IN THE COURT OF APPEAL OF NEW ZEALAND CA.300/91

THE QUEEN

V

BRIAN DAMIAN HUNTER

Coram: Casey J
McKay J
Holland J

Hearing: 16 September 1991

Counsel: W.M. Johnson for applicant
J.C. Pike for Crown

Judgment: 16 September 1991

ORAL JUDGMENT OF THE COURT DELIVERED BY HOLLAND J

The applicant seeks leave to appeal against the sentence imposed upon him on seven charges brought under the Arms Act 1983 that he was in possession of firearms except for some lawful proper and sufficient purpose, the latter charge of which was a charge of being in possession of a rifle and shotgun ammunition. A search of the applicant's property had revealed seven firearms in different parts of his property.

In 1987 the Arms Act was amended so as to provide that on conviction on indictment on this charge an offender was liable to a term of imprisonment not exceeding two years or to a fine not exceeding $4,000 or

to both. Prior to the amendment the maximum term of imprisonment for the offence was three months imprisonment.

The applicant was sentenced to eight months imprisonment but the sentencing Judge said that he considered that an appropriate starting sentence would be a term of imprisonment for one year. He reduced the sentence because of a plea of guilty and because the applicant had been in custody on these charges and other matters for some period.

Mr Johnson for the applicant has carefully taken us through the background of the applicant. He has had a number of convictions of dishonesty and false pretences from 1975 up to 1990 although there is a gap between 1983 and 1990 when he has had no convictions. It is obvious that the applicant has been the subject of considerable psychiatric examination in relation to his offending, and was for some months a patient in Ashburn Hall in Dunedin. He was discharged from that treatment when he committed a number of dishonesty offences while a patient in the hospital.

There was before the Judge a psychiatric report obtained shortly after the applicant's arrest on these charges. It is undated but appears to have been received by the Court on 29 April 1991. This report discloses the applicant's psychiatric history and concludes with the

observation that the psychiatrist does not consider that any psychiatric intervention is warranted and that it is more appropriate for the applicant to accept the consequences of his actions in the first place. It was acknowledged by Mr Johnson that the applicant had avoided earlier prison terms for the dishonesty offences because of psychiatric evidence that he has a severe personality disorder that could generally be described as frequently living in a world of fantasy.

The applicant was first before the Court on these charges in March 1991. He had assigned to him by way of legal aid Wellington counsel who had represented him in the past. Originally it was intended that the charges would be defended and the psychiatric report was obtained in relation to an application for bail. There were a series of remands to 29 July when the trial on indictment was due to take place. On that day the applicant pleaded guilty. Counsel persuaded the Judge that there may have been material changes in circumstances since the obtaining of the psychiatric report in April that would justify getting a further report, and in particular a reference from a Wellington psychiatrist who had earlier examined the applicant. The Judge ordered a further psychiatric report and remanded the applicant for sentence to 16 August. No psychiatric report was available and the applicant was further remanded until 29 August.

Counsel who had been assigned for the applicant ascertained that the report was still not available on 29 August and he instructed counsel in Napier to appear anticipating that sentencing would be further adjourned. In view of the delays and the fact that it was suggested that the failure to obtain the psychiatric report was due to the fault of the prison authorities, instructions were given to apply for bail. This application was made on 29 August but adjourned for hearing on 30 August. On that day the applicant instructed the counsel appearing for him in Napier that he wished to be sentenced and to have the matter dealt with. The Judge agreed to that course and imposed the sentence that is now appealed against.

Mr Johnson submits that a sentence of periodic detention was the appropriate sentence for this man who had no previous convictions under the Arms Act and who also had no previous convictions of violence. He also referred to the case of a person known to the applicant who had appeared in the District Court at Napier some two months previously on a charge of possession of two pistols that were found with some cannabis, and who had received a sentence of eight months periodic detention.

Although there had been no previous offending under the Arms Act, it is significant that the applicant has apparently from time to time set himself in conflict with authority and in particular the police, although at no

stage has violence been used or threatened. Further, on 7 July 1989 the applicant had been served by the police with a notice that he was not a fit and proper person to hold a firearms licence, and he clearly had purchased some of the firearms involved in this charge after being served with that notice.

We do not have before us full particulars of the offence or the offender in relation to the man who received a sentence of eight months periodic detention. On the bald description presented to us we can only comment that the sentence might appear to be a particularly lenient one. This, however, is not a case of disparity between co-offenders and this Court has said on a number of occasions that the fact that an appellant is able to produce an example of a lenient sentence cannot be relied upon to support an appeal against a sentence which would otherwise be appropriate.

We are likewise satisfied that in the circumstances the Judge was justified in acceding to the request of the applicant to sentence him when he did. He had before him a reasonably up to date psychiatric report the conclusion of which we have referred to earlier. We think he was entitled to assume from the record of the applicant and the contents of the psychiatric report that the applicant had not been recently in receipt of any psychiatric treatment, nor did any appear appropriate. This conclusion is reinforced by the fact that the appeal has

been presented before us without any further psychiatric evidence or any affidavit from the applicant from which it could be inferred that psychiatric treatment was an appropriate way of dealing with his offending.

There is great concern in the community at the irresponsible use of firearms that has been demonstrated in recent events. Here is a case of a man told that he is not fit to have a firearms licence, who acquires or retains in his possession seven firearms and ammunition. The matter must be regarded as serious and we are not persuaded that the sentence imposed by the Judge in the circumstances was beyond the range of proper sentencing. It follows that we are not satisfied that the sentence in the circumstances was either excessive or inappropriate. The application for leave to appeal against sentence is refused.

Solicitors

Crown Law Office, Wellington