IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI-2009-485-000106

NORMAN LATHAM TANIWHA
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 29 September 2009

Counsel: B S Yeoman for appellant
J M Webber for respondent

Judgment: 30 September 2009

RESERVED JUDGMENT OF DOBSON J

Introduction

[1] Mr Taniwha appeals against his sentence of 25 months' imprisonment after he was convicted having pleaded guilty to a range of offences. He raised two grounds of appeal:

- that the sentence is manifestly excessive due to successive cumulative sentences; and

- that insufficient regard was given to Mr Taniwha's suffering from mental illness at the time of the offending.

[2] Mr Taniwha was convicted and sentenced for the following offences:

Date	Offence	Section	Sentence
28.09.08	Assault with intent to injure	s 193 Crimes Act 1961	Nine months' imprisonment (cumulative upon first, but concurrent with second sentence)
06.01.09	Assault with a weapon	s 202C Crimes Act 1961	Nine months' imprisonment
06.01.09	Common Assault	s 196 Crimes Act 1961	Four months' imprisonment (concurrent)
11.02.09	Common Assault	s 196 Crimes Act 1961	Four months' imprisonment (cumulative)
28.02.09	Common Assault	s 9 Summary Offences Act 1981	Four months' imprisonment (concurrent)
01.03.09	Common Assault	s 196 Crimes Act 1961	Three months' imprisonment (cumulative)
01.03.09	Resisting Police Officer	s 23 Summary Offences Act 1981	Three months' imprisonment (concurrent)
01.03.09	Intimidation (two counts)	s 21 Summary Offences Act 1981	Three months' imprisonment (concurrent)
01.03.09	Threatening to kill	s 306 Crimes Act 1961	Three months' imprisonment (concurrent)
01.03.09	Possession of offensive weapons	s 202A Crimes Act 1961	Three months' imprisonment (concurrent)

[3] Mr Taniwha was convicted and discharged on a further six charges involving trespass, careless driving, resisting a Police officer, disorderly behaviour and two counts of failing to answer bail. There were 17 charges in total.

Factual background

[4] The convictions that resulted in prison sentences stem from five discrete incidents.

[5] On 28 September 2008, Mr Taniwha and his partner, who are currently separated, had an argument leading to Mr Taniwha grabbing her shoulders and neck and pushing her against a chest of drawers, whilst speaking threateningly to her.

[6] On 6 January 2009, Mr Taniwha was in a bar on Abel Smith St in Wellington, and attempted to talk to a worker in the kitchen of the bar about some money owed to him. The worker told Mr Taniwha that he was busy and could not

talk to him. Mr Taniwha became abusive and punched the worker in the mouth, and attempted to kick the worker. He then struck the worker twice in the head with a pool cue then punched him again in the mouth, chipping his tooth.

[7] On 11 February 2009, Mr Taniwha assaulted the duty manager at a bar in Courtenay Place, Wellington at which Mr Taniwha had previously been employed. Mr Taniwha punched the victim from behind on the left side of his face, causing a cut to the victim's upper lip.

[8] On 28 February 2009, Mr Taniwha was working as a doorman at a bar in Taranaki Street, Wellington. A visitor to the bar was accosted by him, with Mr Taniwha blowing smoke over the visitor, flicking ash in his face and subsequently slapping the visitor with an open hand. When the visitor made to call the Police, Mr Taniwha threatened to hit him again.

[9] On 1 March 2009, Mr Taniwha crashed his car into a parked vehicle in Hataitai. Police attempted to talk to him, but he became abusive, and it took some time before Police could apprehend him, whereupon he threatened to kill the arresting officer and his family, and spat at the other Police officer. Mr Taniwha was carrying in his bag two knives, a meat cleaver, a tomahawk and a chisel.

District Court decision

[10] In his 11 May 2009 notes on sentencing, Judge Grace viewed Mr Taniwha's offending as ongoing and opined that he did not seem to have taken responsibility for his offending. Several reports were prepared for the hearing. The psychiatric report made no particular recommendations but the alcohol and drug assessment report recommended that Mr Taniwha had anger management counselling and alcohol and drug counselling as appropriate. Noting that Mr Taniwha had no suitable accommodation, the Judge – with the acquiescence of defence counsel (different to counsel for the appellant) – stated that a sentence of imprisonment was the only possibility.

[11] Noting that the raft of offending would mean ensuring balance in the totality of the final sentence, the Judge sentenced Mr Taniwha accordingly. He did not make use of starting points nor explicitly accounted for any mitigating factors. Some of the offences stated by the Judge did not correspond to the informations provided, but it is clear what the end sentences for each offence amounted to.

