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THE SUPREME COURT OF
THE NORTHERN TERRITORY

SCC 22400689

THE KING

and

NATHAN MCKENZIE

(Sentence)

HUNTINGFORD J

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON TUESDAY 12 NOVEMBER 2024

Transcribed by:
EPIQ

HER HONOUR: Nathan McKenzie, on 31 July 2024 you entered a plea of guilty to the single charge of aggravated robbery on the indictment of 15 May 2024. The circumstance of aggravation was that you had possession of a dangerous or offensive weapon, namely a knife. The maximum punishment for that offence is imprisonment for life.

The victim in this matter was RM. He is a 77-year-old man. At the time of this offending you were 27 years old.

At 4 pm on 4 January 2024 RM entered the Nightcliff Sports Club where he had a few drinks and played the poker machines.

At 4:42 pm the same day you entered the club. You were holding a knife with a 30 centimetre blade concealed in a tea towel.

At approximately 5:40 pm the victim got up from the poker machine he was playing and went to the toilet where he stood at a urinal.

Approximately a minute later you followed the victim into the toilet and stood in the doorway to prevent him from leaving. When RM had finished using the toilet you approached him and removed the large knife you had secreted within the tea towel. The knife, as I have said, had a 30 centimetre blade.

You held the knife out towards the victim and said words to the effect of, "Give me your money." RM responded saying, "Don't be silly. You wouldn't get away with it. This is a club." You again demanded the victim's money and said "hand it over" while continuing to threaten the victim with the knife and standing within one metre of the door preventing the victim from leaving.

You then demanded money from the victim again saying, "Empty your wallet." RM, fearing that he would be stabbed by you, handed over the contents of his wallet which contained \$450 to \$500 in \$50 notes.

After receiving the money you demanded the victim lock himself inside a toilet cubicle which he did out fear. After approximately 30 seconds the victim opened the cubicle door believing you had left however you were still standing in the doorway and you instructed the victim to get back in and lock it while pointing the knife at the victim.

RM complied and he stayed in the cubicle for a number of minutes before opening the door again and finding that you had left with his money.

The victim reported the matter to the club management and police were called.

You ran from the scene with the property and were later identified by investigators.

On 5 January 2024 you were located and arrested and you have been in custody since that time.

I have read the victim impact statement from RM dated 11 April 2024. The offending has had a significant impact upon him. RM was left feeling shaken and nervous. He plays the incident over in his mind. He considers himself lucky to have not been stabbed or injured however he is no longer able to trust people in public as he did previously.

It has affected RM's social life as he does not visit clubs or other licensed premises as often as he used to and his wife has also been affected because she will not go to those venues at all. Other public places such as shopping centres have also become difficult for the couple to access due to fear.

The offending cost RM approximately \$500 and he requests for restitution for the loss however the mental stress and anguish has been more of a burden on him and his wife than the amount you stole.

This is serious offending. You confronted a vulnerable older man in the toilet with a large knife. It was brazen offending in a hospitality venue which was open to the public. Although relatively unsophisticated the offending involved some planning.

The selection of the victim appears opportunistic however you went to the venue armed and you waited about an hour until you committed the robbery.

The offending was more than fleeting. You demanded money three times and then made the victim lock himself in the toilet cubicle ordering him back inside when he initially came out after a short period.

You did not desist when the victim attempted to reason with you but continually demanded money while threatening the victim with a knife. You did not actually harm or touch the victim although the ordeal was frightening for him, as the victim impact statement shows.

The amount stolen, while not trivial, was not particularly large however the money has not been recovered. It appears that you do not have the capacity to reimburse the victim for the loss.

This offending is on the mid-range for offences of this sort.

As to your personal circumstances. You are now 28 years old. You were born and raised in Darwin, attended Naraka Primary School from kindergarten until Year 6. You started Darwin High School in Year 7 however only lasted a day as you got into a fight and were suspended.

Your education was disrupted by moving between schools on Goulburn Island and juvenile detention at Maningrida and Darwin each with limited engagement. However you did complete your education at Maningrida to about Year 10 or 11.

