NOTE: PUBLICATION OF NAME(S) OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND

CA487/2009
[2010] NZCA 28

BETWEEN	MARE JONES WHAREPAPA Appellant
AND	THE QUEEN Respondent

Hearing: 16 February 2010

Court: William Young P, Wild and Heath JJ

Counsel: P H H Tomlinson for Appellant
M D Downs for Respondent

Judgment: 24 February 2010 at 4 pm

JUDGMENT OF THE COURT

The appeal, which is against sentence only, is dismissed.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] Mr Wharepapa appeals against a sentence of preventive detention, with a minimum period of imprisonment of six and a half years, imposed on him by MacKenzie J in the High Court at Wellington on 26 June 2009.[1]

[2] The submission for Mr Wharepapa is that a finite sentence of imprisonment was the appropriate one, and that the Judge erred in the following respects:

- Inadequate allowance for guilty pleas.
- Wrongly assessing the level of violence involved in Mr Wharepapa's previous offending.
- Wrongly assessing the appellant's attitude to the issue of treatment.
- Wrongly sentencing the appellant on charges that were not before the Court.

[3] A further point on appeal, contending that the Judge erred in not considering the possibility of a finite sentence coupled with an extended supervision order, was abandoned on 9 February. The appellant accepts that the sentencing Court could not have made an extended supervision order.

Background

[4] The six charges on which Mr Wharepapa was sentenced arose out of two separate incidents, ten months apart. On 23 August 2007 a 19 year old man (we will call him X) went to his father's home in Tawa, Wellington. Mr Wharepapa also lived there. No-one was home, so X waited for his father. Mr Wharepapa arrived home soon afterwards. He became angry over $20 which he believed X owed him.

---

1 *R v Wharepapa* HC Wellington CRI-2008-085-1713, 26 June 2009.

He pushed X up against the wall in the lounge and punched him repeatedly around the stomach and kidney area. At some point X's trousers slipped down. Mr Wharepapa threw X to the floor and pulled his underwear down. After pinning him down with his legs, Mr Wharepapa pushed an empty wine bottle up X's anus. He continued to do this although X was struggling to stop it happening. Mr Wharepapa then removed the bottle and hit X over the head with it. He then pulled a dagger like knife from his trousers and waved it in X's face, threatening to kill him if he did not hand over the $20. At one point Mr Wharepapa held the knife against X's throat. When Mr Wharepapa went outside the house, X was able to escape. Although bruised and sore, he did not seek medical attention.

[5] This first incident resulted in five charges: sexual violation by unlawful sexual connection, possession of an offensive weapon, threatening to kill, assault with intent to injure and assault with a weapon. All were laid indictably.

[6] Mr Wharepapa pleaded guilty to the two assault charges on 4 March 2008.

[7] Although it is not clear from the criminal record we have, we understand that Mr Wharepapa pleaded guilty to the remaining three charges on or about 4 September 2008. This followed an adverse ruling given by Judge Barry pursuant to s 344A of the Crimes Act 1961 on 25 July 2008, in relation to evidence on the sexual violation charge.[2]

[8] On 3 November 2008, pursuant to s 28G of the District Courts Act 1947, Judge Zohrab declined sentencing jurisdiction, and committed Mr Wharepapa to the High Court for sentence on all five charges.[3]

[9] The second incident occurred at Rimutaka Prison on 4 July 2008, while Mr Wharepapa was on remand for the August 2007 offending against X.

---

2 *R v Wharepapa* DC Wellington CRI-2008-085-1713, 25 July 2008.
3 *R v Wharepapa* DC Wellington CRI-2008-085-1713, 3 November 2008.

[10] The previous day a prison officer (whom we will call Y) reported Mr Wharepapa for verbal abuse, and an internal disciplinary process had begun. On the morning of 4 July Y and another prison officer were watching Mr Wharepapa and another inmate playing table tennis. After the game ended, Mr Wharepapa picked up a broom and moved across the floor pushing the broom in front of him as if he were sweeping. When he got near Y, he swung the broom with both hands directly at Y. The blow felled Y to the concrete floor. Y suffered a fractured eye socket, a ruptured eyeball and a fractured jaw. He was taken to hospital, where a titanium plate was inserted into his skull. It is probable that Y will lose the sight in his left eye permanently.