[12] The Judge noted that Mr Taniwha was a violent man. He initially imposed release conditions to the effect that he attend Tikanga Maori, alcohol, drug and anger management counselling. However, the sentencing Judge later recalled the judgment deleting the release conditions because the sentence was in excess of two years' imprisonment, presumably reflecting the terms of s 93(5) of the Sentencing Act 2002.

Counsel submissions

[13] For Mr Taniwha, Mr Yeoman submitted that the Judge failed to adequately address the provisions of s 85 of the Sentencing Act, with regard to the imposition of successive cumulative sentences. The Judge ought to have imposed sentences which were as short as possible so as to not offend the totality principle. Mr Yeoman also submitted that insufficient regard was given to Mr Taniwha's mental illness which affected him at the time of the commission of the offending. These two factors mean that the total sentence of 25 months' imprisonment was manifestly excessive.

[14] For the Police, Mr Webber submitted that all of the individual sentences were well within the range available and could not individually be impeached as manifestly excessive. Further, that the sentencing Judge was correct in the attribution of cumulative status to offences that were not part of a connected series of events. Whilst certain mental health difficulties were acknowledged, it was argued for the Police that they appeared to be primarily induced from substance abuse, which was self-induced and therefore not deserving of the same recognition as an established mental illness when regard was had to a reduction in the level of moral culpability for offending that is generally recognised where an offender is acknowledged to have an established mental illness.

Discussion

Did the end sentence offend the totality principle?

[15] Section 85 Sentencing Act states:

> **85 Court to consider totality of offending**
>
> (1) Subject to this section, if a court is considering imposing sentences of imprisonment for 2 or more offences, the individual sentences must reflect the seriousness of each offence.
>
> (2) If cumulative sentences of imprisonment are imposed, whether individually or in combination with concurrent sentences, they must not result in a total period of imprisonment wholly out of proportion to the gravity of the overall offending.
>
> (3) If, because of the need to ensure that the total term of cumulative sentences is not disproportionately long, the imposition of cumulative sentences would result in a series of short sentences that individually fail to reflect the seriousness of each offence, then longer concurrent sentences, or a combination of concurrent and cumulative sentences, must be preferred.
>
> (4) If only concurrent sentences are to be imposed,—
>
> (a) the most serious offence must, subject to any maximum penalty provided for that offence, receive the penalty that is appropriate for the totality of the offending; and
>
> (b) each of the lesser offences must receive the penalty appropriate to that offence.

[16] Mr Yeoman referred to the decision of the Court of Appeal in *R v Forrest* CA383/06 11 December 2006 for guidance as to the approach to s 85. *Forrest* refers to another decision of the Court of Appeal, *R v Xie* [2007] 2 NZLR 240. At [16] of that decision, Chambers J for the Court held:

> [16] The fundamental tenet of the totality principle is that the final sentence must reflect "the totality of the offending". How the total sentence is made up has never been important.

[17] And at [17] the Court restated the key principles when sentencing for multiple offending:

> (a) With multiple offences the sentence must reflect the totality of the offending;
>
> (b) In respect of multiple offences, this court will not insist that the total sentence be arrived at in any particular way; and
>
> (c) The total sentence must represent the overall criminality of the offending and the offender.

[18] Thus the core question in this appeal is whether 25 months' imprisonment appropriately reflects the criminality of the 17 offences for which he was convicted. For assistance with this question, I turn to the following comparative decisions:

- *R v Chiyabi* CA CA457/07 20 February 2008

  The appellant was charged with threatening to kill, breaching bail conditions and resisting arrest arising from two separate incidents. He was found guilty at trial and sentenced to 33 months' imprisonment. The appellant had threatened neighbours who had complained about noise that he would kill their children if they ever complained again. Cumulative sentences were imposed for the separate incidents. The Court of Appeal held that the three-year starting point imposed was commensurate with the appellant's criminality and the discount given for his personal circumstances was generous and dismissed the appeal.

- *Wallace v Police* HC HAM CRI 2008-419-000068 9 March 2009 Cooper J

  The appellant was convicted having pleaded guilty to one charge of assault using a weapon, one charge of injuring with intent to injure and one charge of assault. He appealed against his sentence of four years six months' imprisonment, made up of cumulative terms of 22 months' imprisonment and 32 months' imprisonment from two separate incidents. The offending included striking victims with bottles. Cooper J held that the starting point for one of the incidents was too high:

  > [32] As a result of the starting point adopted in respect of the first charge, I am of the view that, having regard to the totality principle, the overall effective sentence was too high. I would reduce the sentence imposed on the first charge by nine months to overcome that difficulty. An effective term of three years nine months would effectively mark both the gravity of the offending and reflect the appellant's poor record, notwithstanding that, the harm caused to the victim was not severe.

