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NZLR

MEDIUM PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP 131/96

BETWEEN ROLAND CECIL HONNIWELL

Appellant

AND POLICE

Respondent

Hearing: 12 July 1996

Counsel: G.A. Anderson for Appellant
K.M. Williams for Respondent

Judgment: 12 July 1996

ORAL JUDGMENT OF ANDERSON J

SOLICITORS

G.A. Anderson (Auckland) for Appellant
Meredith Connell (Auckland) for Respondent

This is an appeal against sentences imposed in the District Court at North Shore on 17 May 1996 in respect of convictions entered after a defended hearing. Informations were laid in summary form against the appellant. They informed that on three occasions he had threatened to kill two named complainants who were persons connected with psychiatric assistance to the appellant in prison towards the end of a five year sentence for similar offending. The threats were made by letter to one of the complainants and orally to and about another complainant. There was serious concern that the threats represented actual intentions at the time they were made, although of course the ability to carry them out immediately was absent.

This case, for obvious reasons, has caused considerable anxiety both to the Judge who sentenced the appellant and this Court in dealing with the appeal. The appellant is a man who suffers at best from a most serious personality disorder which raises concerns about his risk to members of the public, and in particular women with whom he may have had some platonic contact. Numerous psychiatric reports were prepared, and these were plainly given careful consideration by the learned District Court Judge who noted that in the course of 20 years the appellant had been convicted on eight counts of assault, five counts of threatening, and one count of unlawful sexual connection. He is not yet 40 years of age but has been in prison for much of his adult life. He is a person who plainly requires psychiatric and other medical responses for the sake of his health and, in particular, for the safety of the community. The learned District Court Judge was acutely aware of these considerations. He imposed a combination of concurrent and cumulative

sentences resulting in an overall sentence of eight years imprisonment which would become effective immediately upon the expiration of the five year term which the appellant had been sentenced to. In respect of that term an order had been made on application by the Secretary for Justice, pursuant to s 105 of the Criminal Justice Act 1985, requiring him to serve the whole of the five year term without remission. The effect of the sentences appealed from in connection with those was a 13 year overall past and future period of incarceration.

In this Court it has been submitted on behalf of the appellant that the sentence was in the result about twice as long as even a firm and protective sentence could have been. In the course of the very helpful and extensive submissions by both learned counsel I have had the opportunity to consider a number of cases, some of which I am judicially familiar with through having dealt with them, dealing with persons who have been convicted of threatening to kill. This category of offences carries a maximum term of seven years imprisonment. It is inherently in the middle range of seriousness for all offences.

In *R v McVeagh* (CA 140/94) a sentence of 15 months imprisonment was confirmed by the Court of Appeal which had to consider the appeal in terms of safeguarding the community. *McVeagh* had a long period of psychiatric disability and there was a high likelihood of re-offending in the future. The psychiatric information was to the effect that the only way to ensure that that appellant did not act on his threats was to detain him in a secure environment. Conscious of all these

public safety indications the Court of Appeal nevertheless found 15 months imprisonment to be not inappropriate. In so doing it re-affirmed the principle that a sentence could not be greater than warranted by the criminal offending itself. That principle is, of course, qualified by the logical and legally recognised further principle that where matters of public safety are concerned the upper level of an appropriate sentence in terms of criminal culpability will be applied when necessary.

In *R v Hughes* (CA 297/91) the appellant had three previous convictions for violence, although the most recent was 10 years prior. He had a disorder indicated by feelings of persecution and these were exacerbated by the consumption of alcohol. The form of his threats involved the use of a revving chainsaw after he broke into the complainant's house. He desisted only when the complainant's husband threatened him with a pistol. I was the sentencing Judge in that case and imposed a sentence of two years imprisonment which the Court of Appeal did not disturb but considered that the sentence was as full as could be imposed in the particular case.

In *R v Cherri* (CA 80/89) a sentence of six months imprisonment was considered appropriate by the Court of Appeal where there had been a number of telephone calls to a police officer in the early hours of the morning made by a woman with a long list of previous convictions, including several for assault on law enforcement officers, possession of offensive weapons, misusing the telephone and

intimidation. One of the intimidation convictions had been imposed only a few days before the incident in question. The Court of Appeal in fact reduced the original sentence on appeal to six months.

