].
8 Sentencing Act, s 8(d).

(b) The second of your offences, meaning those for sentence today, is a hair's-breadth away from the more serious offence of wounding with intent to cause grievous bodily harm. To recapitulate, you stabbed the second victim 12 times, including to the head.

(c) You committed both offences within a month, and while in prison for other serious violence.

[16] In reaching this conclusion, I have considered other cases captured in a footnote to my written remarks,[9] and your criminal record, about which more shortly. Sometimes a person's record results in a discrete increase to the starting point. However, I have approached your starting point with this in mind, because your offending was committed in prison. And, this feature is integral. A discrete uplift would risk double-counting.

[17] You are only 26 years old. However, there are no true mitigating features beyond your guilty pleas. As to these, you were charged with two offences of wounding with intent to cause grievous bodily harm in November 2017. On 25 May this year, the Crown proposed to amend the charges to wounding with intent to injure if you entered pleas of guilty. On 27 June 2018, you did so.

[18] Ms Bloem contends you should receive between 15–20 percent discount for this factor. The submission is realistic. And responsible. Your pleas were reasonably prompt, but not immediate. They were plainly influenced by a reduction in the charges, which significantly benefited you.[10] The case against you was strong, even in the absence of the victims.[11] This because all the offending was fully captured on closed-circuit television. Conviction was all but inevitable. It is clear from the reports you have little, if any, empathy for your victims. For these reasons, I would have allowed a discount of 15 percent.

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9 *Karetu v R* [2013] NZCA 408; *Vincent v R* [2015] NZCA 201; and *R v Wereta* [2015] NZHC 2248.
10 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [62].
11 At [60].

[19] But for the three-strikes regime, I would have sentenced you to five years and one month imprisonment, subject only to a possible deduction for totality.[12] I would have imposed a minimum period of two-thirds to denounce your offending and protect the public. So, you would have received a substantial term of imprisonment, with a correspondingly long minimum, meaning non-parole period.

[20] Against this background, I am satisfied parole ineligibility for the duration of the mandatory sentence of seven years' imprisonment would not be manifestly unjust.

[21] First, as just discussed, were it not for the three-strikes regime, you would be serving a substantial term of imprisonment, perhaps as much as five years and one month. You would not be eligible for parole for more than three years. The three-strikes regime effects a disproportionate sentence; not a grossly disproportionate one.

[22] Second, your existing sentences mean you are not eligible for parole until January 2021. Addition of a conventional cumulative non-parole period would extend this to 2024. However, a *concurrent* third-strike term of seven years without parole—which is how I would have imposed the sentence—would extend parole ineligibility to 2025; only a year more.

[23] Third, these offences are very much like your earlier ones, both in kind and seriousness. And, your offending is becoming more frequent, not less.

[24] Fourth, while you are still quite young, nothing about your personal circumstances is remarkable.[13] The mix is depressingly familiar. Reports about your childhood are inconsistent, but include reference to violence from a young age, neglect, leaving school early, and the possibility of an attention disorder. Your father was a patched gang member. You have followed his footsteps.

[25] Fifth, you pose a high risk of violent re-offending. More on this shortly.

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12 *Tryselaar v R* [2012] NZCA 353 at [18].
13 See *R v Waitokia* [2018] NZHC 2146 at [24].

Preventive detention

[26] Preventive detention may be imposed when a person is convicted of a qualifying offence, was 18 years or over at the time the offence was committed, and the Court is satisfied the offender is likely to commit a qualifying offence after serving a finite sentence. There is no dispute the first two of these are met.

[27] The question is whether you are likely to commit a qualifying violent or sexual offence on release. Even then a discretion remains. Preventive detention is not a sentence of last resort, but it is exceptional. A long but determinate sentence is preferable when it would adequately protect the community.

[28] You have 68 convictions and five Youth Court notations. You have offended consistently since you were 16. Seventeen of your convictions are for violence.[14] Your first notable example occurred five years ago. In 2013, you assaulted a prison officer. A short cumulative term of imprisonment followed. In 2015, you assaulted someone with intent to injure. Your record says you used what is described as a stabbing or cutting weapon.

