IN THE COURT OF APPEAL OF NEW ZEALAND CA 39/90

THE QUEEN

v

BRENT KEITH GORDON **WALKER**

Coram: Bisson J
Hardie Boys J
Smellie J

Hearing: 22 May 1990

Counsel: N J Scott for appellant
Lowell P Goddard QC for Crown

Judgment: 22 May 1990

ORAL JUDGMENT OF THE COURT DELIVERED BY BISSON J

This is an application for leave to appeal against sentence. In the High Court at Timaru on 8 March 1990 the applicant appeared for sentence on 13 charges, five of which were of a very serious nature, each involving a maximum sentence of 14 years imprisonment. An effective sentence of 12 years imprisonment was imposed.

The offending started in November 1989 with the use by the applicant of his step-father's Postbank savings book. This resulted in three charges of using a document for pecuniary advantage with intent to defraud and two charges of false pretences. The amount involved in respect of which reparation was sought totalled $1,870.00. When spoken to by the Police the applicant was co-operative, admitted the offences. Although he said he needed money to pay debts, he had simply "blown it all".

On Christmas Eve the applicant committed an offence of aggravated robbery in which the applicant was armed with a pitchfork and the victims were a 71 year old man and his wife in their home at Himitangi. At approximately 10.00 pm the husband heard their guard dog start barking so went outside to investigate and was confronted by the applicant who was armed with a pitchfork. He pointed this at the husband and ordered him inside the house. The husband ran inside and attempted to secure the aluminium flyscreen door but the applicant smashed it open with the pitchfork. He then forced the wife to tie her husband to a kitchen chair. He then ripped the telephone cord out of the wall and used that to tie up the wife. Both victims were terrified and genuinely feared for their lives, the applicant having threatened them with the pitchfork.

According to the summary of facts he then demanded firearms, ammunition, drugs, cash and the keys to their car. His counsel in this Court said that the applicant denies asking for drugs or a firearm but accepts that having found the .22 rifle in the house he then asked for ammunition but none was available. As to the drugs, none were obtained as there were none in the house.

He took the rifle, two gold watches of great sentimental value, some alcohol, a small quantity of cash and food and the family car, all the property having a total value of $4,608.00. He denies that before leaving he threatened both

victims that if they went to the police and gave a description of him he would be back to deal with them. However, they were so terrified by the ordeal that it was some eight hours before they were prepared to go to a neighbour for help.

The applicant drove to Wellington in the car he had taken and he there altered its appearance by spray painting the boot with black paint and changed the number plates. He then spent Christmas Day with a friend consuming the liquor he had taken. He then headed north in the car, taking with him his slug or air pistol.

On Tuesday morning, 26 December 1989, he was spoken to by a Ministry of Transport officer at Patea and subsequently arrested. The .22 rifle was recovered from the car. He admitted the offences and in explanation said he had been hitch-hiking north from Wellington and when it got dark he decided to take a car, it being his intention to find a car with keys which he could take without disturbing anyone and that the robbery was a spur of the moment thing. He claimed to have thrown the watches away.

Repairs to the car amount to $1,636.88. The only property recovered was the .22 rifle. Reparation would amount to $1,636.88 for the repairs and $508.00 in respect of property not recovered.

The applicant appeared in the District Court at Palmerston North on 3 January 1990 when he was granted bail.

He then returned to Timaru and the next series of offences occurred in the evening and early morning of 6/7 January 1990.

The applicant committed two offences of burglary when he broke and entered houses in the township of Pleasant Point near Timaru on 6 January 1990. From one house which was unoccupied he took a pair of rubber gloves to the value of $7.00 and caused damage to a window amounting to $60.00. At the other house he took approximately $150.00 in cash, a shotgun valued at $450.00 and assorted clothing to the value of $660.00. The cash has been recovered and the shotgun has been recovered in a damaged condition.

In each case his air pistol was used to fire shots through a window so as to gain admission.

On the same date, Saturday 6 January 1990, the applicant went to another dwelling house in Pleasant Point. He reached in through an open window and unlocked and opened a ranch slider door leading into a bedroom where the husband and wife occupying the house were asleep in bed. At this time the applicant was carrying his air pistol. The wife awoke on hearing the sliding door open and she was confronted by the applicant who was wearing rubber gloves and pointing the air pistol at her. According to the summary of facts he told her not to move or scream or he would shoot her. He denies making this threat but accepts

that such a threat could be inferred from his actions. The husband then awoke to find the applicant in the bedroom. The applicant ordered the wife to lie down on her stomach and he then told the husband to tie her hands behind her back with an apron and tie her legs with a belt. The applicant then tied the husband's hands and feet before gagging them both with ties. He then searched the bedroom looking for money and jewellery. He found the husband's cheque book, untied his hands and told him to write a cheque for $2,500.00 payable to B Walker. The applicant was not happy with the first cheque, so made the husband write out a second cheque. He then retied the husband's hands and continued the search of the house, later driving away in the complainants' Toyota car. They were left tied on the bed throughout this ordeal which they say lasted for one and a half hours.