You were incarcerated at the Don Dale Youth Detention Centre for various periods which seemed to total around six months as a youth. While at Don Dale you suffered, you say, sexual abuse at the hands of a staff member as well as physical abuse.

Your mother Rhoda McKenzie has provided the court with a letter outlining the deprivations you suffered in childhood such as lack of stability, lack of positive male role model, lack of stable care and parenting, exposure to domestic violence, physical and sexual abuse and exposure to drug and alcohol abuse.

Ms Vanessa Edwige, psychologist, prepared a report dated 4 October 2024 which was received into evidence. Her report contains lengthy descriptions of the significant and deep impacts of the physical and sexual abuse which you suffered as a child including the long term effects of such experiences.

One of those impacts is that you have used alcohol, cannabis and methamphetamine to self-medicate beginning with the use of cannabis when you were 13 years old. Ms Edwige opines that your adverse childhood experiences impacted your social and emotional wellbeing resulting in a diagnosis of complex post-traumatic stress disorder and substance use disorder.

Ms Edwige further states that those untreated disorders have had a significant impact on your emotional regulation, decision-making and judgment. She says that at the time of this offending you were suffering from those clinically significant mental health impairments which had an impact upon your ability to make considered and appropriate choices, make reasoned judgments and regulate your behaviour.

The Crown noted that there was no independent evidence of what happened to you in Don Dale but did not dispute Ms Edwige's report.

Despite your difficult upbringing there are some positives in your life. You have the support of your partner here in Darwin and your mother in Maningrida. You have two young sons with whom you are in contact. One of your sons lives with your mother in Maningrida.

You have previously found that participating in traditional activities such as hunting and fishing have given you a sense of self-worth and helped to deter you from participating in antisocial criminal behaviour. I have seen the video tendered on the plea which shows the value you obtained from participating in cultural activities when you were a child.

As to your prior criminal history, you have an extensive criminal history dating back to 2009 including a number of violent offences as well as property, drug and traffic offending. Of significant concern is your previous conviction for aggravated robbery in August 2020 when you were sentenced to a term of imprisonment of two years and three months from December 2019.

I am told that you did not apply for parole and served the full term which would have seen you released in about March 2022. Your criminal history also shows you have previously failed to comply with court orders including bail and a suspended sentence.

You are not being sentenced again for any of those old matters but your history shows that you do not come before the court as a person of good character. You are not entitled to the leniency which might be afforded, for example, to a first offender.

Your history also shows that some consideration must be given in the sentence to the need to impress upon you that you must cease your offending behaviour. Your previous offending and failure to comply with court orders is also relevant to your rehabilitation prospects.

This is disturbing and cowardly offending. The key sentencing principles are punishment, denunciation, deterrence and community protection. Defence counsel have conceded that a term of imprisonment is the only appropriate sentence.

Regrettably robbery, including the use of knives, is very prevalent in Darwin and there is generally a need to give considerable weight to general deterrence. The offending has had a significant impact upon the immediate victim as seen from the victim impact statement but also contributes to a lack of community safety and the behaviour must be denounced.

There is some evidence of a causal link between the effects of your adverse childhood experiences and the offending behaviour. Ms Edwige describes an impact upon your ability to make reasoned judgements and regulate your behaviour.

Although the full extent of that contribution is difficult to discern I accept that your adverse childhood experiences and your complex post-traumatic stress disorder and substance use disorder reduced your ability to exercise appropriate judgment and make calm and rational choices and that therefore your moral culpability is somewhat reduced.

As a result it is appropriate to reduce the weight which would otherwise be given to general and specific deterrence. However that reduction is tempered by the seriousness of the offending and the fact that, notwithstanding that you suffer from the disorders I have referred to, you were fully aware of the nature and gravity of what you were doing and that it was wrong.

It is also necessary to give weight to the principle of community protection. Your counsel conceded in written submissions the court cannot be satisfied that you would not offend again.