[29] From here, your offending has sharply escalated. It has become more serious and frequent. As I discussed earlier, in July 2015 you wounded another prisoner by breaking his arm and trying break his other limbs, the first-strike offence. In October 2016, you committed second-strike offences attacking, with others, prison guards with weapons. As noted, some were significantly hurt. To this mix must be added your offending in October and November of last year.

[30] It follows your worst violence has been in prison. And, other prisoners and prison staff your most serious victims.[15] I accept the Crown submission the harm caused to the victims and wider community is likely to have been significant. That your recent victims suffered, I assume, no lasting injury is a matter of luck, not intent.

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14 Sentencing Act, s 87(4)(a).
15 Section 87(4)(b).

[31] I have helpful reports from Dr Krishna Pillai, a psychiatrist, and Ms Michelle Coutinho, a clinical psychologist.[16] You have not been willing to engage in any meaningful rehabilitative programmes, beyond briefly seeing a prison psychologist in 2013.[17]

[32] True, your security classification has not helped. But neither has your attitude. You have been assessed as insufficiently motivated for some programmes, and excluded from alcohol and drug treatment programmes because you failed to comply with the rules. You told the pre-sentence report writer you were willing to work with a psychologist but not willing to address your use of "dope". However, Ms Coutinho says you are motivated to address your offending. Dr Pillai does not appear so optimistic.

[33] You present as sanguine, meaning carefree, about remaining incarcerated. These attitudes appear to be linked to your view of gangs and violence. You were a member of the Mongrel Mob, but you are now affiliated with the Killer Beez. You told Ms Coutinho you liked committing assaults in prison as you felt you had achieved something by hurting a rival gang member. You said in prison, it is a case of "either him or me". You also told Ms Coutinho you are not in favour of segregation, as prisoners in that wing are viewed as scared.

[34] You made similar remarks to Dr Pillai. You said you had wanted to be a "lifer" since the age of 18, and you admired prisoners who frightened other prisoners and guards. You said when you commit an offence of violence, you intend to cause the victim "maximum damage". You said also you owe "love and loyalty" to the Killer Beez gang.

[35] Other remarks by you offer some hope. You accept you are living for the moment, but that you will regret this one day. You have also said you want to "get out" for your mother. I consider these remarks important.

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16 Sentencing Act, s 88(1)(b).
17 Section 87(4)(d).

[36] Unsurprisingly, both experts consider you pose a high risk of re-offending—in prison and beyond.[18] It seems, for now, those most at risk are other prisoners and prison staff. But unless your attitude changes—and you distance yourself from gangs—I have no doubt the public would be at considerable risk too. That you are prepared to repeatedly stab someone because they took your biscuits does not bode well for your interactions with others in the outside world, particularly given the pressures and pitfalls of modern life.

[37] I acknowledge an argument prison may act as a potential incubator for serious violence, and preventive detention may give you what you want, only to enhance your status within prison. I acknowledge also those most at risk now are those around you. However, I am satisfied a long finite sentence would *not* provide adequate protection for society, including those in prison.[19] You pose a high risk of re-offending. Your offending is escalating. You show little inclination for reform. This despite receiving two long prison sentences only recently. Plainly, you are dangerous. You seem to take pride in that. An exceptional sentencing response is now required.

[38] Another aspect is equally important. Preventive detention is the *only* sentence that may persuade you to take responsibility for your actions, and in turn encourage reform. I am mindful of Ms Coutinho's observations here. In a meaningful sense, your future will be in your hands. Preventive detention may help you come to appreciate violence is not a sustainable way of life, and destructive only, both for your victims and you. A long finite sentence offers no such path; merely more of the same.

[39] Your minimum period will be what it would have been under the three-strikes regime. I have already explained this is not manifestly unjust.[20]

[40] Mr Nuku, would you now please stand:

(a) On each charge, you are sentenced to preventive detention.

(b) You must serve at least seven years' imprisonment.

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18 Sentencing Act, s 87(4)(c).
19 Section 87(4)(e).
20 Sentencing Act, s 86D(7)(b).

This sentence is concurrent on your existing ones.

[41] Please stand down.

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Downs J