[11] As a result of the second incident, Mr Wharepapa was charged with wounding with intent to cause grievous bodily harm. Mr Wharepapa pleaded guilty to this charge on arraignment before Gendall J in the High Court at Wellington on 16 March 2009.

The Judge's sentence

[12] Rather than any general summary, we will refer to those parts of MacKenzie J's sentence which the appellant challenges, and also to some parts he accepts.

Any pattern of serious offending

[13] This was the first consideration for MacKenzie J, in terms of s 87(4)(a) of the Sentencing Act 2002. This is what the Judge said:

> [8] ... You have an appalling record of previous offending. This began in the Youth Court in 1983 when you were 14 years of age and you have amassed over 200 convictions in the period since then. Not all of these are relevant for present purposes because they are predominantly property offences. You have, by my count, 19 previous convictions for violent offences and five for threatened violence, which have led to the imposition of numerous terms of imprisonment. None of these is, so far as I can see from your record, itself a qualifying violent offence. The present offending involves two separate incidents of serious violent offending. One of the

> charges is sexual in nature but as counsel submitted the circumstances suggest that that is more properly to be categorised as violent offending than sexually motivated offending. The pattern of serious offending disclosed by your history is one of a ready and frequent resort to violence, the level of which has escalated over time.

[14] Mr Tomlinson challenged the accuracy of this summary. While accepting that Mr Wharepapa has a pattern of offending, he submitted that the vast majority of it – particularly of his more serious offending – is property related. Mr Tomlinson contended that the escalation of the violent offending is very recent and contains nothing as serious as the offences for which Mr Wharepapa was being sentenced. Most of Mr Wharepapa's offending was, Mr Tomlinson submitted, of a relatively minor nature and had attracted prison sentences of between three months and two years.

[15] The Crown responds by pointing out that, although Mr Wharepapa completed a voluntarily criminogenic programme in 2004 while subject to release conditions, he was subsequently convicted of injuring with intent in October 2004, assault with intent to injure in February 2006 and both common assault and assault with a weapon in the latter half of 2007. The Crown contends that the present offending represented a further escalation.

[16] The following is a summary of Mr Wharepapa's violent offending. We have excluded a number of offences from this summary, for example two breaches of a non-molestation order, both in 1989:

Date of offence	**Offence**	**Sentence**
3.8.87	Common assault	42 days imprisonment
10.5.88	2 x common assault	3 months non-residential PD
6.1.89	Common assault	1 month non-residential PD
14.3.90	Assaulting a prison officer	4 months imprisonment
4.11.93	Assaulting a female	1 year's imprisonment
11.11.93	Common assault	6 months imprisonment (concurrent with previous sentence)
11.2.95	Assaulting prison officer	To come up for sentence if called upon within 1 year
14.2.95	Assaulting prison officer	Ditto
14.5.95	Assaulting female	1 year's imprisonment

7.4.96	Assaulting female with weapon	3 months imprisonment
7.4.96	3 x assaulting Police with weapon	3 months imprisonment (concurrent) on each charge
10.3.98	Inciting violence	2 months imprisonment
11.4.98	Speaks threateningly	2 months imprisonment
18.12.99	Speaks threateningly	1 month's imprisonment
9.10.01	Threatens to kill (do gbh)	9 months imprisonment
9.10.01	Common assault (domestic)	9 months imprisonment
6.3.04	2 x behaving threateningly (to stab or cut with a weapon)	14 days imprisonment on each charge
13.10.04	Injuring with intent to injure	2 years imprisonment
23.1.06	Threatening to kill (do gbh)	6 months imprisonment
11.2.06	Assaults with intent to injure	3 months imprisonment (concurrent with previous sentence)
23.7.07	Common assault	3 months imprisonment
23.8.07	Offences against victim X	
1.9.07	Assault with a blunt instrument	3 months imprisonment
4.7.08	Offence against victim Y	

[17] We consider this summary confirms the accuracy of MacKenzie J's summary of Mr Wharepapa's history of serious violent offending. Until 2001 it comprised assaults, threats and inciting. In 2001 it escalated to a threat to kill or do serious injury. In 2004 it escalated further to threatening to stab and injuring with intent to injure. A sentence of two years imprisonment was imposed for the latter of those offences. In 2006 there was assault with intent to injure. On 1 September 2007, just a week after his 23 August 2007 attack on X, Mr Wharepapa assaulted a person with a blunt instrument. We view all of this as providing a factual basis for the Judge's observation that Mr Wharepapa has a history of ready and frequent resort to violence, the level of which had escalated. We consider that escalation began in 2001, and increased in 2004-2006.

