IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CRI-2009-027-000660

THE QUEEN

v

JONOTHAN POUTAI

Hearing: 29 October 2009

Appearances: Ms B O'Connor for Crown
Mr R Garbett for Prisoner

Judgment: 29 October 2009

SENTENCING REMARKS OF PRIESTLEY J

Solicitors:
Crown Solicitor, Whangarei
Counsel:
Mr R Garbett

Introduction and description

[1] Jonothan Winiata Poutai, you have been convicted of wounding with intent to cause grievous bodily harm. That conviction follows your being found guilty by a jury at the end of your trial. The crime carries a maximum term of 14 years imprisonment.

[2] You were, in terms of the jury's verdict, party to a sustained and premeditated attack on your victim Matthew Te Hira. The assault took place in March 2008 in a remand pod at Ngawha Prison. Both you and your victim were inmates at the time.

[3] I am satisfied as Trial Judge on the evidence that the attack on the victim was directed and incited by you. You had the belief that his former partner or girlfriend had been having some form of sexual relationship with the victim.

[4] The assaults all took place in the victim's cell and comprised three waves. The first wave was carried out by the prisoners Connelly and Hoeer. The victim was pushed and punched. The evidence suggests, however, that he was not seriously injured during that wave. There is no satisfactory evidence of bleeding. He was seen to sit on a bench in his cell shortly thereafter. This sight irritated you and you incited the second wave which involved the prisoners Te Whata and Briggs. The evidence of those assaults suggests that the victim was pushed to the ground and was kicked and stomped. Certainly blood flowed from the victim after that series of assaults. The third wave involved again the prisoners Hoeer and Te Whata and during that wave the victim was again seriously assaulted, kicked and stomped on the ground and was hit over the head by Mr Hoeer wielding an improvised weapon being torch batteries inside a sock.

[5] You displayed at the end of all this a degree of callousness and the Crown has correctly drawn my attention to evidence to the effect that after that third wave when the victim could be seen spasming on the floor you were heard to comment "Fuck he might die. Oh well, he will learn his lesson this time from this", or words to that effect.

[6] I have listed carefully to your counsel's submissions but I reject those submissions, carefully crafted as they are, that you were not over-anxious to beat up Mr Te Hira or that other direct causes of the assaults were operating. Although not an assailant yourself, you were clearly inciting and advising, and your Black Power status inside the pod that day gave your wishes great weight.

[7] The resulting injuries on the victim and the long-term effect of those injuries were serious. The Crown is not able to produce any evidence as to which specific blows or kicks caused what damage. However, the medical evidence I heard at trial was to the effect that on admission to Whangarei Hospital the victim was semi-comatose, had a perforated left ear drum, a grossly swollen face and, revealed by a CT brain scan had sustained a subdural haematoma on the left side of his brain and brain swelling which indicated severe injury. This led to memory loss, mild to moderate cognitive deficits and has required support and rehabilitative intervention. In short, he is permanently damaged and his life has changed drastically.

[8] I need to say something about your personal circumstances which have been gleaned from the pre-sentence report in the main. I note that for personal reasons you declined to be interviewed.

[9] You are 44 years of age. According to previous reports you joined the local Black Power gang when you were 15 and remained a hard-core gang member for over a quarter of a century. When last interviewed by the Probation Officer in November 2007, you stated you were no longer a member of the Black Power but did not elaborate any further on that.

[10] You have a number of previous convictions for violence and other offences. Your offending history spans 27 years. In fact, only four calendar years have been offence free. You have attended several anger management programmes in the past both in prison and in the community but the pre-sentence report suggests this has not stopped your violent offending. I will say a bit more about that in a moment.

[11] The report writer assessed your motivation to change being low due to your extensive past criminal history and your failure to respond to past deterrent

sentences. You, unfortunately, have a history of non-compliance with community-based sentences. The risk of your re-offending is assessed as being high and will remain so unless you fully address key rehabilitative needs. Unsurprisingly, the pre-sentence report recommends imprisonment.

[12] I do, despite your past history Mr Poutai, give you some credit in recent times. Although you have 96 previous convictions, the convictions from 2000 up to 2008 have been for male assaults female, breaching protection order, contravention of protection orders; one in 2000 one of kidnapping and another one in 2000 of assault on the police.

[13] Given the relatively short terms of imprisonment imposed on you for that offending over the last eight or nine years, I take the view that as far as I can assess it, that offending on your part was not at the more serious end of the range and that your past criminal history must have been built in to some extent into those periods of imprisonment imposed.

