IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CRI-2009-419-35

BRADLEY HUGH PATERSON
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 12 June 2009

Appearances: N Brodnax for Appellant
S Cameron for Respondent

Judgment: 12 June 2009

JUDGMENT OF ASHER J

Solicitors:
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Almao Douch, Crown Solicitor, Hamilton

[1] Bradley Hugh Paterson appeals against a sentence of two years three months' imprisonment imposed on him in the District Court at Hamilton on 31 March 2009. The sentence was imposed in relation to the following offences:

a) assaulting with intent to injure on 26 August 2008 – maximum term of imprisonment three years' imprisonment;

b) possession of an offensive weapon on 1 November 2008 - maximum term of imprisonment two years' imprisonment;

c) assault with a weapon 1 November 2008 - maximum term of imprisonment five years' imprisonment; and

d) contravention of a protection order dated 11 November 2008 - maximum term of imprisonment six months' imprisonment.

[2] In addition, the sentence imposed included a sentence that had to be imposed because an earlier sentence of 240 hours community work was not able to be completed by Mr Paterson due to a medical condition, and it was necessary for him to be re-sentenced. The offending there had involved assault with a weapon (a car) and threatening to kill, charges carrying respectively five and seven years' imprisonment as a maximum term.

The facts

[3] I do not have a summary of facts relating to the earlier charges of 5 March 2008, and it does not appear as if the District Court did either when it sentenced Mr Paterson. It would have been desirable to have had those facts but counsel are content for me to decide on a sentence of imprisonment that is based on the sentence of 240 hours community work earlier imposed. This does, of course, indicate that the Court does not view this offending as of the most serious type, requiring a custodial sentence.

[4] The 26 August 2008 incident involved Mr Paterson being refused entry by the victim to his home that she shared with him. The two became involved in a heated argument, with Mr Paterson banging on the door, swearing in an aggressive manner. Finally the victim opened the door and Mr Paterson came inside. He grabbed the victim with two hands by the throat and forced her further inside the dwelling. The confrontation continued with the victim yelling out "don't hurt me". The police were called. The charge in relation to this event is assault with intent to injure.

[5] The second incident, and the most serious, occurred on 1 November 2008, again at Mr Paterson's home. He had again been involved in a heated argument with the victim. Mr Paterson had his 14-month-old daughter with him and as the argument proceeded he put her in the backseat of his vehicle. The victim had their three-year-old son in her arms and was standing on the driveway asking Mr Paterson to give their daughter back to her. Mr Paterson drove back narrowly avoiding colliding with the victim and then drove down the road. He then returned with their daughter still in the car. He went into the house and appeared a short time later carrying a large knife of the type used by butchers. The victim at the time was at Mr Paterson's vehicle trying to get her daughter out.

[6] Mr Paterson then confronted the victim while she was still carrying their young son. He walked across the road holding the knife saying "give me the boy". The victim tried to get away from him but he caught her on the opposite side of the vehicle. While holding the knife up in the air with his right hand, he attempted to grab their son from her with his other hand. At this point his mother intervened and stopped him from what he was doing. The victim ran off for help. Mr Paterson then drove off with his daughter still in the car. When spoken to by the police he gave no explanation but accepted that he should not have grabbed the knife.

[7] On 11 November 2008, following these alarming events, the Family Court at Hamilton issued a protection order. On Thursday, 4 December 2008, Mr Paterson telephoned the victim using a private line. His call was taken by an occupant at the address who refused to pass him on to the victim. He then tried to contact her on multiple occasions by phone and text messages. There may have been up to 20 such

messages. On one occasion he parked some 200 metres from the victim's address and pressed the horn of his car. When spoken to by the police Mr Paterson admitted what he had done and stated that he wanted to talk to the victim because he thought he was going to jail the next day.

The decision

[8] The District Court Judge considered at some length the pre-sentence report and facts of the two incidents and the breach of the protection order. He focused in particular on the 1 November 2008 incident, which he considered had escalated into an "extremely dangerous situation". He took the view that there was an escalating level of violence. He noted that there was no physical wounding but considered that to be good fortune. He asked rhetorically 'What would have happened if there had been resistance?' He considered the letter of apology that had been provided by Mr Paterson. Although he did not consider it to be Mr Paterson's intention to harm the victim, he considered that there was a high chance of harm during the incident. He felt he had to promote in Mr Paterson some sense of responsibility, and that Mr Paterson had to change his ways.

