IN THE COURT OF APPEAL OF NEW ZEALAND

C.A.31/81

THE QUEEN

v.

MURRAY JON WILSON

Coram: Davison C.J.
McMullin J.
Mahon J.

Hearing: 5 June 1981

Counsel: R J M Shaw for Crown
J R Parkes for Applicant

Judgment: 5 June 1981

ORAL JUDGMENT OF THE COURT DELIVERED BY DAVISON C.J.

The applicant Murray Jon Wilson pleaded guilty in ~~the~~ a District Court [redacted] on 11 February this year to two charges of extortion laid under s 238(1)(a) of the Crimes Act 1961.

The first charge was that on 16 January 1981 [redacted] with intent to extort the sum of $500 in money from [redacted] (the complainant) he threatened to make against him an accusation of the crime of sodomy.

The second charge was that on 28 January 1981 [redacted] with intent to extort the sum of $200 in money from [redacted] (the complainant) he threatened to make against him an accusation of the crime of sodomy.

He was convicted on each charge and remanded to the High Court [redacted] for sentence on 23 February.

FACTS RELATING TO OFFENCES

The complainant is a single man aged 47 years and a well established businessman, [redacted] In 1977 for a period of some two months the complainant formed an association with the applicant and during that time they engaged in sexual activities on two occasions.

About a month after the association ceased the applicant went to the complainant's shop and asked for money, and thereafter the applicant made further calls to the complainant's shop seeking money, saying that if the complainant refused he would contact the complainant's family and expose the association.

After a time the applicant's visits became more frequent and he became more threatening and demanding. The complainant, on the advice of his solicitor, reported the matter to the police.

On the evening of the first offence the applicant went into the complainant's shop and demanded $500, saying that if the complainant did not pay up he would tell the complainant's immediate family of the association. That same evening the complainant met the applicant in a local car park and handed over to him the sum of $500.

On the occasion of the second offence, the applicant called at the complainant's shop and demanded the sum of $200, again making the threat that if the complainant did not pay up the applicant would notify the complainant's immediate family of the association. The complainant agreed to comply and the applicant then told him that he (the applicant) would contact the complainant later in the

evening about payment. The complainant was contacted and told to take the money to a meeting place near the applicant's home.

About 6.25 p.m. the parties met. Police officers hidden nearby watched the handing over of the money. The applicant then went into his home where shortly afterwards he was visited by a police officer. The sum of $120 was found in the applicant's possession and $80 in his wife's possession.

The applicant when interviewed admitted the association with the complainant and claimed that he had obtained only $700 from the complainant as a result of threats although the complainant said he had paid the applicant because of threats over a period of time a total sum of approximately $3,000. The applicant claimed that the difference between the sum of $700 referred to in the two charges and the sum of $3,000 claimed had been paid to him by the complainant by way of loans.

APPLICANT'S PERSONAL CIRCUMSTANCES AS DISCLOSED IN PROBATION REPORT

The applicant was 19½ years of age, married to an older woman who had three children by a previous marriage and one child by the current union. The applicant had a chequered work record. At the time of sentence he was unemployed and in a poor financial position. He was stated by the probation officer to be an immature person, self-centred, and at times irresponsible. He was assessed by Dr Harrison of Ngawhatu Hospital as of below average intelligence and considered to have some personality disorder.

It was suggested by the probation officer that at the time the applicant was not fully aware of the serious consequences of his threats. It was said he was under stress at the time because of financial problems; because of his wife's indifferent health since the child was born; and because of anxieties regarding the terminal illness of his mother who died a short time later; and also because of strained relationships with the father.

He has had some previous offences. There are five minor convictions for theft and one for burglary but they must have been minor because they were all visited by small fines.

The sentencing Judge imposed upon the applicant a term of 18 months' imprisonment on each charge, the terms to be served concurrently. In doing so he accepted that the sum involved was $700. He took no account of the further moneys said to have been paid by the complainant. He treated the previous convictions as minor. He accepted that the present type of offence is rare in New Zealand but regarded it seriously, as is indicated by the maximum penalty of 14 years' imprisonment provided by the Act. He considered the possibility of a community based sentence but came to the view, in his own words:

> " This matter is so grave that the Court must set its face against it, and let the message go forth to like minded people, that if they offend in this way they will be dealt with in a deterrent fashion. "

The learned sentencing Judge also took into account the fact that the applicant had pleaded guilty and

not exposed the complainant to the risk of being identified in the community. He had regard to his youth and the undesirability of sending a young person to prison but, having taken into account all those matters, he finally concluded that the matter was so serious that it must be visited by imprisonment.

The applicant now seeks leave to appeal against that sentence on the grounds that the term is manifestly excessive.

The grounds advanced in support of that argument were briefly these.

1. The sums involved were only $700 and did not include the further $2,000 odd.

2. The applicant's reaction was an immature reaction in suggesting a threat to the complainant's mother.

3. The degree of seriousness of wrongdoing was not great.

4. The applicant pleaded guilty and was cooperative with the police.

5. The applicant's wife and family have hopes of a good stable relationship and have now got a home for their occupation.

6. Previous convictions were for petty offences.

7. He is a reliable worker.

8. In relation to the factors concerning the offences, it is said:

(a) He was lead into the situation by the ease of getting money in the past.

(b) Financial pressures - his parents living with him.

(c) His unemployment.

(d) His mother's terminal cancer.

(e) Poor relationship with his father.

9. The penalty does not anywhere near justify a lengthy term of imprisonment.

DECISION

All those matters were clearly before the sentencing Judge. The sentencing Judge had the benefit of the probation officer's report and the submissions of counsel. He gave weight to all the matters which were advanced by way of mitigation at the time of sentence but in the end, as appears clearly from the two references to be found in the notes taken on sentence, it was what the Judge determined to be the gravity of the offences that caused the Court to set its mind against a sentence other than imprisonment.

As we have indicated, the matters which today were advanced in support of this application are no different from those which were before the sentencing Judge. He has not been shown to have failed to give due weight to any proper factor or given undue weight to others. These offences are of a type that are not common in Courts in this country, but the type of crime is regarded by the community with abhorrence. There is but need to refer to

it by its common name of "blackmail" to see this, and the law reflects the serious nature of the offence by providing for a maximum punishment of 14 years' imprisonment.

Because we do not have many cases of this nature in this country it has been necessary to refer briefly to the English situation to find comparable cases which might be looked at in judging the sentence in the present case. In D A Thomas, Principles of Sentencing (2nd ed) p 146 the author says:

> " Most cases of blackmail which come before the Court fall into one of two categories - demanding money under a threat to expose or accuse the victim, and demanding money under a threat of violence.
>
> Cases in the first category are almost invariably treated seriously and will often attract a sentence of 3 years' imprisonment even where there is substantial mitigation. "

The author by way of illustration makes reference to the case of R v Wray where a youth of 18 years demanded several hundred pounds from another man with whom he had homosexual activities and a sentence of three years' imprisonment was considered appropriate. Reference is also made to the case of R v Powell and Barford where youths of 18 and 20 demanded money and a car from an older man after homosexual activity and three years' imprisonment in each case was upheld.

It was suggested by Mr Parkes that the complainant's own acts lead to the offence and that the applicant was exploited by a much older man. Of course, that is

invariably so in cases of this kind but, as we have just indicated from a reference to the English authorities, that factor is not one which can justify other than a term of imprisonment.

The learned sentencing Judge considered the appropriate penalty in this case was a sentence of 18 months' imprisonment, and in our view that sentence is by no means excessive.

The application for leave to appeal against sentence is declined.