[14] I need to mention for sentencing purposes the various aggravating features of this particular offending and I will return to that again when looking at the tariff case of *R v Taueki* 2005] 3 NZLR 372. Aggravating features, however, particularly those set out in [31] of *Taueki* include extreme violence, premeditation, the use of a weapon, serious injury, attacking the head, facilitation of a crime, multiple attackers, the vulnerability of the victim and an element which I will elaborate on shortly, of gang warfare. All those are features which when setting a start point, Mr Poutai, I will have to reflect.

[15] I am unable to see any mitigating features here relating to either the offending or to you as the offender. There has been no expression of remorse by you. Unlike some of your co-offenders, you chose to run the case through to the final verdict by the jury. You did not enter any plea of guilty.

[16] I turn now to counsel's submissions. Ms O'Connor for the Crown submits that the start point of your co-offender, Mr Hoeer, has some relevance and that I should be looking at a start point of between 12 and 13 years with perhaps an uplift to reflect the features that this was offending whilst you were on remand in the prison and your previous criminal history.

[17] I am bound to say that your own counsel, Mr Garbett, did an extremely good job at trial and took every point which properly could be taken. I have already indicated, however, that his submissions to me today I have rejected because it seems perfectly clear to me that you were, not only a party, to these three waves of assault on the victim but were a party for your own private purposes and were using your seniority in the gang.

[18] Mr Garbett's submissions were that I should get to a start point of about six years and not impose any minimum term of imprisonment. The Crown for its part submits that a minimum term of imprisonment is appropriate.

[19] The Court of Appeal tariff case of *R v Taueki* mandates various aggravating features in [31] and describes three bands. There is no doubt in my mind having regard to *Taueki* [40]-[41], that these assaults sit inside Band 3 where the start points are suggested as ranging from nine years to a maximum of 14 years.

[20] Band 3 offending requires three or more aggravating features which, in combination, are particularly grave. Relevant aggravating features here are premeditation, serious injury, the use by Mr Hoeer of a weapon, attacking the head, multiple offenders spread over three waves and the vulnerability of the victim who, although an adult, was confined to a prison pod sitting inside his cell. These probably present a broad description of vigilante action in as much as you and those acting on your direction took the law into their own hands acting out of revenge.

[21] Although *Taueki* headlines as an aggravating factor "gang warfare" [31](k), the following description of "serious" violence perpetrated by members of a criminal group" can, in my view, be correctly seen as an aggravating feature given that you and most of the assailants were Black Power members.

[22] There are no mitigating features relating to the offending here. There was no element of proximate provocation or a brawl.

Sentence

[23] Mr Poutai, you are aged 44. You have spent most of your life in crime. Although you say you are no longer a Black Power member the evidence from your trial satisfies me that you were regarded by inmates and prison officers alike as a senior Black Power person who had influence and authority. You arranged an attack on a defenceless victim to exact private revenge. Being unsatisfied with the results of Wave 1 and Wave 2 because the victim seemed still capable of sitting up, you incited a third wave. You sat at a table across from the victim's cell and directed operations.

[24] In terms of *R v Taueki* a significant number of aggravating features are present, as I have specified. As a result, your target, the victim, had his life blighted. It is true you did not personally inflict violence but you directed it deliberately and for your own ends.

[25] I consider that a start point of 12 years is justified. I see no remorse, no mitigating factors. An uplift for personal aggravating features is unnecessary given that your more recent offending appears to be domestic related. That is not to minimise it but the sentences imposed, as I have said, on a man with your criminal record, suggests your more recent offending is not comparable to this offending.

[26] So the end sentence too will be 12 years imprisonment. There are no mitigating factors which justify any credit and I sentence you to 12 years imprisonment accordingly.

[27] In my view, all s 86 factors come into play. Parole eligibility after four years would result in an inadequate sentence. Denunciation and deterrence are particularly appropriate here. I therefore impose on you, as a minimum term of imprisonment, a term of six years and two months.

[28] Stand down.

Addenda

[1] Paragraph [7], which appears in all earlier sentencing notes of co-prisoners, was omitted by me in error. With the consent of both counsel it has been added into these sentencing notes.

[2] The Registrar informed me that in paragraph [26] I made a verbal slip saying 12 "months" rather than "years". This error was corrected by me in open Court.

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Priestley J