In *R v Rolander* [1989] 1 NZLR 366 a term of four years imprisonment was upheld by the Court of Appeal. There, as here, there was a defended hearing so that no allowance for a guilty plea could be made. Many psychiatric reports and examinations disclosed that *Rolander* represented a danger to the public. He practised the occult and purported to be a devil worshipper. His sleep was regularly disturbed by dreams of killing. The Court of Appeal held that the four year sentence bore a reasonable relationship to the gravely threatening conduct but was nevertheless at the upper end of the scale even allowing for matters of public safety.

In *R v Meek* (CA 265/80) following a defended hearing a sentence of two years imprisonment was imposed and was upheld by the Court of Appeal. The appellant in that case was convicted of five charges of threatening to kill. He had brandished a knife and threatened members of his family. The sentence was considered to be appropriate.

The sentences in total imposed in the present case exceed any of which I am familiar. They exceed in fact the maximum sentence which could have been imposed on indictment for the particular offence on one occasion. The informations had been laid summarily and the maximum sentence of imprisonment in respect of

any information was accordingly three years. There would have been considerable justification for laying the informations indictably, in which case the appellant would very likely have been remanded to this Court for sentence if he had pleaded guilty or dealt with on indictment in the District Court if he had maintained his not guilty stance. In either case the sentence would have exceeded three years imprisonment. The mechanism availed of by the learned District Court Judge of accumulating sentences was certainly not inappropriate in this case, which is fortunately of a rare type. As the Court of Appeal has observed on many occasions, including, for example, in *R v Swain* (CA 158/92), the ultimate appropriateness of a sentence is of more importance than the way in which it is constructed.

Conscious as I am and appreciative as I am of the compelling indications for keeping this appellant out of the general community for a long time, I am nevertheless satisfied that the sentence in the result is clearly excessive. It is excessive to the point where there must be a strong presumption of error of principle as well. The relevant considerations, put in their briefest form perhaps, are these:-

1. There were two complainants with a separation of culpability in respect of them so as to justify the imposition of a cumulative sentence in all the circumstances.
2. Although the appellant did not have the immediate means of giving effect to the threats which he uttered, he would at the time soon have been in the community and able to effectuate them if he wished.

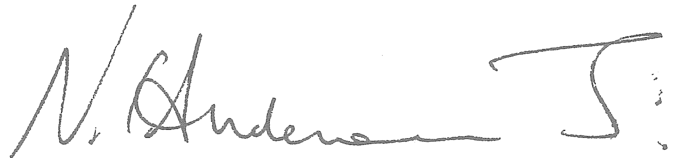
3. The complainants had a rightful sense of fear because the threats had been made by a person with a psychiatric/serious psychological disorder.
4. Whilst in broad moral terms culpability may have been mitigated by the appellant's mental state, in terms of public safety that state increased the indications for a firm sentence.
5. The indications in terms of culpability and risk are made firmer by the appellant's history of violent offending.
6. Those general indications for keeping the appellant out of the community for a long time could not, however, displace the principle that the sentence could be no longer than was justified by the offence or offences themselves, although a sentence at the top levels of appropriateness was indicated.

As I have indicated in my brief review of other similar cases, this case is irreconcilable with sentencing approaches on charges of threatening to kill. It is, of course, obvious, but nevertheless worth stating, that natural anxieties about public risk in the case of persons with psychiatric disabilities should not lead to the substitution of penal responses for appropriate psychiatric care. Many of us who work in the Courts - Judges, counsel, probation officers and others - are acutely conscious of the constraints on medical institutions as far as resources are concerned, but the social response should be to provide those resources rather than seeking to use penal resources as a blunt instrument of custodial care.

A sentence of five years imprisonment overall is the extreme level appropriate to this particular case and in all the circumstances the appeal must be allowed. I allow it by the following mechanism:-

1. The appeal in respect of the sentence of two years imprisonment is dismissed. The sentence in respect of 14 February, CRN 6044006527, is dismissed.

2. In respect of the appeals against CRN 6044006528 and CRN 6044006529 the appeals are allowed to the extent that such sentences were ordered to be served cumulatively on the other sentences. The length of sentence in each case is confirmed but I make an order on appeal that such sentences be served concurrently with the sentence of three years imprisonment imposed in respect of CRN 6044006527. They are, of course, to be cumulative on the sentence of two years imprisonment imposed in respect of CRN 6044006526. The result is a total term of five years imprisonment.



NC Anderson J