When the applicant left in their car he took with him jewellery, money, a .303 rifle and ammunition, bottles of spirits, cooking utensils, a gas barbecue, blankets, clothes and food to a total value of $4,200.00. The Toyota car taken by the applicant was valued at $5,500.00.

While the applicant was travelling in the Toyota car towards Kimbell he was stopped by a Ministry of Transport patrol car for an alleged speeding infringement at about 1.15 am. The Ministry of Transport car was manned by Senior Traffic Sergeant Herridge as observer and Traffic Officer

Thomas as driver. Traffic Officer Thomas got out of the patrol car and at the same time the applicant got out of the Toyota. He was carrying the .303 rifle previously taken from Pleasant Point. He pointed the rifle at Traffic Officer Thomas and ordered him to turn the flashing lights of the patrol car off and not to use the radio. This gave rise to the offence of using a firearm to threaten a traffic officer in the course of his duty, the applicant knowing that he was a traffic officer so acting.

Traffic Officer Thomas attempted to talk to the applicant and told him to calm down and put the rifle down. The applicant walked to the grass verge on the opposite side of the road, still pointing the rifle at Traffic Officer Thomas and screaming for the lights to be turned off. He also yelled to Senior Traffic Sergeant Herridge, telling him on a number of occasions not to use the radio. Traffic Officer Thomas decided to try to get away and jumped back into the patrol car. The applicant then fired a shot at the patrol car. The bullet entered the door pillar on the front right of the patrol car, passing just in front of Traffic Officer Thomas' face. It fragmented on impact and struck Senior Traffic Officer Herridge in the face and neck, causing him extensive facial injuries and damage to the nerves of his right shoulder and arm requiring him to be rushed by ambulance to Timaru Hospital. He underwent emergency surgery on two occasions.

This gave rise to the charge that with intent to facilitate flight upon the commission of a crime - namely aggravated burglary - he wounded Traffic Officer Herridge. The maximum sentence for such an offence known as aggravated wounding is 14 years imprisonment.

As the patrol car sped towards Kimbell in an effort to get away from the applicant, he fired a further shot which went through the rear window of the patrol car, hitting the rear vision mirror and finally exiting through the front windscreen, narrowly missing both officers. That gave rise to a charge under s.198A(1) of using a firearm in a dangerous manner against two traffic officers acting in the course of their duty, the applicant knowing that they were so acting. This and the previous offence of threatening Traffic Officer Thomas with a firearm were introduced in 1986 as s.198A of the Crimes Act in respect of the use of firearms against any law enforcement officer and each carries a maximum penalty of imprisonment for 14 years.

Traffic Officer Thomas was able to drive to Kimbell where he waited until he saw the applicant drive past in the Toyota car. He then drove Senior Sergeant Herridge to the medical centre at Fairly where he was transferred to an ambulance.

After this incident the applicant drove the Toyota car to the Lake Tekapo area and when he had finished unloading some property from the car he drove to the Ohau Canal and

pushed the vehicle into the canal. It was not recovered until 24 January 1990 after extensive searches of the canal using civilian divers and police staff. The vehicle is to be sold by tender and is expected to reach about one-third of its pre-accident value.

As a result of these incidents, the police immediately commenced an operation in the Mackenzie Basin in an effort to locate the applicant. He was located on 8 January 1990 near Twizel. He was arrested and when interviewed by the police in relation to these matters he admitted the offences. Referring to the incident involving the two traffic officers he said when stopped by the traffic officers in the early hours of the morning he jumped out of the car with the .303 rifle which he had loaded in the car just prior to being stopped. He said he fired two shots in the air. He said he intended handcuffing the two officers in the back seat of the patrol car so they could not follow him or call the police on the radio. He denied having fired directly at the patrol car and said he was experienced with firearms so he could have shot the two officers if he had wanted to. He maintained he had fired over their heads. It is difficult to accept he either fired shots in the air or over the officers' heads when both shots fired by a person experienced with firearms entered the car both at head level. These shots could well have proved fatal.

He said that when he drove off towards Tekapo he had thrown the rifle out of the car as he drove and then dumped

the car in the canal because he thought the police were following him. He said he then stayed in hiding because he knew the police were looking for him. After two nights he started walking towards Twizel and claimed he was going to give himself up to the police when he happened to be apprehended.