[9] The Judge adopted the starting point of three years' imprisonment, referring to *R v Hereora* [1986] 2 NZLR 164 and *R v Taueki* [2005] 3 NZLR 372. On the sentence that had to be substituted for the community work he sentenced Mr Paterson to three months' imprisonment. He also sentenced Mr Paterson to three months' imprisonment in relation to the breach of protection order. These sentences were concurrent. He took into account the plea of guilty and the remorse that had been expressed by Mr Paterson, to reach an end sentence of two years and three months' imprisonment.

Approach to appeal

[10] Section 121 of the Summary Proceedings Act 1957 sets out the High Court's powers in relation to a general criminal appeal to the High Court. The High Court must hear such an appeal and make such orders as it thinks fit, but without limiting the generality of that power may exercise any of the powers referred to in the

succeeding provisions of the section. Section 121(3) sets out specific provisions relating to an appeal against sentence. Section 121(3) reads:

> **121 High Court to hear and determine appeal**
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> …
>
> (3) In the case of an appeal against sentence, the High Court may—
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> (a) Confirm the sentence; or
>
> (b) If the sentence (either in whole or in part) is one which the Court imposing it had no jurisdiction to impose, or is one which is clearly excessive or inadequate or inappropriate, or if the High Court is satisfied that substantial facts relating to the offence or to the offender's character or personal history were not before the Court imposing sentence, or that those facts were not substantially as placed before or found by that Court, either—
>
> (i) Quash the sentence and either pass such other sentence warranted in law (whether more or less severe) in substitution therefor as the High Court thinks ought to have been passed or deal with the offender in any other way that the Court imposing sentence could have dealt with him on the conviction; or
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> (ii) Quash any invalid part of the sentence that is severable from the residue; or
>
> (iii) Vary, within the limits warranted in law, the sentence or any part of it or any condition imposed on it.

[11] I do not consider that the Supreme Court decision in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141, has changed the appellate approach to sentencing in this Court. That case related to the appellate approach to be taken in respect of decisions of specialist tribunals, and offered general guidance about the appellate function. There is nothing to indicate that it was intended to apply to appeals against sentence to this Court, and I note that it was not treated as applying this way in *D v Police* [2008] CRI-2008-470-22 9 September 2008, Heath J.

[12] Section 121(3), in referring to the High Court intervening when a sentence is clearly excessive or inadequate or inappropriate, indicates that the Court must be satisfied by a very considerable margin that there has been an error in the sentence imposed before it will intervene. It is not just a matter of the appellate Judge

substituting his own view for that of the sentencing Judge. This is reflected in the approach of judges who hear appeals in this Court, which is generally to consider an appropriate range of sentence, rather than just a single finite correct sentence point. I propose to adopt that approach. Even if the sentence is not exactly that which I would have imposed, if it is within a range which can be justified applying accepted sentencing principles, I will not intervene.

Submissions

[13] After some discussion during the course of submissions, Ms Cameron for the Crown accepted the starting point for sentence imposed by the District Court Judge was clearly too high. For reasons that I will set out, I consider that concession was correctly made. Ms Cameron submitted, in common with Ms Brodnax for Mr Paterson, that the assault with a weapon charge must be treated as the lead charge for sentencing purposes, carrying a maximum penalty of five years' imprisonment. Ms Cameron submitted that the appropriate starting point in relation to that charge and the associated possession of an offensive weapon charge was 12 months' imprisonment. She submitted that six months should be added for the other assault, and to substitute a sentence for the community work sentence. In addition, she submitted that there should be a further two months added on for the breach of protection order and supervision, thus leading to a starting point before personal aggravating and mitigating factors of 20 months' imprisonment. She submitted that some uplift was required because of Mr Paterson's poor record and the fact that the breach of the protection order was made while Mr Paterson was on bail. She also referred to a final warning of imprisonment if there was further offending that had been given by the District Court during the March 2008 sentencing process. She accepted that a full discount for the guilty plea was appropriate.

