

THIS IS NOT A COMPLETE TRANSCRIPT OF WHAT WAS SAID ON SENTENCING ON 13 JUNE 2012. THE NOTES HAVE BEEN EDITED TO REMOVE REFERENCES TO INFORMATION THAT HAS BEEN PERMANENTLY SUPPRESSED. THIS VERSION OF THE SENTENCING NOTES IS PUBLICLY AVAILABLE AND MAY BE REPORTED IN FULL

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CRI 2011-004-1128
[2012] NZHC 1337**

THE QUEEN

v

NATHAN BOULTER

Hearing: 13 June 2012
Counsel: P K Hamlin and L MacDonald for Crown
P Gruar for Prisoner
Judgment: 13 June 2012

(EDITED) SENTENCING NOTES OF HEATH J

Solicitors:
Crown Solicitor, Auckland
Counsel:
P Gruar, Auckland

Introduction

[1] Nathan Boulter, you appear for sentence today having pleaded guilty on 17 April 2012 to nine counts alleging serious and prolonged physical abuse of Ms Montgomerie and wounding Mr Stewart with intent to cause grievous bodily harm.

“Three strikes” warning

[2] Counts 2, 4, 5, 6, 7, 8 and 9 of the indictment are qualifying offences for the purposes of what is commonly called the “three strikes” regime. I am required to give a warning to you in respect of those convictions. There is a particular form of words in which I am required to do this by Parliament and I now give those warnings to you.

[3] I am now going to give you a warning of the consequences of another serious violence conviction. You will also be given a written notice outlining these consequences, which lists the ‘serious violent offences’.

1. If you are convicted of any serious violent offences other than murder committed after this warning and if a Judge imposes a sentence of imprisonment then you will serve that sentence without parole or early release.
2. If you are convicted of murder committed after this warning then you must be sentenced to life imprisonment. That will be served without parole unless it would be manifestly unjust. In that event the Judge must sentence you to a minimum term of imprisonment.

Facts

[4] For a period in 2010, you and Ms Montgomerie lived in a domestic relationship. During this time, she made two complaints of domestic violence against you. One was made on 1 September 2010 and the other on 12 October 2010. After investigation of each, you were arrested and charged with assault. On 15 December 2010, you were bailed by the District Court at Invercargill to appear on 17 March 2011. As terms of bail, you were ordered not to associate with Ms Montgomerie and to reside at an address in Southland.

[5] In the meantime, to avoid further contact with you, Ms Montgomerie had returned to her family's home on Great Barrier Island.

[6] Close to Christmas 2010, you made a deliberate decision to travel from Southland to Auckland to locate Ms Montgomerie. You arrived on 26 December 2010 and stayed with a friend in Papakura.

[7] On 31 December 2010, you sent a Facebook message to Ms Montgomerie saying that you were going to kill yourself. As it happened, she did not read that message until 4 January 2011. On that day you contacted her again by Facebook, writing words that could have been interpreted as a threat to kill her. Ms Montgomerie complained about those messages to Police, on 5 January 2011.

[8] On 17 January 2011, you booked, under a false name, a one way ferry trip to Great Barrier Island from Auckland city. The ferry left for Great Barrier at 7am on 20 January 2011. It arrived at 11.30am at Tryphena Wharf. You travelled about 8.5kms from the wharf, which is on the western coast of the Island, to Ms Montgomerie's residence, on the east. When it was dark, you entered Ms Montgomerie's house through an open door. She was there with another man, Mr Stewart. Ms Montgomerie's younger brother, then aged seven years and his friend, also aged seven, were asleep in an upstairs bedroom.

[9] You went to Ms Montgomerie's room. You hid under the bed. When Ms Montgomerie and Mr Stewart came to bed you emerged and struck Mr Stewart on the back of the head with a hard object. He was knocked to the floor. You continued to strike him about the head and body.

[10] While Ms Montgomerie was begging you to stop, you responded by hitting her in the head with the object. You then resumed your attack on Mr Stewart, rendering him unconscious. Ms Montgomerie ran from the bedroom trying to call for help.

[11] You went after her. While you and she were on a balcony, you held her by her leg and hair while dangling her in mid-air over the balcony. Eventually you pulled her back onto that deck.

[12] Shortly after, you rendered Ms Montgomerie unconscious by punching her in the back with your fist and kneeling her in the head. At this stage you were also threatening her with a weapon resembling a thistle grubber. You then took Ms Montgomerie away from the house.