So much is suggested by your criminal history and is somewhat explained and contextualised by the social history and psychological diagnosis detailed in

Ms Edwige's report, including your substance use disorder, noting that you say this offending was for the purpose of getting money for drugs.

The Crown accept that you have entered a plea of guilty at an early time and that that plea has considerable utilitarian value because the victim was spared the ordeal of giving evidence. Your plea is also an acceptance of responsibility and saved time and expense in the justice system, albeit in the face of a strong Crown case.

You have written, with the help of your lawyer, a letter of apology to the victim. That letter acknowledges that you did not have the right to do what you did. It is often difficult to assess whether remorse is genuine. Apology letters are often seen as self-serving and therefore given little weight.

I also take into account however that Ms Edwige notes your remorse in her report and that the s 103 report states that you recognise the link between your methamphetamine use and your antisocial behaviour.

It appears that you do at least have some insight into the negative effects of your offending and in the circumstances I will afford you a 25 per cent discount on the sentence you would otherwise have received.

Although it is not the principal sentencing objective, rehabilitation remains relevant. Your counsel submitted that effective rehabilitation contributes to community safety. So much is true however in my view your prospects of rehabilitation must be assessed as extremely guarded at this time.

You have been assessed by Community Corrections as suitable for supervision on a suspended sentence notwithstanding your less than satisfactory engagement in the past. Their willingness to give you another chance appears to be related to your reported keenness to engage in residential rehabilitation.

You have been accepted into the Banyan House program for that purpose. I note in that regard that you have attempted rehabilitation in the past in other programs and failed to complete those programs on two occasions.

You have also almost immediately taken up using drugs again upon your release from prison in 2022. It is not clear what has changed on this occasion apart from your stated willingness to engage in rehabilitation.

This offence is an aggravated property offence and pursuant to s 78B of the Sentencing Act, unless there are exceptional circumstances, you must either serve a term of imprisonment which is not suspended in whole and part or be subject to an intensive Community Corrections order which is, in turn, subject to a home detention order or an order that you participate in an approved program.

Your counsel submitted I should find that exceptional circumstances apply in your case. The submission was based upon a combination of circumstances, namely your deprived childhood; mental health disorders and addiction to

methamphetamine; the fact that you are remorseful and motivated to change; that you were suitable and recommended for general supervision; the existence of the Nja-marleya Law and Justice Group which supports you in Maningrida and that the offending was a moderate objective seriousness.

As the Court of Criminal Appeal stated in *R v Duncan* [2015] NTCCA 2 paragraphs 24 to 29:

In considering exceptional circumstances the court may take into account any matter it considers relevant. In determining the sentence and whether exceptional circumstances arise the whole of the circumstances of the case must be considered. That means that the mitigating circumstances must be considered against the egregiousness of the offending and the need for deterrence in determining whether they amount to exceptional circumstances for the purposes of the legislation.

First, in relation to the support from the Nja-marleya Law and Justice Group, that is not something which I can take into account except in the most general way and with very little weight. Based on the evidence tendered the group is just getting started in Maningrida where it hopes to deliver justice related programs.

Some programs do already operate under the auspice of Malal'a Health Service Community Wellness including Murnun Men's Shed and the men's counselling program. However you have not been assessed for acceptance into those programs. Even if you were it is not known whether the services would have the capacity to accept you.

Second, the fact that you are remorseful, found suitable for general supervision and that the offending was of moderate circumstances are not of themselves the basis for exceptional circumstances, even in combination. Such matters are commonly and routinely encountered in sentencing offenders in this court. They can do no more than provide background circumstances so far as an exceptional circumstance submission is concerned.

The strongest argument for exceptional circumstance is your background of adverse childhood experiences and the mental health conditions you suffered as a result. The fact that you were a victim of institutional childhood sexual abuse and physical abuse at home and institutionally is uncommon noting the potentially lifelong effects of such experiences and the effects upon you at the time of this offending as set out in Ms Edwige's report.