[14] Ms Brodnax for Mr Paterson submitted that the appropriate starting point for the assault with a weapon charge was six to nine months' imprisonment. She submitted that there should be a three-month uplift for the earlier assault charge, and further uplifts of one month and six weeks for the breach of protection order charge and the sentence in substitution for community work. She submitted, applying the totality principle a 12-month starting point in the round was appropriate. She

accepted that there had to be some uplift for the offender's past record and emphasised the guilty plea.

Errors in the sentencing decision

[15] Unfortunately the Judge was given summaries of fact for sentencing which contained certain sentences that Crown and counsel for the offender had agreed should be deleted. These deleted sentences contained serious allegations of threatening to kill and endeavouring to run the victim over. It is difficult to discern what weight was placed on these by the District Court Judge. He does note the threat to kill and appears to take it into account in his sentencing. He notes that the endeavour to run the victim over was part of the charge and was withdrawn and that the matter was put to one side, although the general tenor of the decision would tend to indicate that it was still a factor of influence. Further, I am informed that counsel who appeared for Mr Paterson in the District Court had an incomplete summary of facts and did not address certain incriminating facts, and put Mr Paterson's perspective to the Court in relation to those facts. For these reasons alone it is necessary to reconsider the sentence.

[16] Further, the District Court Judge stated in his conclusory remarks, when he adopted a starting point of three years' imprisonment, at [12]:

> I have been conscious of the bands that are imposed in some offending of the very serious grievous bodily harm type situation. In this particular case it really is a band one type situation if one looks at the *R v Hereora* [1986] 2 NZLR 164 type situation and the *R v Taueki* [2005] 3 NZLR 372 type situation which do apply to other forms of violent offending.

[17] The Court of Appeal in *R v Taueki* in setting out the three sentencing bands was expressly dealing with serious violent offending, and in particular wounding with intent and aggravated wounding or injury, both of which involve a 14 year maximum term of imprisonment. Even the lowest band is described at [36] as the band appropriate "for offending involving violence at the lower end of the spectrum of GBH offences." It is quite clear from the examples given that the band applies to situations where there is actual bodily harm inflicted. The whole purpose of the bands was to show ranges of starting points in relation to such violent offending.

The *R v Taueki* bands should not be applied to assault charges of the less serious type, which do not involve actual violence to a victim.

[18] Given the facts of this case, where there was no harm suffered by the victim and no indication that there was an intention to inflict actual harm on her, or attempts to cut or stab, it was a mistake to endeavour to equate the offending to the *R v Taueki* bands. They should not have been applied. This may have led to the fixing of the high starting point which, for the reasons I will set out below, I consider to be clearly excessive. It is necessary to consider the sentence afresh. In the circumstances, rather than consider a range, and whether the sentence is manifestly excessive, I will first carry out an exercise to decide what I consider to be the appropriate sentence.

The appropriate starting point

[19] The facts relating to the lead charge indicate a domestic dispute where Mr Paterson, in the course of a very heated argument, deliberately went and took a knife from within his home and held that knife while he proceeded to argue and struggle with the victim. She was at the time holding their three-year-old son. The use of a weapon is not a matter that has to be given particular weight given the fact that the use of a weapon is an essential element of the charge. However, the fact that a large knife was the weapon used was a relevant factor. In assessing culpability it is also necessary to give weight to the fact that the victim was holding a young child, and that there was another younger child in the backseat of the car, who was presumably affected by events.

[20] It is also to be noted that there was no contact between the knife and the victim. The summary of facts indeed does not show the knife was swung at her or wielded against her in a manner indicating that she might be cut or stabbed. It was just held. Given the fact that Mr Paterson was using his other arm to grab the child there was always the possibility of an accidental injury.

