IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CRI-2009-409-000050

REGINA

v

GEORGE WILLIAM COWEN

Hearing: 25 June 2009

Appearances: M Zarifeh & T Mackenzie for Crown
JHM Eaton for Respondent

Judgment: 25 June 2009

ORAL JUDGMENT OF HON. JUSTICE FRENCH

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[1] This is a Solicitor-General's appeal against a non-custodial sentence imposed in respect of an offence of aggravated robbery.

[2] The appeal has been filed out of time, and accordingly the Crown needed to seek leave.

[3] The application for leave was opposed by the respondent.

[4] After hearing from counsel at the commencement of the hearing this morning, I granted leave because, as I will go on to explain, the reason why the appeal was filed out of time was due simply to administrative oversight. Because of that, and because the appeal is not without merit, I considered it should be heard.

[5] The background is as follows.

[6] The respondent, Mr Cowen, appeared for sentence in the District Court on 5 February 2009, having pleaded guilty to one charge of aggravated robbery.

[7] The facts of the offending were that on 8 October 2008 Mr Cowen had entered a Christchurch bank. He was disguised, wearing a beanie, a scarf covering half his face, black clothing, and gloves. He was also carrying, tucked into the top of his trousers, a black barbecue lighter which resembled a small pistol.

[8] He approached the first counter and demanded money from the female teller, telling her he had a weapon. He indicated that the weapon was around his trouser waistline. The teller placed $2200 cash on the counter and pushed it towards Mr Cowen. He took the money and then approached another teller, demanding money from her as well. The teller placed $1900 cash on the counter, which Mr Cowen took. He then ran out of the bank on foot, being pursued by members of the public. In his flight, he dropped some of the money and clothing as he ran.

[9] Within half an hour, he was arrested by the police. He was immediately co-operative, admitted to what he had done, helped the police find the scattered money and the lighter.

[10] In explanation for his extraordinary conduct, he told the police that three or so weeks earlier he had been threatened by an unknown male outside the Christchurch Casino and told that if he did not come up with $10,000, his family would be harmed. Mr Cowen said he had been targeted because he had had a big win at gambling the week before. He took the threat seriously, but did not want to tell anyone because he did not wish his family to know about his gambling. He had become addicted to gambling and was spending some 80 to 100 hours a week gambling online and at the Casino instead of going to university as his parents thought. His gambling had become so frenetic he was staying up at times all night online.

[11] He pleaded guilty at the earliest possible opportunity and spent a month in custody awaiting sentence.

[12] The information before the sentencing Judge included the victim impact reports. They spoke of how shaken the tellers had been by the incident, as is only to be expected. Fortunately, it seems the effect on them was not as far reaching as it might have been, and as has happened in other cases.

[13] Other information before the Judge included the pre-sentence report. It told the Judge that Mr Cowen was 20 years of age, a first offender, and a person who had come from a good family – and, as the Judge said, a person who had enjoyed every material and emotional advantage that comes from such a background.

[14] The pre-sentence report also told the Judge that Mr Cowen had found his remand in custody "a difficult experience for him to say the least", and that in the opinion of the report writer, Mr Cowen and his family "are likely to want to work hard to avoid this in the future." The report said Mr Cowen made "a good candidate for rehabilitative sanctions", stating he was genuinely remorseful, a person likely to be compliant with Court orders, and at low risk of reoffending.

[15] In addition to the two reports, the Judge said he had been deluged with letters speaking of Mr Cowen in the most glowing terms – so glowing the Judge found it difficult to reconcile the person the writers were speaking about with a young man who was prepared to commit such a serious crime.

[16] The information also included reference to the fact Mr Cowen had shown insight into his offending, and in particular had been able to understand just what a terrifying ordeal it must have been for the tellers. The letters spoke, too, of his remorse and his past willingness to help others.

[17] In terms of mitigating factors, the Judge considered the question of the alleged threat to be an extremely significant issue, so much so that he held a contested fact hearing, at which Mr Cowen gave evidence and was cross-examined.

[18] Having heard that evidence, the Judge found on the balance of probabilities that the threat had been made and that Mr Cowen was acting under the result of the threat or a perceived threat. This was something, the Judge said, which put the case into "a totally different position from how it might otherwise appear, and I think in such a circumstance I would have considerably more latitude".

[19] In closely reasoned and detailed sentencing notes, the Judge identified the starting point as a term of imprisonment of five years. That was the starting point agreed by both counsel and based on the leading guideline authority, *R v Mako* [2000] 2 NZLR 170.

[20] The Judge then gave the respondent a one-third discount for his early guilty plea, adjusting the sentence to one of three years, four months. He then gave Mr Cowen a further discount of 18 months on account of personal matters, including previous good character, remorse, his offer to make amends, as well as the threat.

[21] In giving a discount of 18 months, it appears from the notes that the Judge was particularly influenced by another District Court decision of *R v Fraser* DC Christchurch CRI-2008-009-015814, 19 December 2008, Judge Spear.