[18] We accept that the bulk of Mr Wharepapa's convictions are for offences other than violence, notably dishonesty with a generous sprinkling of burglaries. The Judge did not include those in his analysis of Mr Wharepapa's pattern of serious offending. We agree with that, because the Judge's focus was rightly on Mr Wharepapa's violent offending.

[19] We do not accept that the Judge erred in [8] of his sentencing remarks, and dismiss this first challenge to the sentence.

The seriousness of the harm to the community caused by the offending

[20] This consideration is not disputed by the appellant. Given the facts of the two incidents, particularly the second, it could not be.

Information indicating a tendency to commit serious offences in future

[21] Again, this factor is not disputed. The psychiatric assessment dated 2 February 2009 had stated:

> ... It is self evident Mr Wharepapa has been, and remains, a substantial risk of further acts of violence.

Dr Barry-Walsh tempered that assessment by flagging to the Court "significant problems in providing an opinion with regard to Mr Wharepapa's future risk of violence", on which he then elaborated.

[22] The earlier psychological assessment, dated 20 October 2008, had assessed Mr Wharepapa "as a very high risk of violent reoffending and at least a medium-high risk of sexual offending".

The absence or failure of efforts by the offender to address the causes of his offending

[23] The Judge said this:

> [10] ... You have indicated a lack of commitment to addressing these problems in that you have stated that you would not be willing to undertake the intensive violence prevention unit programme if you were sentenced to preventive detention. ... Your attitude has been one of a willingness to comply only on your own terms. ...
>
> ...
>
> [14] The next matter which I must consider is the absence of, or failure of, efforts by you to address the causes of your offending. I have already

> addressed this factor to some extent in describing the various reports. Your attitude is demonstrated by your indicative unwillingness to cooperate with a violence protection programme if you are sentenced to preventive detention. It is further demonstrated by your unwillingness to undergo psychological assessment. Essentially, these exemplify the pattern which comes through the reports, of your being willing to accept efforts designed to assist you only on your own terms. There can be no confidence whatever that you will make any effort to address your offending while you are in prison. Your counsel has submitted that efforts to rehabilitate you and address the causes of your offending have not yet been fully tried. I consider that that history of interventions and of your attitude is such that there can be little confidence of a change in attitude if you were given a further chance by the imposition of a finite sentence.

[24] Again, Mr Tomlinson challenged this as "not entirely correct". He submitted that Mr Wharepapa's statement that he would not do any programme if sentenced to preventive detention was most likely a statement in despair.

[25] Mr Tomlinson referred to Mr Wharepapa's voluntary completion of the criminogenic programme in 2004, and to the positive comments about this in the pre-sentence report dated 14 October 2008. That part of the report gives further detail about attempts to assist Mr Wharepapa with his propensity for anger and violence.

[26] In addition to the psychological and psychiatric assessment reports, and the 14 October 2008 pre-sentence report we have already mentioned, the Judge had a further pre-sentence report dated 30 March 2009. Each of these four reports commented on this aspect. First, the 14 October 2008 pre-sentence report noted:

> Mr Wharepapa maintains he is still very motivated to address his anger and violence and stated clearly his desire to get into the violence prevention unit at Rimutaka Prison.

While accepting this, the report writer noted that Mr Wharepapa was assessed as a very high risk offender, and expressed "great concern" at his stated justification for his assault on victim X:

> ... Nothing to tell ... I put a bottle up his arse and he deserved it.

[27] The report writer noted that Mr Wharepapa was in the maximum security unit at Rimutaka Prison, and thus would need to reduce his security classification before

he could undertake the violence prevention unit, which would likely take a very long time given the circumstances surrounding his security classification.

[28] The psychological assessment of 20 October 2008 echoed these comments. Dr Freeman considered the risk of Mr Wharepapa again offending violently depended on his motivation to undergo treatment, and also pointed to the difficulty in his obtaining treatment, resulting from Mr Wharepapa's current security classification.