The sentences imposed in respect of these offences, the applicant having pleaded guilty to all charges, were as follows:

> on the charges of aggravated robbery at Himitangi and the aggravated burglary at Pleasant Point, 4 years imprisonment on each;
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> on the two charges of burglary at Pleasant Point, 18 months imprisonment on each;
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> on the three charges of using a document for pecuniary advantage and one charge of false pretences involving an amount of $450.00, 1 years imprisonment on each;
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> on the charge of false pretences involving the sum of $200.00 and the theft of the car, 6 months imprisonment;

The sentences on those 10 offences were concurrent with each other.

> In respect of using a firearm in a threatening manner against Traffic Officer Thomas, 6 years imprisonment;
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> on the charge of using a firearm in a dangerous manner against Traffic Officers Thomas and Herridge, 6 years imprisonment;
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> on the charge of aggravated wounding of Traffic Officer Herridge, 8 years imprisonment.

Those sentences were concurrent with each other but cumulative on the sentence imposed in relation to the

aggravated robbery at Himitangi. The Judge said that separation in time and the nature of the offences called for a cumulative sentence. The application of s.5A(3) of the Criminal Justice Act would also require a cumulative sentence. Accordingly, the total sentence imposed was one of 12 years imprisonment.

On sentencing, the Judge, after reviewing the facts of the case, referred to the offences with the firearm involving the traffic officers being clearly the most serious ones and called for deterrent penalties. He then referred to the victim impact reports which stated how the elderly couple at Himitangi now have sleepless nights and are upset and unsettled in their rural environment. The other married couple at Pleasant Point are also now very apprehensive and are suffering reaction. The traffic officers and their families have clearly suffered distress. Traffic Senior Sergeant Herridge had the projectile go through his jaw and neck requiring surgery and has been left with a large scar on the right side of his face and nerve damage to his right arm, those injuries have had and will continue to have a significant effect on him.

The Judge then had regard to the circumstances of the offender, he being 20 years of age at the time of the offences with a previous history of offending mainly for dishonesty and having had sentences of supervision, periodic detention and imprisonment. The Judge considered the

pre-sentence report from the Probation Service and a psychiatric report. They disclose the applicant as being the unfortunate product of a broken marriage with recurring problems of drug and alcohol abuse. The pre-sentence report referred to a claim by the applicant that he was under the influence of LSD when the shooting took place but to the consultant psychiatrist he did not describe himself as particularly affected by LSD at the time the offences took place. He has been described as a tall, pleasant and co-operative young man by the psychiatrist, whereas he was described as a shy individual with few friends by the probation officer who had known him since November 1988. It is to be noted that for some years after he left school he worked in a variety of jobs and was not indulging in antisocial behaviour and appeared to be living a reasonably stable lifestyle. However, later when unable to find work he began drawing the unemployment benefit and according to the psychiatric report,

> "made a conscious decision that the only way he could survive financially was to pursue the career of a criminal. Since that time the Defendant states that is essentially what he has done."

According to the opinion of the psychiatrist,

> "There is no evidence of a psychiatric illness at the time of the alleged offences ... Given the nature of his recent behaviour, as seen against a history of drug taking since the age of 13 and significant antisocial behaviour at that age, the Defendant would fall within the category of having a personality disorder of the antisocial type. An antisocial personality disorder is not a psychiatric illness as such but can be seen as a description of the manner in which a person interacts with other people and with society in general."

The Judge gave him credit for his co-operation with the police and his pleas of guilty and for those reasons reduced the sentence which he considered otherwise appropriate by approximately one-fifth. He also took into account that the applicant had been in custody for two months.

The Judge regarded the use of firearms as a particularly serious feature of the offending, calling for the Court to be firm in relation to sentences that are appropriate having regard to the total criminality involved. He then imposed the sentences already set out.

Mr Scott for the applicant has properly conceded that sections 5, 5A and 12A of the Criminal Justice Act all apply in this case. There is no need to set these sections out in this judgment. Suffice it to say they make imprisonment mandatory and any sentence of imprisonment in respect of violent offending while on bail for another violent offence cumulative on a sentence of imprisonment for that first violent offence unless the Court is satisfied that because of the special circumstances of the offence or of the offender, a sentence of imprisonment or cumulative sentence should not be imposed. Mr Scott's submissions go to the total sentence of 12 years imprisonment being excessive. He contends that the Judge paid insufficient regard to sections 5(3) and 5A(2), both of which require the Court in determining the length of the sentence to have regard to the

need to protect the public. He submits that while the dishonesty and burglary offences are typical of past offending, those involving violence are not, the applicant having no previous convictions for violent offences. However, the applicant has shown in these serious offences a move into the field of violent crime. He has resorted to the use of a pitchfork and armed himself with an air pistol used to break into two houses and to threaten the occupants of another and on three occasions he has taken firearms - a .22 rifle, a shotgun and a .303 rifle, the lastnamed with ammunition which he used against the traffic officers. Clearly the protection of the public calls for a lengthy sentence.