However, despite this in the circumstance of this case I am not satisfied that your background and mental health disorders amount to exceptional circumstances, for the purposes of s 78B of the *Sentencing Act* when considered together with the seriousness of the offending and the need for deterrence both specific and general even after taking into account the reduction in moral culpability I have referred to.

It was also submitted that you are a suitable candidate for an Intensive Community Corrections Order. An Intensive Community Corrections Order is a term of imprisonment which is served in the community. The purpose of an ICCO is to hold the offender accountable while also addressing the personal factors which contribute to the offender's criminal behaviour.

You were reassessed in an updated s 103 report of 11 November 2024 and found suitable to reside at Banyan House subject to a home detention order and then to reside at Maningrida and participate in a work project as a condition of that order.

An Intensive Community Corrections Order commences on the day it is made. The period in which it is enforced must not exceed two years. The *Sentencing Act* provides that a court may consider any period of time the offender was remanded in custody in determining the period the order is enforced.

There are features of ICCO regime which, in combination, might possibly provide a plan which is both significantly restrictive to hold you to account for what you have done but at the same time addresses your behaviour. In particular the program at Banyan House which involves you being on a home detention order.

However, you cannot be supervised on a home detention order at Maningrida because there is no capacity for Corrections to do so including no facility for electronic monitoring. What that means is the home detention order could really be in force for no longer than about four months.

I do note that there is a possibility that you participate in a work project at Maningrida and I have taken that into account. Your family indicated that they do not want you back in Maningrida unless you have successfully completed rehabilitation first.

However, even if there are some benefits to this plan, and it is something which I am not completely sure about based on your history and your poor prospects of rehabilitation, the sentence must comply with the *Sentencing Act*.

In my view the seriousness of this offending requires a term of imprisonment which is significantly greater than two years even after discount. It is not entirely clear whether the effect of the *Sentencing Act* provisions as the imposition of an ICCO mean that a court may only make that order when the term of imprisonment imposed is two years or less or whether the provisions might be interpreted such as the court may take into account time spent on remand in making a decision to impose a term of imprisonment of two years to be served by an ICCO in circumstances where the appropriate sentence would have been more than two years but a period in excess has already been served on remand which approximates the length of the total sentence.

There is no authority on this point in the territory that I am aware of. Although I understand that similar but not identical provisions operate in New South Wales

and are interpreted as providing that an ICCO is not available unless the appropriate term of imprisonment is two years or less. It is my understanding that the terms of the New South Wales legislation are much clearer in that respect. The position is not necessarily the same in the Territory.

However, in my view the proper approach to imposition of an ICCO is that the term of imprisonment should be determined first before consideration of how the sentence is to be served. The effect of that is that an ICCO can only be imposed when the term of imprisonment is two years or less. Accordingly, I am of the view that the ICCO is not available in this case as a matter of law.

Even if I am wrong about that, in my view the total sentence here should be a little more than the period on remand plus two years. You have been on remand at the Darwin Correctional Centre since 5 January 2024, a period of around ten months and one week and I take that into account.

I also take into account that time spent on remand is more difficult than time as a sentenced prisoner and that there have been some overcrowding issues in the correctional centre during the period you have been there.

I have considered the time you should spend in gaol before you are released given the seriousness of the offending. In the circumstances this is a matter where the Parole Board will be best placed to assess your prospects for rehabilitation and to set appropriate conditions for your release.

I again take into account the factors I have mentioned. I will set a non-parole period which is 50 per cent of the sentence. I am hoping that you will apply for parole and that your rehabilitation needs will be taken into account at that time.

Can you stand up please, Mr McKenzie?

On the count on the indictment you are convicted. You are sentenced to imprisonment for 3 years, that is after discount, backdated to 5 January 2024. The non-parole period is 1 year and 6 months.

Thank you. You can take a seat.

Is there anything arising?

MS THOMAS: Nothing arising, your Honour.

MR MAYNARD: No, your Honour.

HER HONOUR: Thank you very much for your assistance.

We will adjourn.
