

Mr Brain, you have pleaded guilty to one count of wounding and one count of assault.

You committed these crimes on 12 August 2021. At about 6 pm, you and another man were yelling and swearing loudly in a shopping centre walkway. You were affected by illicit drugs. CCTV shows you walking in one direction along the walkway, but as you pass a member of the public, a man of Asian appearance, you turned to follow him. You then grabbed a metal scooter being carried by your companion, came up behind this man and swung the scooter at him in an aggressive and violent way. It is obvious that you were verbally abusing him at the same time. He appears to be somewhat surprised by this abuse and quickly moved on. The complainant, also a man of Asian heritage, was at that time walking through the area with his wife. He heard you yell the word "coronavirus" at him. I also infer that he had just seen what you did to the other man. He was justifiably offended by this and walked toward you and your companion. It is clear from the CCTV that he was remonstrating with you both. Your companion approached him. As he did, you again took the scooter from him, and used it to attack the complainant, swinging the scooter at his head. The scooter struck the complainant to the head. He then defended himself, and he and your companion struggled and fell to the ground. You then hit the complainant several times with the scooter to his head and body while he was on the ground and struggling with the other man. The attack was stopped because of the intervention of members of the public and police. Police were required to deploy OC spray when you refused to drop the scooter. After this you fled, but police eventually caught up with and arrested you.

As a result of the attack, the complainant suffered a significant wound to his head, approximately 5 cm long, which required treatment with nine staples. He had an injuries to his right shoulder and arm and a large areas of bruising to his arm, chest, shoulder right thigh and hip. I have also received an impact statement from him. Both he and his wife have been, and continue to be, significantly affected by this attack. The experience itself was painful and terrifying for both of them and his injuries took a considerable time to heal. He was unable to work for four weeks, with consequent financial impact.

You are 37 years of age. You have a long-standing problem with the use of illicit drugs, and ongoing issues with your mental health. You also have a significant criminal history. It includes numerous offences involving dishonesty, drugs and breaches of traffic laws. It also includes convictions for assaulting a police officer, common assault and breaches of family violence orders. You have received previous sentences of imprisonment, both suspended and actually served, in relation to such offences. At the time of committing the crimes I am dealing with, you were subject to a suspended sentence of imprisonment which had been imposed a few weeks earlier for offences of dishonesty. I am required to activate this sentence unless I am of the opinion that it would be unjust to do so. Given the seriousness of the crimes which breach the terms of suspension and the proximity between the imposition of the suspended sentence and the breach, it is in my view clearly not unjust to activate the sentence. Accordingly, it must and will be activated.

Your mental health is addressed by a neuropsychological report prepared on 29 October 2022. The opinion of the author of the report is that you suffer from a significant psychosocial disability which is severe and long-standing and presents "as a combination of adjustment disorder, depression, anxiety and reduced coping skills". The report identifies a range of functional limitations. Other material indicates that you have had support in the community

and this has assisted you in coping with these limitations. It has been recommended that you have support through the NDIS.

The significance of this disability to sentencing is that you will experience difficulty and a setback to your efforts to manage life in the community if you are incarcerated for any significant period. Further, it can be reasonably inferred that you will find incarceration more punitive and difficult than others without your disability. However, there is no material before me which establishes any causal connection between this disability and the commission by you of these crimes. It may well be that this disability predisposes you to illicit drug use, but this is not clear from the material and in any event self-induced intoxication resulting from the consumption of a drug or other substance cannot by law be regarded as a mitigating factor. I will take your disability and life circumstances into account in a general way as background relevant to your personal circumstances when assessing the appropriate sentence.

