

**IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY**

CRI-2007-063-5128

THE QUEEN

v

JAMES ALEXANDER DALLAS SMITH

Hearing: 24 March 2009

Appearances: Mr R Bird for Crown
Mrs L Smith for Prisoner

Judgment: 24 March 2009

SENTENCING REMARKS OF LANG J

:
Crown Solicitor, Rotorua
Counsel:
Mrs L Smith, Auckland

[1] Mr Smith, you have pleaded guilty to a charge of kidnapping. That charge carries a maximum sentence of 14 years imprisonment.

Factual background

[2] The factual background to the charge is to be discerned from a summary of facts that you have accepted as being accurate.

[3] You originally faced a charge of murder. That charge arose as a result of the death of a person by the name of Hemi Hohepa, who died of a single stab wound on or about the evening of 18 October 2007.

[4] Earlier today I heard an application by you for an order discharging you pursuant to the provisions of s 347 of the Crimes Act 1961 on that charge. You advanced that application on the basis that the Crown did not have sufficient evidence to enable a properly directed jury to reasonably convict you on the charge.

[5] After hearing from both the Crown and your counsel I found that the application had been made out. Before discharging you, however, I invited the Crown to reconsider its position and to file a new indictment that properly reflected your culpability in relation to this matter. In a separate judgment I have recorded that the Crown has now presented an amended indictment containing a single charge of kidnapping. I was satisfied that that was an appropriate charge given your culpability as contained in the material currently available. For that reason I granted the Crown leave to present the new indictment and you have pleaded guilty to it on that basis.

[6] The kidnapping charge stems from a series of events that occurred on the late evening of 17 October 2007 and the early hours of the following morning. You had come to Rotorua from another area in a vehicle that you had earlier obtained from another person. Whilst in Rotorua you became involved with members of a group who were concerned about Mr Hohepa's activities. They had been involved in drug dealing activities with him and they believed that he was "ripping them off". A scheme was hatched whereby Mr Hohepa would be deceived into getting into your

vehicle. You would be driving the vehicle and he would then be taken to another place where members of the group would scare or hurt him in an effort to persuade him to tell the truth about what he had been doing. From what you told other people it seems that the plan was carried out without incident until a point where one of the members of your group became angry and stabbed Mr Hohepa. He later died of a single stab wound to the chest.

[7] In discharging you on the charge of murder I accepted that there was no evidence that you knew of the existence of a weapon in your group and that you did not know before the incident began that Mr Hohepa's death was a likely outcome of the undertaking that you had agreed to participate in.

[8] Quite clearly you were shocked by what had happened. The associates to whom you spoke shortly after the incident record that you just wanted to get out of Rotorua to go back to where you had come from. It is clear that you had very little detailed knowledge either of the background to the incident or of the other participants in the enterprise.

Sentencing Act 2002

[9] In sentencing you I have to bear in mind the principles set out in the Sentencing Act 2002. In a case like this, issues of deterrence and denunciation are to the forefront. Kidnapping is a very serious crime as is shown by the fact that it has a 14-year maximum penalty. People must know that if they detain others against their will for their own purposes then severe sentences are likely to follow. Your counsel realistically accepts that a sentence of imprisonment is the only outcome possible in the present case.

[10] Having said that, I am also required by the Act to ensure that I impose the least restrictive outcome possible. That really means the shortest sentence that is appropriate having regard to the circumstances of your offending and your personal circumstances.

[11] I am also required by the Act to have regard to the interests of the victims of your offending. The prime victim, of course, was Mr Hohepa who was the subject of the kidnapping plan. There are wider victims as well, namely his family, friends and associates. They will no doubt have suffered greatly as a result of what has happened to him, although predominantly from his death rather than the fact of his detention.

[12] I had given consideration to postponing sentencing in order to enable the Crown to obtain victim impact statements from them. In the end I have elected not to do that because I consider that it is important that you be dealt with immediately. That is not to say, however, that I do not recognise and take into account the very real loss and damage that your offending, and that of your co-offenders, has caused not only for Mr Hohepa but also for his family and friends.

Starting point

[13] There is no tariff, or guideline judgment, in relation to the crime of kidnapping. This is because the crime can be committed in many different ways, each of which will be unique. At one end of the scale is a deliberate, pre-meditated plan to kidnap someone for financial gain. At the other end of the scale is a momentary detention that has occurred on the spur of the moment.

[14] Your actions, I am satisfied, fall somewhere in the middle. There was clearly a degree of pre-meditation because you knew that you would be driving a vehicle that was carrying a person who was to be detained against their will. You also knew the purpose of the detention which was to take Mr Hemopo to a place where other members of your group could scare or hurt him until they achieved their objective.

[15] Counsel for the Crown submits that an appropriate starting point is in the range of two and a half to three and a half years. Your counsel does not argue, to any significant degree, with that. I, for my part, consider that a starting point of two and a half years imprisonment is appropriate in your case.

Aggravating factors

[16] I must also, however, have regard to aggravating factors relating to you personally. In your case, you have numerous previous convictions, Mr Smith. These are for a wide range of offences predominantly involving crimes of dishonesty. Nevertheless, you have been in prison before in 2001 on a charge of injuring with intent to injure. I consider that your previous convictions are such that they amount to an aggravating factor that operate to increase the starting point that I have selected.

[17] You need to know, Mr Smith, that from now on whenever you appear on criminal charges, it is likely that the Court will take your criminal history as an aggravating factor that increases your sentence. Unless you stop offending, the sentences are going to get longer and longer. I propose to increase the starting point by six months to reflect your previous convictions and, in particular, the fact that you have been prepared to become involved in offending like this when you have already served a sentence of imprisonment for a charge of injuring another person.

Mitigating factors

[18] I must then take into account mitigating factors. In reality, there is only one mitigating factor in this case and that is your plea of guilty. This came at a relatively late stage, so far as the overall proceeding is concerned, because you were due to stand trial in May 2009 on the charge of murder.

[19] Having said that, I accept that you have pleaded guilty immediately to the charge of kidnapping as soon as that charge was substituted by the Crown. Up until today you have never had an opportunity to plead to that charge. In doing so, you have both saved the cost of a trial and also acknowledged responsibility for your offending.

[20] That is also important in your case because in order to secure a conviction against you, the Crown needed to rely to some extent on the evidence of your associates. There was no cast-iron guarantee that they would either come up to brief

or that the jury would have been prepared to convict you on the basis of their prior written statements alone. For that reason, I accept that the Crown has also had something of a windfall in the fact that you have been prepared to plead guilty today.

[21] I am therefore prepared to give you an allowance of one-third to reflect those matters.

Sentence

[22] On the charge of kidnapping, you are sentenced to two years imprisonment.

[23] Stand down.

Lang J