

**IN THE DISTRICT COURT
AT AUCKLAND**

THE CROWN

v

JUNIOR SAMI

Hearing: 14 October 2005

Appearances: S McColgan for the Crown
J Edgar for the Defendant

NOTES OF JUDGE FWM McELREA ON SENTENCING

[1] The defendant, Junior Sami, is for sentence today in respect of one charge that, on 12 May 2005 at Auckland, he assaulted Judy Watt with intent to rob her. That is a crime under s 236 of the Crimes Act 1961 and it carries a maximum sentence of seven years' imprisonment.

[2] The summary of facts discloses that on that day at about 6.25pm the defendant and three unknown associates were at St Lukes shopping mall in Auckland. They were standing on the level 3 car park by a set of steps leading to the shopping mall. Although the car park has adequate lighting to ensure customers can see where to go, the area in which they were waiting was not well lit due to two blown light bulbs, and because of the lack of lighting the defendants had chosen this area to wait for potential victims.

[3] The victim, Judy Watt (a 43-year-old mother of two children), had parked her car and walked to this area with her friend, with a view to going to the shopping mall. The waiting group parted to allow them through to the steps and as the victim moved through the group the defendant grabbed her handbag and attempted to rip it from her possession. She was holding it securely and was pulled off balance and fell to the ground. The defendant continued to pull at the handbag and, as a result, she was dragged a short distance along the ground. The victim pleaded with the defendant not to take her bag and, after a short struggle, he gave up attempting to steal the bag and ran off with his associates to the vehicle and then drove off.

[4] As a result of the attack the complainant received a grazed elbow and a grazed knee. Her jeans were ripped and a strap on her handbag was broken. Reparation in the sum of \$150 was sought for these items.

[5] When spoken to by the police the defendant admitted the facts and stated that he wanted to show his mates he could do it. He is a 22-year-old male who has not previously appeared before the Courts.

[6] The statement that he “admitted the facts and said that he wanted to show his mates he could do it” is something of an over simplification. In the video interview he made with the police the defendant stated he had not known these three co-offenders before but met them after an informal game of basketball when he had finished work – they were three Tongan men. He had his sister’s car and they asked him to take them to the St Lukes shopping centre; he agreed to do this but on the way there he became concerned at their discussion of plans to carry out a theft or robbery.

[7] According to the pre-sentence report he indicated to them that he did not want to take part in this activity but said one of the young men showed him a gun and threatened him and he was forced to stop and hand over the car keys. He said that he did not want to leave his sister’s car with them and was afraid for his life if he did not co-operate by going with them and waiting for a victim in a darkened area of the car park.

[8] The defendant said that when he had snatched the bag from the victim and she fell over the other men ran away. He had then gone back by himself to ask if she was all right.

[9] There is therefore (based on the interview which he gave to the police) some basis for saying that this attempted robbery was not his original plan, and that he went along with it in circumstances where a gun had been shown to him, and he felt somewhat fearful.

[10] The defendant is a person who has not previously been involved in crime, being a first offender at the age of 22. Other matters apparent from the presentence report are that he came here from Samoa in the year 2000, as one of a family of ten children. His father is a minister in the Samoan Methodist Church and the parents commented that they had been very proud of their son who had played sport and “been a good boy” growing up in a small village in Samoa. They said he had made many friends when they moved to Mt Roskill.

[11] He has had a history of work and a previous employer described him as being of friendly disposition with an excellent performance record. However, he is currently on a sickness benefit having suffered injuries when he had a motor accident while driving his brother-in-law’s car last month; he has sustained head injuries which mean he is unable to work at the moment. He lost his job when his employer learned about this present offending, but he wishes to get back into work as soon as his head injuries allow him to do so.

[12] According to the probation report the defendant does not consider himself to be a violent person and was unable to see how he had acted in that way. He is not a drug user and had not been drinking alcohol at the time of this particular incident. The recommendation of the report is that he is probably unsuitable for community work at the moment (due to his injuries) but that a sentence of six months’ supervision, plus reparation, would be appropriate.

[13] A restorative justice conference was held following the expressed desire of the defendant to have such a meeting with the victim, and the willingness of the victim to take part in that process.

[14] The report supplied to the Court (through the Restorative Justice Co-ordinator) shows that this conference was held on 7 July this year at the St Lukes Presbyterian Church in Remuera. It was attended by the victim, her husband and a support person for the victim; the offender, his mother, sister and brother-in-law; and a facilitator and co-facilitator. The police officer in charge of the case was invited but unfortunately was unable to attend.