[13] Between about 11.55pm on Thursday 20 January and 3pm on Saturday 22 January, you held her in isolated bush on the Island. She was wearing only a singlet-top and pyjama bottoms during this time, during inclement weather. At times you dragged her across undulating terrain in the bush.

[14] To accord Ms Montgomerie some dignity at this difficult time I shall give only an outline of what happened over that period of some 38 or 39 hours. You abused her physically over this period. That abuse included physical attacks and strangulation that led to serious injuries. Your intent in doing so was to cause really serious harm to her.

[15] After all of that, Ms Montgomerie was able to persuade you to dispose of a weapon by throwing it into a stream and to walk together towards Tryphena Wharf to escape. Later in the day, searchers located the two of you. Ms Montgomerie's ordeal finally came to an end.

Harm to the victims

[16] Mr Stewart received a fractured skull at the front of the head, bruising and swelling to the rest of his body.

[17] Ms Montgomerie received haemorrhaging to both eyes and a diagnosed brain bleed from strangulation. She too sustained bruising and swelling to her head and body and abrasions to her feet.

[18] One only has to read the victim impact statements of both Ms Montgomerie and Mr Stewart to realise the horrific situation in which they found themselves and the emotional and physical harm that has been done to them. Without seeking to minimise the harm caused to Mr Stewart, the physical and emotional injuries to Ms Montgomerie were much more profound.

[19] Ms Montgomerie has read out her victim impact statement in Court today. You have heard her to do. She read it with a great deal of dignity in difficult circumstances. I hope that what you heard from her has some impact on you in understanding exactly what has resulted from your actions over those few days.

Analysis

(a) Starting point

[20] The starting point for any sentence must reflect the conduct involved which is inherent in the offence and aggravating features of the offending, viewed against the maximum penalty for the lead charge for sentencing purposes.

[21] The offending involved a pre-conceived plan to travel almost the full length of this country to confront Ms Montgomerie. At the time, you were on bail in respect of domestic violence charges that had been laid in Invercargill. It is fair to the Judge who granted you bail to say that nobody could have foreseen the trouble to which you went to meet up with Ms Montgomerie, in contravention of your bail conditions.

[22] When you arrived in Auckland, you contacted Ms Montgomerie through her Facebook page, making threats. You went to the trouble of booking a one-way voyage from the city to Great Barrier Island in a false name. You went into Ms Montgomerie's house without authority. You concealed yourself under the bed. At the time when Ms Montgomerie and Mr Stewart entered the bedroom, they were at their most vulnerable. You then embarked on what can only be described as a course of conduct over a protracted period of time during which extreme physical violence

was inflicted on Ms Montgomerie. In respect of Mr Stewart, he had been hit by a weapon in a manner that rendered him unconscious.

[23] In relation to the offending against Ms Montgomerie, I take a starting point of 11 years 6 months imprisonment and add to that a period of one year to reflect the serious assault on Mr Stewart. That takes an overall starting point to 12 years 6 months imprisonment.

[24] To that, I add a further three months to reflect the fact that you were on bail when the offending occurred. That is an aggravating factor of a personal nature. That means the starting point for sentence is 12 years 9 months imprisonment.

(b) Mitigating factors

[25] Next, I need to consider mitigating factors relating to the offence and to you personally. There are none in relation to the offending. Your personal circumstances are much more complex.

[26] A psychiatric report from Dr Fernandez has been made available to me. She saw you at Mt Eden prison on 11 May 2012. She has been able to provide greater insight into your mental health condition than was possible in earlier reports that considered your fitness to plead.

[27] In summary, Dr Fernandez diagnoses you as having a psychotic disorder. Your symptoms do not meet the criteria for any specific type of disorder. Nevertheless, she is clear that you have an underlying psychotic illness which has responded positively to a trial of psychotropic medication.

[28] Dr Fernandez is of opinion that if your psychotic symptoms were to persist, it could lead ultimately to a diagnosis of schizophrenia, a major psychotic disorder.

[29] As a result of taking prescribed medication while in custody, your mental health state is now stable and you do not currently experience aggressive ideation or

impulses. You are able to participate appropriately in therapeutic interventions. However, Dr Fernandez still regards the prognosis as “unclear”.

[30] More relevantly to the time of offending, Dr Fernandez opines that “the link between” your “abnormal state of mind and” your “offending does exist but remains tenuous”. I take from that observation that Dr Fernandez cannot say confidently the extent to which your offending was brought on by your mental condition. Nor can she rule it out as a significant cause.