[22] The further discount reduced the sentence to 22 months, which rendered Mr Cowen eligible for home detention. Having reached that point, the Judge said the issue then became whether the principles of deterrence and denunciation could be met by a sentence which fell short of incarceration.

[23] The Judge had earlier acknowledged that in *Mako* the Court of Appeal had said a sentence of two years or less is available only if the elements which convert a robbery into an aggravated robbery are present to a small degree, and that was not the case here. However, the Judge felt he was free to depart from this, given that *Mako* pre-dated the Sentencing Act regime, and in particular pre-dated the availability of home detention as a stand-alone sentence.

[24] The Judge went on to say:

> [30] There is some force in Mr McKenzie's submission that I have to take into account deterrence as far as the wider community is concerned, as well as far as you are concerned, but I am of the view that a properly informed public knowing all the circumstances of the case would regard this sentence in relation to this particular offence and this particular offender as satisfying deterrence. The circumstances being so unusual, the likelihood that we are going to have a plague of well set up youths such as yourself from good families resorting to this sort of behaviour seems to me to be far fetched and can be discounted.
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> [31] To the extent that I might be seen to be departing from what the Court of Appeal said in *Mako*, I think it is necessary to bear in mind the new sentencing regime which applies and indeed I have, I believe, followed the principles set out in *Taueki* in any event.
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> [32] The pre-sentence report is very favourable and I have really discussed all the relevant matters and it emphasises your remorse. Given the fact that there nonetheless needs to be a good deal of deterrence, I think home detention on its own is not sufficient. There needs to be a very significant period of community work as well. Quite clearly once I reach the two year period and with the caveat about deterrence and denunciation, you are eminently suited for home detention. You will therefore be sentenced as follows.

[25] The Judge sentenced Mr Cowen to a term of 11 months' home detention, with special post-detention conditions designed to address the gambling problem, and also sentenced him to 250 hours' community work, with leave to convert this into training.

[26] The last day for filing an appeal against that decision was 5 March 2009. On that day the Crown did file a notice of appeal, but in the wrong Court. The notice was filed in the Court of Appeal instead of the District Court in Christchurch. It came with a covering letter, copied to Mr Cowen's counsel, to the effect that the lodging of an appeal was to put the matter on hold pending receipt of the District Court sentencing notes. However, on 10 March, a further letter was sent saying the Crown did intend to prosecute the appeal.

[27] It took until 6 April before the mistake was realised, and on that day the appeal that had been filed in the Court of Appeal was abandoned and a notice of appeal filed in the District Court at Christchurch.

[28] Unfortunately, Corrections advised Mr Cowen that the appeal had been abandoned, without also informing him that an appeal had been filed in the District

Court. He therefore underwent what Mr Eaton described as something of an emotional rollercoaster.

[29] What all this means is that as at today's date Mr Cowen has spent four months in custody on remand, served five months of his 11-month home detention sentence and completed 180 hours of his community work.

[30] I have been provided with letters from Corrections, from the counsellor, and from the school where Mr Cowen has been doing his community work. All these letters are extremely positive. They confirm he has been co-operative and generally doing well and making progress.

[31] It is well established that on a Solicitor-General's appeal a sentence should not be increased unless on a review of the facts and circumstances of the case it is clear the sentence imposed is manifestly inadequate, or the Crown is able to point to some error in principle upon which the sentencing Judge acted.

[32] The grounds of appeal advanced by the Crown are two-fold.

[33] First, that it was contrary to the binding authority of *Mako* for the Judge to hold that home detention was available as a sentence. The offending was too serious to fall into the range where home detention was appropriate, and the Judge was wrong to consider the purpose of deterrence could be met by such a sentence.

[34] Secondly, the Crown argues that the mitigation discounts given were excessive and inappropriate.

[35] In support of the first ground, counsel Mr Mackenzie relies in particular on a passage in *Mako* where the Court enunciated a principle which Mr Mackenzie described as the sub-two-year rule:

> [68] A sentence of two years or less is available to the sentencing Judge *only if* the elements which convert a robbery into an aggravated robbery are present to a small degree or the offender's participation in the crime and its planning (if any) was very much in a secondary role. Several Solicitor-General's appeals against suspended sentences for aggravated robbery have succeeded in recent years because not enough weight was given by the

> sentencing Court to the seriousness of the crime and the offender's role in it. The need for deterrence to others is an important consideration. (emphasis added)

[36] The sentencing Judge was cognizant of the *Mako* decision, as I have said, but considered that in so far as it purported to lay down some absolute rule, it had been overtaken by the Sentencing Act, and in particular the provision of the new sentence of home detention as explained in *R v Iosefa* [2008] NZCA 453.