[15] The report of the conference describes the process followed at the meeting. The offender was invited to speak first, because this was the wish of the victim. He did so and he expressed his remorse and apology for what had happened. At one point he is reported as having said (with assistance from his sister, acting as interpreter) how he “had wanted to please his new friends” but I do not interpret that (especially given the difficulties of translation) as necessarily being inconsistent with the account previously given to the police.

[16] The victim was obviously significantly helped by the restorative justice process at the meeting. She expressed the fact that she had been unable to feel safe in public places and had suffered much anxiety because of this attack. It was of assistance to her to hear the matters stated to her by the defendant. She expressed the hope that the defendant would move on and do something productive with his life, she accepted the apology and had no anger towards him as a person, but said that she wanted him to learn from his mistake and hoped it had taught him a lesson.

[17] The victim said that if the defendant worked with youth (as he said he wanted to do) then he could share his experience, and she wanted to know about his progress. She wanted the agreed reparation to be put into a bank account for her children, and arrangements were made for that to happen.

[18] The victim, her husband and her support person all agreed that the conference had helped them to move on and that they really wanted to know how the defendant

managed to do the things requested of him. At one point in the conference the victim said that she did not want Junior to serve a prison term but wanted to be kept informed of his progress.

[19] The outcome of the conference was that the apology was made and accepted, Junior would join the youth group at his father's church, and he would pay \$150 reparation. Those matters have been agreed as part of the conference. They of course do not bind the hands of the Court in any way as to what an appropriate sentence is, but they have a relevance to which I will return in a moment.

[20] For the Crown, submissions were filed suggesting that a term of imprisonment was called for in this case and that an appropriate starting point was one of 12 months' imprisonment, subject to a reduction on account of the Guilty plea and other mitigating factors.

[21] In Court, Mr McColgan, representing the Crown, said he felt that 12 months was too high for the starting point in this case, given that it was at the lower end of the scale of such matters, and that a starting point of 9 months was appropriate. He submitted that a short sharp shock was required but accepted that it was for the Court to assess whether this was expressed in terms of a sentence of imprisonment or in terms of community work and supervision coupled with reparation.

[22] However, according to Mr McColgan, the primary reasons supporting a sentence of imprisonment were issues of denunciation and deterrence, including specific deterrence for this defendant.

[23] Mr Edgar, on behalf of the Public Defenders Service, filed written submissions and supported those in Court today. He submitted that the leading case of *R v Mako* (CA446/99, 23 March 2000, a judgment of the Court delivered by Gault J) allows for non-custodial sentences in appropriate cases at the lower range of the scale; in particular, he pointed to paragraph 35 of that judgment in support of that submission. At that point in the judgment the Court specifically acknowledged that the sentencing discretion "extends across the range from non-custodial sentences to the maximum of imprisonment for 14 years ... [thereby] placing the task of assessing

the particular combination of features comprising an offence in its proper relative position on the scale of seriousness as a matter of judgment calling for the careful exercise of the sentencing discretion.

[24] The Court of Appeal's decision in *Mako* is helpful but of course it deals with aggravated robbery which has a maximum sentence twice that of the present case, which is why the range of 18 months to 3 years for aggravated street robberies was not taken as the appropriate starting point by the Crown in this case.

[25] Whilst the Crown pointed correctly to the need to denounce this type of offending strongly and to deter others from it, those are but two of the purposes of sentencing. Since the Court of Appeal's decision in *Mako* the Sentencing Act has been passed introducing some purposes of sentencing not previously expressed. Denunciation and deterrence remain amongst those available to the Court (as set out in s 7) along with protection of the community and assistance in rehabilitation and reintegration. But new factors not previously expressed in this way include the first three in s 7(1). They are:

- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or*
- (b) to promote in the offender a sense of responsibility for and an acknowledgment of that harm; or*
- (c) to provide for the interests of the victim of the offence....*

[26] Where a defendant takes part in a restorative justice process, which is successful in achieving the usual objectives of that sort of process, then that can have a very real relevance in terms of the purposes of sentencing. The Court is required by s 8(j) and s 10 to take into account the outcome of such a process. Where a defendant such as Mr Sami takes part in a conference with a direct face-to-face meeting with the victim (and is willing to answer her questions and to be accountable to her in a very direct way) the Court in my view can accept, as a mitigating factor, that he has already been held accountable in that face-to-face way for harm done, and he has been held accountable in a way which is likely to promote a sense of responsibility for harm and some personal acknowledgement of that harm. The conference has also provided for the interests of the victim by making things easier for her and her family to put this incident behind them and to move on in their lives.

