ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE VICTIM.

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CRI 2009-470-01

B
Appellant

v

THE POLICE
Respondent

Hearing: 16 February 2009

Appearances: P Mabey QC for appellant
L G Meredith for respondent

Judgment: 16 February 2009

JUDGMENT OF ALLAN J

Solicitors/Counsel :
Crown Solicitor Tauranga
P Mabey QC, PO Box 13199, Tauranga
Beach Legal, PO Box 5109, Mt Maunganui

[1] Mr B appeals against a sentence of 12 months imprisonment imposed upon him in the Tauranga District Court on 22 December 2008 on a charge of injuring with intent to injure. Mr Mabey for the appellant takes no issue with the Judge's approach to the calculation of the appropriate term of a sentence of imprisonment; rather he submits that the appellant ought not to have been sentenced to imprisonment at all, and that a sentence of home detention ought to have been imposed. The Crown's position is that the Judge's approach cannot be faulted and the sentence ought not to be disturbed.

[2] The incident which gave rise to the charge against the appellant was summarised by the Judge at the outset of his sentencing notes:

> [2] As to what occurred, the circumstances were that you took your wife out that evening, alcohol was consumed, you and your wife got into an argument which became somewhat heated in the taxi as you came home. Once you reached your home the argument degenerated into violence. Your wife was pushed over, she tried to get up, you pushed her down to the floor, you dragged her out of the bedroom to the top of the stairs, there she was thrown down a flight of stairs, falling eight steps, she was then thrown down a second flight of stairs, seven stairs, to the ground floor, then she was dragged by her hair into the kitchen. There she was repeatedly punched in the head and face, knocking her to the floor, you put her forearm across her throat preventing her from breathing properly and leading her to believe she would die. She was then dragged into a spare bedroom and punched in the buttocks, she could not get onto the bed so you dragged her onto the bed in the spare bedroom and you kicked her.
>
> [3] Some time later she managed to contact the police. As a result of the attack she received two black eyes, a suspected broken nose, bruising to her mouth, wrists, forearms, swelling to her face, pain to her lower back and tail bone. There was petechial haemorrhaging from both eyes, which is a feature not altogether uncommon in cases where pressure has been placed on the throat, but it also can arise from blows to the head.

[3] Mr Mabey accepts that the summary is essentially accurate. The Judge went on to say:

> [5] I have received some photographs, which graphically illustrate the injuries suffered by your wife. The injuries, in my view, are substantial and it is clear to me that she has received from you a sustained brutal beating over a period of several minutes at the very least. This is not a case of a push or a punch from someone who has

> lost their temper, it is a sustained attack which has continued over a period of time resulting in injury which supports the charge that has been laid.

[4] The Judge considered the offending categories identified in the very recent decision of the Court of Appeal in *R v Harris* [2008] NZCA 528, and placed this case near the top end of the second category in *Harris* which would suggest a starting point approaching two years imprisonment. Mr Mabey does not quarrel with that assessment.

[5] The Judge rejected the submission that the case called for a sentence of home detention, coupled with community work. He said that:

> … the seriousness of the assault, its prolonged nature, the seriousness of the injuries suffered and the vulnerability of the victim, all lead directly to the conclusion that this is the type of case in which a sentence of home detention is simply out of range.

[6] In reaching that conclusion the Judge appears to have regarded the need for deterrence as precluding the possibility of home detention. He said:

> If the Courts are not prepared to impose deterrent sentences, it seems to me that the public at large can obtain mixed messages about what is going to occur in relation to charges involving serious violence against women and children. In my view that is undesirable indeed. The protection of the community requires that in cases involving substantial and serious violence, deterrence must take priority over all other matters.

[7] Although expressly acknowledging that he was required to impose the least restrictive available penalty, he considered that home detention was simply not available.

[8] Notwithstanding the care with which the Judge approached the sentencing exercise, Mr Mabey submits that he fell into error, and that the proper response was a sentence of home detention, accompanied if necessary by a sentence of community work.