[37] Mr Mackenzie however submits that was wrong. He referred me to post-*Mako* decisions such as *Burke v Police* HC Tauranga CRI-2006-470-000032, 16 November 2006, *Waterhouse v Police* HC Hamilton CRI-2007-419-000130, 29 November 2007, R Young J and *R v Hall* [2008] NZCA 270, which he argued demonstrate the sub-two-year rule is still applicable. Before offending can be in the lowest category and so trigger the availability of a sentence of two years imprisonment or less, it must be either secondary or committed only in a technical form.

[38] Mr Mackenzie said this case was not in that category: it was planned and it was an armed bank robbery. It followed on the authority of *Mako* that home detention was not available.

[39] As regards the second ground of appeal, Mr Mackenzie pointed out that the mitigation discount allowed by the Judge was some 63 per cent, which he submits was excessive and smacks of the Judge artificially tailoring the sentence to enable Mr Cowen to have the benefit of the home detention option, something which the Court of Appeal has said sentencing Judges must not do.

[40] Mr Mackenzie also submitted the Judge was wrong in law to give the weight he did to the Casino threat, a threat which Mr McKenzie submitted was too vague and too removed in time from the offending to be something that could legitimately be taken into account. In his submission, Mr Cowen's objectively unreasonable overreaction to that threat was the result of a self-induced addiction, and therefore should not have counted.

[41] I have carefully considered all the submissions that have been made.

[42] Recent High Court decisions, including my own of *R v Tiopira* HC Dunedin CRI-2008-412-000042, 20 November 2008, show an increasing readiness to use the option of home detention in cases involving young offenders who have real rehabilitation prospects and are unlikely to re-offend.

[43] I accept it is debatable whether, strictly speaking, some of the facts in those cases are within the lowest category of *Mako* as that had been previously interpreted. I also accept that none of these cases involved the factor of a threat, also something not considered by the Court of Appeal in *Mako*. However, that said, in my assessment the aggravating features of this case are distinguishable from those recent decisions, involving, as it does, a bank robbery and the carrying of something that did resemble a gun and which was intended to make the victims think it was a weapon. I also consider it is clear from the Court of Appeal in *Hall* that two years or less is still only available if you are within the lower *Mako* category.

[44] Had I been the sentencing Judge, it is likely I would have imposed a prison sentence in the vicinity of between two and three years' length, depending on the view I might have taken of the threat.

[45] But that, of course, is not the test.

[46] Nor, ultimately, in my judgment, does this case fall to be determined on whether the sentence was manifestly inadequate or reached in error.

[47] In my view, the outcome of this appeal turns on the point emphasised to me by Mr Eaton: namely that in its residual discretion the Court should be reluctant to interfere with a non custodial sentence and replace it with a custodial sentence. The reasons for that reluctance (which applies even if the Court determines the sentence is manifestly inadequate or based upon a wrong principle) were clearly articulated in the decision of *R v Donaldson* (1997) 14 CRNZ 537 at 550:

> An offender must initially look at his or her pending sentencing with considerable trepidation and, in many cases, intense hope that a non-custodial sentence will be imposed, especially when that prospect is encouraged by their counsel. If in real jeopardy they will almost certainly be overwhelmed with relief if they in fact receive a non-custodial sentence. Although they will in all probability be advised of the right of appeal

> statutorily vested in the Solicitor-General and be apprehensive, they must necessarily feel elated that the primary sentencing process has been completed and imprisonment has been avoided. Hope may convert itself into confidence that the Judge's sentence will be upheld. In the meantime they have been at liberty. They have rejoined their family or friends and returned to their work and daily routine. They may have undertaken treatment or therapy where that has been recommended or stipulated as a condition, and such treatment may well be proving successful. With an appreciation of these considerations any decision to reverse a non-custodial sentence and replace it with a term of imprisonment is not lightly undertaken. The Court, indeed, is most reluctant to do so.

[48] Elsewhere in the judgment, there is reference to the "harsh effect" of substituting a non custodial sentence with a prison sentence and there being an "element of inhumanity" in doing so.

[49] That is not to say that in every case where a person has been sentenced to a non-custodial sentence, a Solicitor-General's appeal can never succeed, but in this case there is the added factor of the Crown's delay and the effect that has had on Mr Cowen and his family, and of course the effect it has had in terms of how far along the sentence he has come.

[50] In *R v Clark* CA266/81, 10 March 1981, it is clear from what the Court of Appeal said that they considered the Crown should file its appeal against a non custodial sentence at the earliest possible opportunity. Here, however, it was left until the last day, and then of course we have the mistake about filing in the wrong Court.

[51] Accordingly, although I am prepared to grant leave, the fact of the delay and the effect it has had is something I take into account and which in my view definitely tips the balance in favour of Mr Cowen.

[52] In all the circumstances, I think the better course is to allow Mr Cowen to continue with the home detention and community work sentence.

[53] I stress that this case turns on its special facts, and for offending of this kind a sentence of imprisonment is to be imposed as a general rule.

[54] The outcome of this hearing is therefore that the application for leave to appeal is granted, but the appeal is dismissed.

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