[29] The psychiatric report of 2 February 2009 mentioned Mr Wharepapa's "sense of futility as a result of his perception that a sentence of preventive detention would mean that he would be detained for the rest of his life". It recorded his scepticism at attempts at rehabilitation. It noted that Mr Wharepapa had not had significant psychiatric or psychological intervention for the sequellae of his traumatic experiences, probably as a result of recurrent imprisonment, difficulties that arise when he talks about his experiences and a suspicion about the value of therapy. The report concluded:

> Mr Wharepapa is at least ambivalent about the value of further intervention. However I think it is likely that following sentencing, he will have the opportunity to review his situation and may be more open to interventions.

[30] Lastly, the pre-sentence report of 30 March 2009 said this about Mr Wharepapa's motivation to change:

> ... He did accept that his violence is an issue and advised that if he were to receive a determinate sentence of imprisonment, he would be willing to undertake the intensive Violence Prevention Unit programme, Mr Wharepapa explained that "violence has followed me ... it's like my next door neighbour". Furthermore, he advised that he is willing to attempt to "bring down the wall I have built around me", and expressed emotion in stating that this would be the most positive thing he has ever done in his life. However, Mr Wharepapa has adamant that should Preventive Detention be imposed, he would not take part in such a programme stating "it's a waste of time ... I could do it and the Parole Board won't let me out anyway". Another barrier for Mr Wharepapa is the fact that it would likely take him some years to reduce his security classification. Given the length of time he is likely to serve in prison, it is envisaged that should he co-operate with staff this classification will reduce in an appropriate fashion to enable him to complete the Violence Prevention Unit.

[31] For whatever reason, these successive comments perhaps show a drop, between the October 2008 and the March 2009 pre-sentence reports, in Mr Wharepapa's motivation to change. Overall, we consider they support the Judge's somewhat gloomy assessment in [14] of his sentencing remarks. The Judge simply could not have confidence that Mr Wharepapa was a man motivated to try and overcome his problems with anger and violence. We do not accept this challenge to the sentence.

The principle that a length-determinate sentence is preferable if this provides adequate protection for society

[32] The Judge's comments on this consideration were:

> [15] The final matter which I must consider is the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society. In your case, I have reached the view that a finite sentence would not provide adequate protection. The risk which you pose of further violent offending is extreme and will require extensive management if you are released. That degree of ongoing control over the timing of your release, and supervision after release, could not be achieved to the necessary extent by the imposition of a finite sentence. Your counsel submits that you should be given a finite sentence with a final warning. In fact you have already had that. You were on notice of the possible imposition of a sentence of preventive detention when you committed the attack at Rimutaka Prison.

[33] Given the sequence of events as we have detailed it in [6]-[8] we think the Judge may have erred in stating that Mr Wharepapa was on notice that he was likely to be sentenced to preventive detention before he attacked the prison guard on 4 July 2008. But that does not detract from the validity of the Judge's comments in [15]. We agree with the Judge that a finite sentence would not have provided adequate protection for society. That is perhaps another way of saying that we agree with the Judge that the test prescribed in s 87(2)(c) of the Sentencing Act 2002 was met: the Judge was entitled to be satisfied that Mr Wharepapa was likely to commit another qualifying sexual or violent offence if released at the sentence expiry date of any finite sentence the Judge could have imposed.

[34] Mr Tomlinson's countering submission was to be that a finite sentence coupled with the imposition of an extended supervision order was the appropriate

sentence. As we have mentioned, he accepted that the Judge could not impose an extended supervision order.

[35] We also reject this basis of challenge to the sentence.

Comment about preventive detention

[36] It seems to us that Mr Wharepapa does not understand the sentence of preventive detention. It formerly involved an automatic minimum parole eligibility period of 10 years: s 89(1) of the Criminal Justice Act 1985. It no longer does. The minimum period of imprisonment is now five years. The Judge imposed a minimum period of imprisonment of six and a half years on Mr Wharepapa. In other words, he will not be eligible for release on parole for six and a half years. We think Mr Wharepapa has the despondent belief that he has effectively been imprisoned for the rest of his life. That is not necessarily the case. Once Mr Wharepapa has served six and a half years in prison, he will become eligible for release on parole. His own willingness to try and overcome his life-long problems with anger and violence will then become an important factor in determining when he is released back into the community. In short, if Mr Wharepapa is not minded to help himself, then others will not be able to help him.

Result

[37] The appeal is dismissed. The sentence of preventive detention imposed by MacKenzie J stands.

Solicitors:
Crown Law Office, Wellington for Respondent