[21] Given these facts it is helpful to consider some comparable cases. In *R v Lee* CA217/06 28 November 2006, the defendant went to the house of a former partner and demanded sex. When she refused he slapped her and threatened her with a

knife. Several days later he returned and threatened to kill her. He returned a third time and broke into the house, took some of her property and attempted to set fire to the hallway. In relation to the assault and threatening to kill charges a starting point of 15 months was considered by the Court of Appeal. The appeal against sentence was dismissed and the Court of Appeal commented that the sentence was below the available range. The knife was waved in front of the victim's face, and the actions were associated with her being physically held and abused. I consider the culpability there to be at a greater level than here.

[22] In *Mann v Police* HC INV CRI-2005-425-14, CRI-2005-425-15 19 August 2005, Frater J, after the relationship had broken down the victim awoke to find her former partner beside her rubbing a butcher's knife up and down her throat. In the second incident a few weeks later, an argument between the couple resulted in the offender grabbing the victim by the throat, pushing her and threatening to knock her out and punching her several times. This gave rise to a charge of male assaults female. There were also other charges. The District Court had imposed a sentence of 9 months' imprisonment for assault with a weapon, and that was regarded by Frater J as at the outer end of the sentencing range: at [31]. However, that sentence, and a concurrent sentence of three months' imprisonment for threatening to kill was not interfered with.

[23] The sentence in relation to the male assaults female charge was a cumulative sentence of six months. That was reduced to three months' imprisonment. A sentence of three months in respect of breach of a protection order was reduced to one month's imprisonment, to be served concurrently. The total sentence, therefore, to be served was 12 months' imprisonment.

[24] In *Leatherby v Police* HC PN CRI-2008-454 11 September 2008, Miller J, the defendant, after harassing a victim through the day, walked up to the victim and struck him once on the side of the head with a butcher's knife. He was then overpowered and the knife taken from him. The victim suffered a 1.5 centimetre cut just above his left eye and bled profusely. Miller J considered *Mann v Police* and other judgments, and concluded that a starting point of 18 months for that offending was too high and substituted a sentence of 12 months' imprisonment. In *Latilakepa*

v R HC AK CRI-2007-404-291 10 December 2007, Asher J, the defendant had obtained two large kitchen knives and chased his partner around the yard brandishing the knives and yelling and threatening to kill her. A starting point of nine to 12 months was there considered to be appropriate.

[25] These sentences reflect the range of offending that can take place when a defendant is charged with assault with a weapon. Threatening gestures with a weapon, holding the weapon against a victim's body or actual wounding are all matters that will increase the culpability of the defendant in ascending amounts. None of these features were present in this offending.

[26] I do, however, take into account the fact that there were children present who were undoubtedly terrified. I also consider it relevant that the knife was held while the parties struggled with each other, and there was a risk of injury. The knife had been obtained with an element of pre-meditation. In all the circumstances I consider the appropriate starting point to be 12 months' imprisonment for this offending. There is no uplift in relation to the associated charge of possession of an offensive weapon, as it relates to the same events.

[27] I now turn to the other offences. The earlier assault with intent to injure charge involved Mr Paterson entering his home and holding the victim by the throat and pushing her. These facts do not show a high level of culpability in the circumstances. As both counsel conceded, such offending on its own would normally have warranted a sentence involving only supervision. However, that is not an option and some uplift must be made in respect of this offending.

[28] In relation to the contravention of the protection order, the offending involved communications by phone and one instance of tooting a horn from some 200 meters away from the victim's address. There was no actual face to fact contact or threats. I do not regard this as a particularly serious offending.

[29] I conclude that, taking into account the totality principle and the fact that these offences can be seen as part of a continuous train of conduct where

Mr Paterson was allowing his feelings for the victim to get out of control, that an uplift of three months is appropriate.

[30] I note that the District Court Judge did not address any specific uplift for the assault with intent to injure count, but did allow an uplift of three months in respect of the breach of the protection order charge. That uplift, given that three months was the maximum penalty available, was too high. The culpability was in fact quite low.

[31] In relation to the sentence that must be substituted for the community service sentence, given the fact that the sentence was for 240 hours community work, an appropriate equivalent would be a sentence of one-month imprisonment.

[32] Therefore, taking into account the totality principle I consider that four months should be added to the starting point, which increases the starting point to one year and four months' imprisonment.