[31] I have read your letter to me and the supporting letters from your friends and family. It is clear that you would benefit from an ability to serve the inevitable prison sentence in Southland, but that is a matter for Corrections officials rather than me. I urge that they give serious consideration to that.

[32] I have also read your letters to your victims. I am still left unsure about the degree of insight that you actually have into your offending and the consequences of it. Like Dr Fernandez, I have concerns about your inability to empathise adequately with your victims.

[33] The question is what credit, if any, can be given for your psychotic disorder. If credit were to be given it would need to come under the umbrella of diminished responsibility; in other words a personal affliction that diminished your culpability for the physical abuse that you carried out on your victims.

[34] In this case, it is clear that the dominant sentencing goals must be denunciation of conduct, holding you accountable for your actions, deterring you and others from offending in a like manner in the future and managing risk of harm to the community. But those goals are tempered, in cases involving mental disorders suffered by offenders, by the need to reflect diminished responsibility and consequential diminished culpability of someone who acts while suffering from such a disorder.

[35] As our Court of Appeal has said previously, it is a shame the law does not contemplate dual use of imprisonment and detention in a mental health facility, in

these circumstances. There is a lack of fit, in such a case, between sentencing principles and the need, in the interests of both offender and community, for psychiatric rehabilitation.¹

[36] I am prepared to accept some link between the historical nature of your diagnosed disorder and your offending. That view is supported by the background that has been recounted to me by Mr Gruar today, particularly the incident of abuse that led to a change in behaviour. There is also evidence of borderline personality disorder with anti-social traits that tends to align itself with a view of that type.

[37] I am prepared to accept that the underlying mental condition probably removed natural inhibitions that usually prevent human beings from acting in this brutal and callous way. But beyond that, I cannot see any basis for additional credit.

[38] The fact that you are now being treated, apparently with some success, is more relevant to the time at which you may receive parole; namely, to be considered by the Parole Board in assessing your risk to the community at the time of potential release.

[39] You will have heard the discussion I had with the lawyers about whether you should be ordered to serve a minimum period of imprisonment. I say now that I do not intend to impose a minimum term. It is important that you have an incentive to continue treatment for your underlying mental disorder and to undertake programmes for that purpose.

[40] If you can undergo that treatment and programmes and find a way of managing the consequences of your mental illness, that will be beneficial both to you and the community at large. But you do need to be aware of something. If you are unable to demonstrate that you can have your psychiatric condition managed adequately and there are risks to the community, it is likely that you will serve the whole of the finite sentence that I am going to impose upon you today. The purpose of not ordering a minimum period is simply to give you an incentive to do what you can to rid yourself of these demons before you are released from prison.

¹ *R v Khan* CA83/02, 4 December 2002, at paras [19] and [20].

[41] I give a credit of 15% for the mental disorder and add another 5% to represent a degree of remorse that I detect, notwithstanding the lack of insight or empathy to which I have referred. I give you the benefit of the doubt that lack of insight and empathy that is apparent on the record, may in fact result, at least in part, from the psychiatric disorder from which you suffer.

[42] I allow a total of 20% for those mitigating factors. That makes a rounded revised starting point of 10 years imprisonment before deducting a credit for the guilty pleas.

[43] I deduct a credit of 15% to reflect the guilty pleas. I do not accept that the pleas can be seen as reflecting an acceptance of responsibility for the offending at the earliest possible time. It is clear that, by the time the sentencing indication was requested in March this year in anticipation of a trial due to take place this month, you were in a position to acknowledge responsibility.

[44] While I do not suggest there is any misuse of the sentencing indication process in this case, this Court needs to be mindful of the possibility that sometimes the process will be prolonged and a sentencing indication obtained with counsel seeking further credit even though responsibility has not been taken before determining whether an indication will be accepted or not. I consider that the credit of 15% is adequate in those circumstances.

[45] I round the credit to 18 months, making the effective term of imprisonment one of eight years six months imprisonment.


[46] I am required to consider whether reparation should be ordered. I do not do so, simply because you do not have the means to pay.

Sentence

[47] Mr Boulter, I impose the following sentences:

- (a) On count 1 of the indictment, you are sentenced to a term of two years imprisonment.
- (b) On count 2, you are sentenced to a term of three years imprisonment.
- (c) On count 3, you are sentenced to a term of three years imprisonment.
- (d) On count 4, you are sentenced to a term of five years imprisonment.
- (e) On counts 5, 6, 7 and 9, you are sentenced to a term of imprisonment of eight years and six months.
- (f) On count 8, you are sentenced to a term of imprisonment of six years.

[48] Stand down, please.


P R Heath J