Mr Scott's next point is that the Judge gave insufficient weight to the totality principle. In R v Bradley [1979] 2 NZLR 262 this Court in referring to this sentencing principle said at p.263,

> "We would hesitate to attempt to refine the principle or to evolve rules of thumb for its application. For our purposes it is sufficient to say that undoubtedly it is crucial in arriving at a sentence for several offences, after considering them individually, to stand back and look in a broad way at the totality of the criminal behaviour."

This principle of sentencing known as the totality principle was not overlooked by the sentencing Judge. He made express reference to the need to have regard to the total ciminality. The general rule is that cumulative sentences

should not be such as to result in an aggregate term wholly out of proportion to the gravity of the offences viewed as a whole.

Starting with the violent offence of aggravated robbery at Himitangi, the sentence of 4 years imprisonment was not in our view manifestly excessive - involving the forced entry of a private dwelling, the use of a particularly frightening weapon, a pitchfork, tying up two elderly law abiding citizens and robbing them of valuable property, terrifying them at the time and causing them lasting fear for their safety. Another grave offence of this nature occurred at Pleasant Point. This also called for a sentence of four years imprisonment.

Then moving to the offences involving the traffic officers - the Court has said before and we repeat that deterrent sentences are needed to protect law enforcement officers who in this country are usually unarmed. As this Court said in R v Taylor CA 407/88 judgment 9/5/89,

> "Section 198A was enacted in 1986 and shows a firm legislative intention that those using firearms against law enforcement officers should be dealt with severely. Clearly deterrence must be a major consideration in sentencing for this offence. The maximum penalty is one of 14 years imprisonment, and the section does not distinguish between different kinds of use, indeed it speaks of using a firearm in any manner whatever."

In this case a loaded .303 rifle was pointed at a traffic officer to threaten him, it was then fired at a stationery vehicle with intent to facilitate flight and wounded Traffic

Officer Herridge and finally it was fired again at the departing car in a dangerous manner.

In the earlier case of R v McKay CA 307/84 judgment 3/4/85 this Court said,

> "This Court has on a number of occasions taken into account the special position of police officers who in this country are unarmed. In R v Simon, Barbarich, Roberts and White, (CA 70-73/68, judgment 22 October 1968) this Court said:
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> > '... in New Zealand ... we take pride in the fact that our police officers, in the performance of their ordinary duties, are unarmed ... but it must be understood that because our police officers are unarmed when on ordinary duties, the Courts will take a very serious view indeed of an attack made by anyone - whether he be an escaped prisoner or not - on a police officer, particularly so when the attack is a brutal one as was the position here.
> >
> > In our opinion it would be harmful to the maintenance of that principle if we took any step in the way of reducing the sentences in this case ...'
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> More recently in R v Bryant [1980] 1 NZLR 264, a case involving very severe assaults on two police officers, this Court said:
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> > 'No community can or will permit the use of such a weapon (a hammer) upon an unarmed constable doing his conscientious best to discharge his responsibilities.'
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> What was said on those occasions of police officers is equally true of traffic officers, and we take the opportunity now of reiterating what was said in these earlier cases."

The concurrent sentences of 8 years and 6 years for these serious offences cannot be said to be manifestly excessive.

Miss Goddard for the Crown has pointed to the following significant features of the applicant's offending: firstly

the vulnerability of the victims - people at night alone in their homes and unarmed traffic officers in the normal course of their duties; secondly the severity of the injuries and suffering caused to the victims; and thirdly the complete lawlessness of the applicant and the aggravating feature that while on bail from an offence of aggravated robbery he committed soon after another offence of similar nature - indeed he could well have been charged with aggravated robbery instead of aggravated burglary.

We agree that these are all valid and important considerations in considering this application. Although a lengthy term of imprisonment was imposed, we are satisfied that sufficient credit was given for the applicant's co-operation and pleas of guilty and time spent in custody on remand. When the Court stands back and looks in a broad way at the totality of the offending, we are not satisfied that the cumulative sentence of 12 years is manifestly excessive.

Leave to appeal is refused and the application dismissed.

Gresson J.

Solicitors

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