[9] In the course of his submissions Mr Mabey referred extensively to the recent decision of the Court of Appeal in *R v D* [2008] NZCA 254 where the Court engaged in an extended discussion of the application of the home detention regime in cases

involving domestic violence. In *R v D* the appellant had been found guilty by a jury on one count of wounding his former wife with intent to injure. That was a more serious charge than the charge faced by the appellant in the present case. The evidence given by the complainant at trial in that case was that the appellant grabbed the back of her head in his left hand and delivered a number of hard uppercuts to her face. The photographic evidence displayed a gash to the left cheek area which required six stitches, together with significant facial bruising and swelling. In the District Court the appellant had been sentenced to 12 months intensive supervision. The Solicitor General sought leave to appeal. The Court allowed the appeal, quashed the sentence, and substituted a term of community work of 250 hours, together with a term of intensive supervision of two years. But the Court said that, had it been sentencing at first instance, it would have imposed a sentence of 12 months home detention.

[10] I turn to the factors relied upon by Mr Mabey. The first is the appellant's guilty plea and his clearly expressed remorse. The Judge expressly referred to both, and explicitly recorded his acceptance that the appellant was genuinely contrite for what had occurred. Mr Mabey pointed out that in *R v D* the appellant had neither pleaded guilty nor displayed any remorse, and the appellant in that case was described as being in denial.

[11] The second point relates to Mr B's previous record which is negligible, and indeed was quite properly disregarded by the Judge. To all intents and purposes the appellant is a first offender.

[12] The next point relied upon, and it is of some substance, relates to the appellant's previous good character. He has made a success of his life. For a long period he has established and maintained a successful business involving the hire of machinery. Plainly the appellant possesses many fine personal qualities. A number of supporting letters placed before the sentencing Judge attest to his standing in the community, and indeed to the affection with which he is widely regarded.

[13] So this offending was out of character. There are very significant prospects of rehabilitation although there had been one or two earlier incidents between the

appellant and his wife, and no real risk of re-offending, having regard to the fact this incident has brought the appellant's marriage to an end. The fact there is likely to be no repetition in the future appears to be acknowledged by the victim.

[14] The next point taken by Mr Mabey relates to a report from the appellant's psychologist who confirms that certain underlying personality issues involving past trauma and depression may have prompted the offending. The report suggests some of the underlying causes of the offending may dissipate with counselling and treatment.

[15] Mr Mabey refers also to the stance of the complainant. She believes that the appellant needs help and support rather than a sentence of imprisonment, and despite the recent separation she confirms the appellant's qualities as a loving father and husband. Care is needed in considering this point. The Court of Appeal has confirmed in *R v Taueki* [2005] 3 NZLR 372 (CA) that the sentencing preferences of a complainant are to be accorded little weight in cases of domestic violence.

[16] Finally, there is a positive pre-sentence report, written Mr Mabey says, by a senior Tauranga probation officer, which recommends home detention with special conditions intended to address certain relevant personal and psychological issues.

[17] Taken together, Mr Mabey argues, these factors so strongly point to a sentence of home detention, that the Judge's decision to impose a sentence of imprisonment instead, must be regarded as wrong in principle.

[18] The jurisdiction to impose a sentence of home detention is of recent provenance. A review of the jurisdiction was undertaken by the Court of Appeal in *R v Hill* [2008] 2 NZLR 381. There, Arnold J delivering the judgment of the Court said at [33]:

> The sentence of home detention reflects a perception that society's interests are better served in some cases by the imposition of restrictions on liberty through home detention rather than through imprisonment. The explanatory note identifies the "acknowledged advantages" of home detention, as including "low rates of reconviction and re-imprisonment, high compliance rates and positive support for offenders' reintegration and rehabilitation".

[19] The Court further observed that a sentence of home detention must be imposed in a manner that is consistent with the purposes and principles of sentencing as set out in the Sentencing Act. Further, and a point of some relevance here, the Court noted that:

> Where the giving of a significant discount to reflect an offender's personal circumstances produces an end sentence that is sufficiently low to raise the possibility of home detention, those personal circumstances will also be relevant to the question of whether home detention should be imposed.