Personal factors

[33] I now turn to aggravating and mitigating factors relating to Mr Paterson personally. The Court has the benefit of a helpful pre-sentence report, which is generally fairly sympathetic towards Mr Paterson. He paints a picture of a person who has enjoyed considerable success in life but has developed mental and behavioural problems which have destabilised him over the last eight years. He appears to feel genuine remorse in relation to what happened. Both Mr Paterson and his partner have advised the probation officer that they continue to love each other and want to be together. It appears that the victim still supports Mr Paterson. It must also be noted that Mr Paterson appears to have immediately accepted wrongdoing when he spoke to the police, and entered a guilty plea as soon as possible.

[34] As against this, the District Court Judge was right to be concerned about Mr Paterson's past record and the way in which his propensity towards violent outbursts is worsening. He was first convicted of an assault charge in 2003, that being male assaults female, where he was sentenced to six months' supervision. In

December 2006 he was convicted of threatening to kill and assault with a weapon and sentenced to 240 hours community work. He was sentenced for this offending in March 2008, and it is in respect of that offence which he has been re-sentenced today.

[35] I do not consider he has been penalised twice if that earlier offending is taken into account in assessing his past record under s 9 of the Sentencing Act 2002. I assess it as an aggravating factor on the basis that he carried out the August and November assaults having already been convicted and sentenced on those earlier counts. It is relevant to culpability in that it indicates that he has not learnt a lesson from his previous convictions. It is of particular relevance that he had been given a final warning, presumably telling him that he would be imprisoned if he offended violently again, in the March 2008 sentencing process. Despite this he has offended again. His past record and the fact that he re-offended supports the District Court Judge's concern that something had to be done to give Mr Paterson a sense of responsibility, and to make him understand that he had to change his ways. In terms of s 7 of the Sentencing Act it is necessary to promote in Mr Paterson a sense of responsibility and to protect the community from him.

[36] An uplift of six months is appropriate for this factor, which increases the starting point of one year and four months' imprisonment to a total of one year and ten months' imprisonment. From this I propose deducting one month to take into account Mr Paterson's remorse and his apparent mental illness. From that point of 21 months' imprisonment I must deduct approximately one-third to take into account his guilty plea. That leaves a net sentence of one year and two months' imprisonment.

Conclusion

[37] There were errors in the summary of facts presented to the Judge and defence counsel, which have meant that it has been necessary to re-assess the sentencing process. There was also an error in the Judge's approach, and his reliance on the sentencing bands set out in *R v Taueki*. A re-consideration of the appropriate sentence shows that the starting point of three years' imprisonment was manifestly

excessive. The Judge did not specifically go through an exercise of taking into account the aggravating factor of Mr Paterson's past record. However, even allowing a six month uplift for that past record still results in a sentence that is considerably lower than that imposed by the Judge. That sentence was well beyond the acceptable range.

[38] It is appropriate, therefore, to quash the sentence that has been imposed of two years three months' imprisonment, and to substitute for it a sentence of one year two months' imprisonment. That sentence will be imposed on the lead charge with other sentences to be concurrent.

[39] I propose, by consent, imposing conditions upon release as recommended by the probation officer. It is very important that Mr Paterson attends any prescribed programmes or counselling.

Result

[40] The sentence imposed by the District Court on 31 March 2009 of two years three months' imprisonment is quashed.

[41] The following sentences are imposed in substitution:

a) Assault with a weapon on 1 November 2008 – one year two months' imprisonment;

b) Possession of an offensive weapon on 1 November 2008 – six months' imprisonment (concurrent);

c) Assault with intent to injure – three months' imprisonment (concurrent);

d) Contravention of protection order on 11 November 2008 – one month imprisonment (concurrent); and

e) In substitution for the sentence of 240 hours community work for the offending of 5 March 2008 – one month imprisonment (concurrent). For the avoidance of doubt I record that the earlier sentence of community work is cancelled.

[42] The following conditions are imposed by consent. These conditions to apply for six months after Mr Paterson's release:

a) To attend and complete a family violence prevention course or programme to the satisfaction of the probation officer and counsellor or treatment provider.

b) To attend and complete any course or programme or counselling to address offending needs to the satisfaction of the probation officer and counsellor or treatment provider.

……

Asher J