There are a number of factors in this case which aggravate the seriousness of your conduct. The attack was conducted in public against an innocent member of the community, who was simply going about his business in a public space. You perpetrated the attack in company with another man and used the weapon to brutally beat the victim. There was absolutely no provocation from him whatsoever. The attack included a blow with the weapon to the head, hard enough to result in a significant injury. The attack to the head itself was extremely dangerous and could easily have had far more severe consequences. A further aspect of aggravation is what appears to be an irrational but clearly expressed racial motivation for the attack. The existence of this motivation is confirmed both by your conduct towards the first man, and then your use of the term "coronavirus" immediately before these crimes were committed. The *Sentencing Act* makes it clear that such motivation is to be regarded as an aggravating circumstance, and in any event, aggression towards innocent people which is motivated simply by the perception that they belong to a particular group of people who share similar characteristics, is not only completely irrational, but is also inconsistent with the values and sense of decency expected by our community. On a practical level, violence based on such prejudice is dangerous, random and capable of causing widespread fear and distress among law-abiding members of the community. Such conduct is unacceptable and will not be tolerated. General deterrence and denunciation of your conduct are important sentencing considerations in this case.

As I have already discussed, neither your intoxication from drugs or underlying mental health concerns provide any significant mitigation. In my view, there is nothing else that mitigates your conduct to any significant extent. Your counsel suggested that I could infer from watching the CCTV that you may have been acting defensively as a result of the complainant remonstrating with you and your companion, but I reject this. I offered you the opportunity to give evidence to support any such claim but you have not done so. In any event, it is clear that even if you felt threatened by this man, that threat arose from a situation which was entirely of your making, in particular your racially motivated aggression. There was ample opportunity for you to remove yourself from the area, but you and your friend went towards this man and then you attacked him as I have described. There is no suggestion that he was about to physically attack you or your friend and in my view, there was no reason for you to attack him as you did.

You are, however, entitled to some mitigation from your plea of guilty. There is some utility in this plea, in particular because the complainant was not required to give evidence. I will also accept the plea as some evidence of remorse.

In my view, the only appropriate sentence in this case is one of actual imprisonment. I was asked to consider an assessment for home detention but I do not think that that sentencing option adequately responds to the need for general deterrence and the objective seriousness of your criminal conduct. However, because of your plea of guilty, and what I assess to be, having regard to your personal circumstances, an ongoing need for personal deterrence and supervision after your release, I intend to partially suspend the sentence.

Accordingly, the orders I make are as follows:

- a You are convicted of the crimes to which you have pleaded guilty;
- b The sentence of two months' imprisonment which was imposed by the Magistrates Court on 28 July 2021 is activated. This sentence will be backdated to 12 December 2022. You are not eligible for parole in respect of this sentence.
- c For the crimes of wounding and assault, you are sentenced to a global term of 12 months imprisonment, which will be served cumulatively upon the activated suspended sentence. The last six months of that sentence will be suspended for a period of 18 months on the following conditions:
 - i that you are not to commit another offence punishable by imprisonment during that period.
 - ii that you will be subject to the supervision of a probation officer. You must comply with this condition for a period of 18 months. That period will commence from when you lawfully cease to be imprisoned under this sentence. The court notes that the conditions referred to in s 24 (5B) of the *Sentencing Act* apply to this condition. These include that you must report to a probation officer within 3 clear days of the day that you lawfully cease to be imprisoned under the sentence. In addition to the core conditions the order shall also include the following special conditions:
 - (a) *you must, during the operational period of the order,*
 - i. *attend educational and other programs as directed by the court or a probation officer;*
 - ii. *submit to the supervision of a probation officer as required by the probation officer;*
 - iii. *undergo assessment and treatment for drug dependency as directed by a probation officer;*
 - iv. *submit to testing for drug use as directed by a probation officer;*
 - v. *submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer;*
- d You are not eligible for parole in respect of the operative sentence.
- e For the purposes of s 92A (3) of the *Sentencing Act*, I specify that:

- i the total term of imprisonment which you are liable to serve in respect of all of the above sentences is fourteen months commencing on 12 December 2022
- ii The total period that you must serve before you become eligible for parole is the aggregate of the activated suspended sentence and the non-parole period of the cumulative sentence, which is a total period of 8 months.