[27] Different Judges have mentioned this assistance that can be provided to victims in this way, and where it lessens the trauma for the victim and assists them to heal the wounds of the past then that is certainly something which is not only part of the restorative process but is relevant to sentencing. I refer for example to *R v Cassidy* (High Court, New Plymouth, T 2/03, 10 July 2003, Paterson J) cited in *Observing the Application of Restorative Justice in Courts of New Zealand*, a paper delivered by Judge S.A. Thorburn in Shenzhen City, Peoples Republic of China, on 19 August 2005. There the offender was charged with manslaughter. There had been a bar room scuffle and the victim assaulted the bar manager. The offender, who was a member of the staff, confronted the victim outside and struck him in the mouth with a blow that caused him to lose his balance, fall backwards and strike his head on the footpath, causing death. There was a restorative justice conference for the offender and the deceased's partner. The Judge said at para 10 of his sentencing remarks:

You recently attended a restorative justice conference with members of Mr Kendall's family, their support persons and your family and support persons. At it, it is to your credit that you accepted full responsibility for what happened and expressed your sorrow and deep remorse. You acknowledged the Kendall's family's right to express their anger towards you and apologised on several occasions. The facilitator of the conference noted that the goodwill displayed by both families during the highly charged emotional atmosphere experienced at the conference will be a starting point of the healing process for all involved. It is to your credit that you took part in that process and it is to be hoped that you have been a contributor to some extent in reducing the ongoing stress and effects on Mr Kendall's family. You will be aware, however, from that conference, of the ongoing anguish of those that he left behind.

[28] And at para 16:

I intend to give you credit for attending the restorative justice process. I know you have said it is the hardest thing you have done and I can understand that. You did not need to do it, and you will be given credit for that. I accept there has been genuine remorse and a genuine attempt by you to assist the victim's family.

[29] The combination of matters which Mr Edgar relies on in submitting that no sentence of imprisonment is required here are, first of all, that the defendant is a relatively young man. Secondly, he has no previous convictions. Thirdly, he has pleaded Guilty at an early opportunity. And fourthly, he has taken part in a favourable restorative justice conference.

[30] One might add to that list: fifthly, he has the support of a strong family - which, in itself, suggests that he is unlikely to make this sort of mistake again. Sixthly, there is, in my view, a considerable reduction in culpability given that this offending occurred as a result of meeting up with people previously unknown to him who had this plan to commit a robbery and were carrying a gun, which they produced to him with predictable psychological consequences as a result.

[31] My conclusion is that a sentence of imprisonment is not needed in this case at all, and indeed it would not serve some of the very purposes that the Crown seeks to rely on.

[32] Mr McColgan suggested it was necessary, in terms of specific deterrence, to deter this young man from a life of crime. Given his remorse, his Christian and strong family support systems, and his lack of previous convictions, I would have thought that a sentence of imprisonment is not needed for that purpose and indeed some would say it would subject him to the undesirable and sustained influence of people with entrenched criminal habits.

[33] It is noteworthy that the evaluation of the restorative justice pilot scheme recently completed through the Courts shows not only a reduced reoffending rate for people taking part in restorative justice conferences compared to matched sample cases, but that such reduced reoffending rate occurs despite a reduced use of imprisonment. See *New Zealand Court – Referred Restorative Justice Pilot: Evaluation*, Ministry of Justice, May 2005, especially at table 7.3. Imprisonment in the pilot scheme was used at a rate 28% below that for matched samples, and with shorter prison sentences (see para 7.5.2), and despite this lesser use of imprisonment there was reduced reoffending. That would suggest that where the restorative process has been followed, public safety may well in fact be *enhanced* by keeping the defendant out of prison, if that is possible.

[34] I certainly accept the need to denounce this crime. I do so strongly now, and I am sure that that denunciation has already occurred through the defendant's family and the restorative process. He has been held accountable not just through the Court but in a direct, face-to-face way. He has assisted the victim in a way that many

defendants do not. In my view he is most unlikely to return to the Courts on a matter such as this at any stage in the future, but he should realise that if he were to prove me wrong in that he would certainly serve a term of imprisonment.

[35] Putting all of those matters together my view is that this matter does not call for a sentence of imprisonment. It would be counterproductive from several points of view and the public interests and the interests of all concerned are best served by a sentence of community work, supervision and reparation.

[36] The defendant is accordingly now convicted and sentenced to 200 hours of community work. I accept that that may not be able to start immediately if there are medical reasons to defer its commencement.

[37] He is also sentenced to 12 months supervision with a special condition that he undertake counselling of any type directed by his probation officer and that he live and work where directed.

[38] He is sentenced also to pay reparation in the sum of \$150 and that can be put, by the complainant, into the bank account for the children (as was her wish).

[39] That is the sentence of the Court.

FWM McElrea
District Court Judge