[20] So, where an offender is motivated to change, and where there is a realistic prospect that he will be able to change, there are obvious benefits in a sentence of home detention, both from society's perspective and from that of the offender: *Hill* at [37].

[21] *Hill* was a methamphetamine case. This is not; it involves domestic violence. The sentencing Judge quite properly emphasised the need for deterrence in a case such as this. Indeed, he appears to have regarded it as conclusive against a sentence of home detention. The question is whether he was right to do so.

[22] In *R v D* the Court of Appeal accepted, as the Courts regularly do, the need to provide appropriate sentencing responses to violent offending in a domestic context. The Court said at [47]:

> Domestic violence is a serious social problem in New Zealand. The Courts must respond firmly to such offending, in a manner which promotes the sentencing goals of accountability, deterrence and denunciation, and ensures a consistency of treatment among those convicted of similar offences.

[23] Nevertheless, as *R v D* itself demonstrates, there will be cases in which the deterrent element can be satisfactorily reflected in a sentence of home detention. The degree of violence employed in this case might be thought to be of the same general order as occurred in *R v D*, but D did not plead guilty, displayed little if any remorse, and at the time of the assault had been subject to a protection order in favour of the complainant. He also had previous convictions for violence. Against that somewhat unpromising background, the Court nevertheless considered that [68]:

> … there are good reasons why home detention would have been an appropriate sentencing option. While the assault was serious, there was

> information before the Judge identifying a personality disorder and other personal circumstances which meant that a sentence of home detention, with appropriate special conditions to meet D's particular circumstances, was likely to meet relevant sentencing goals.

[24] That outcome was reached in the context of a consideration of the Court's previous observations in *Hill* as to the acknowledged advantages of home detention.

[25] I return to this case. In emphasising as a primary factor in a domestic violence case the importance of a deterrent sentencing element, the Judge was on firm ground. But the facts of this case were not such as to rule out home detention as an appropriate sentencing response. I do not for one moment downplay what occurred. This was a serious, sustained assault. But this case falls readily within the class where it is proper to impose a sentence of home detention, rather than imprisonment. There is the appellant's early guilty plea and remorse, his good previous record and his high standing in the community. There is also the background to the offending that includes elements of depression and past trauma, and an over-dependence on alcohol resulting largely from over work. And there is the appellant's determination to do something about the causes of the offending.

[26] At the time of his interview with the probation officer on 19 November 2008, he had already undertaken seven sessions of psychological counselling, and had made arrangements to undertake the Living Without Violence Programme. Evidence of initiatives towards self-help was regarded in *Hill* as an indicator of suitability for a home detention sentence.

[27] For these reasons I have reached the conclusion that the appeal must be allowed.

[28] As matters have emerged during this afternoon's hearing, it is not possible today to impose the substituted sentence of home detention and community work which I intend should replace the existing sentence of imprisonment. That is because there has been an element of reconsideration of the home detention address formerly proffered and approved. That address was situated at a relatively isolated location where the appellant would be living on his own. Given the background to

the offending and the personal issues which need attention, that is thought not to represent a satisfactory resolution.

[29] I am told that the appellant's parents, who live in Auckland, are prepared to have him reside with them for the duration of any substituted sentence of home detention, but neither they, nor their residence has been approved by the authorities.

[30] Mr Mabey suggests that I simply adjourn the hearing at this point, in order that the appropriate inquiries might be made. I think that to be the best course.

[31] Accordingly, this hearing is adjourned in the first instance to Friday 27 February 2009 at 9 am, at which time there will be a telephone conference with counsel. At that point if the proffered residence and its occupants have been approved, I will discuss with counsel arrangements to announce the substituted sentence in open Court in Auckland. If there are continuing delays, the further disposal of the appeal will be discussed with counsel.

[32] On the foregoing basis, this appeal currently stands adjourned.

C J Allan J