- *Moana v New Zealand Police* HC INV CRI 2004-425-36 19 October 2004 Heath J

  The appellant, who suffered from a mental illness, was convicted having pleaded guilty to one charge of threatening to kill, one charge of assault with a weapon (a shovel), three charges of common assault (one under the Crimes Act and two under the Summary Offences Act), one charge of behaving in a disorderly manner in a public place and in a manner likely to cause violence and one charge of intentional damage of property. They arose from separate offending, involving a fight in a bar using closed fists, a threat to kill while staying in a private residence and an altercation in another private residence involving hitting a victim with a coal shovel. He was sentenced to 18 months' imprisonment. Heath J held that:

  > [29] In this case, while the events occurred on different days [over four days], I am of the view that the Judge was right to treat the events as part of a connected series of events, similar in nature, for which concurrent sentences were appropriate. In my view, the Judge could properly approach the case in that way given the health concerns which underlay the activities of Mr Moana at that time.

- *Wright v Police* HC AK AP60/03 18 July 2003 Nicholson J

  The appellant was convicted having pleaded guilty to 13 offences committed over the span of about a year. The offences were broadly in the separate categories of dishonesty, driving whilst disqualified and assault. He was sentenced to 30 months' imprisonment. Nicholson J held that cumulative sentences of 12 and 18 months' imprisonment for the lead dishonesty offences were not inappropriate given the appellant's poor criminal history with regards to dishonesty offending. Accordingly, the appeal was dismissed.

[19] The cases above demonstrate that the sentencing Judge in this case was correct to impose cumulative sentences. There were four separate incidents that involved quite different offending over a period of nearly six months, and thus four cumulative sentences representing each of those incidents was within the Judge's discretion.

[20] However, whilst I do not want to derogate from the seriousness of the offending – the two lead offences involving assault with the pool cue and assaulting his partner with intent to injure were very serious – I have come to the conclusion that 25 months' imprisonment overstates the criminality of Mr Taniwha's offending. Despite the Judge mentioning the importance of not offending the totality principle in his judgment, I think the end sentence was not commensurate with Mr Taniwha's overall offending.

[21] Mr Taniwha's offending was not nearly as serious as that in *Wallace* and instead much closer to that in *Moana*. The other incidents, including those which involved confrontations with Police, were relatively minor, and it appears that a series of small incidents that had minimal impact led to Mr Taniwha accumulating many charges. The number of charges Mr Taniwha faced are not, in my opinion, indicative of serious criminality. There is no doubt that Mr Taniwha is a very troubled and angry man with a lamentable criminal history, but the multitude of charges he faced were instead indicative of a series of unfortunate events, rather than an on-going predilection towards serious offending.

[22] Accordingly, I propose to reduce the two lead sentences for assault with intent to injure and assault with a weapon by two months each, reducing the final sentence to 21 months' imprisonment. I believe that this reduction adequately represents the criminality of the two assaults, thereby not offending s 85(3) whilst advancing s 85(2) of the Sentencing Act.

Was the appellant's mental illness properly considered?

[23] The Judge mentioned the psychiatric report that was compiled for Mr Taniwha, but did not state its conclusion, which was that Mr Taniwha suffers from bipolar affective disorder, but that Mr Taniwha's state of mind at the time of the offending was greatly affected by illicit substances. I agree with counsel for the Police that no causal nexus between the offending and Mr Taniwha's mental illness has been made out. Accordingly, this would not have represented a significant mitigating factor. In any case, the reduction I have afforded above sufficiently accounts for any mitigating factors not explicitly considered by the Judge.

Conclusion

[24] The appeal is successful. The sentence is amended accordingly:

Offence	Section	Sentence
Assault with intent to injure	s 193 Crimes Act 1961	Seven months' imprisonment (cumulative)
Assault with a weapon	s 202C Crimes Act 1961	Seven months' imprisonment
Common Assault	s 196 Crimes Act 1961	Four months' imprisonment (concurrent)
Common Assault	s 196 Crimes Act 1961	Four months' imprisonment (cumulative)
Common Assault	s 9 Summary Offences Act 1981	Four months' imprisonment (concurrent)
Common Assault	s 196 Crimes Act 1961	Three months' imprisonment (cumulative)
Resisting Police Officer	s 23 Summary Offences Act 1981	Three months' imprisonment (concurrent)
Intimidation (two counts)	s 21 Summary Offences Act 1981	Three months' imprisonment (concurrent)
Threatening to kill	s 306 Crimes Act 1961	Three months' imprisonment (concurrent)
Possession of offensive weapons	s 202A Crimes Act 1961	Three months' imprisonment (concurrent)

[25] This leads to an end sentence of 21 months' imprisonment. This reduction triggers the opportunity to consider home detention as an alternative. The pre-sentence report cited numerous reasons why that would be inappropriate, and I accept them.

[26] The reduced total sentence means this is now a 'short term period of imprisonment', the jurisdiction to impose release conditions is reinstated, and so I impose the eminently sensible conditions that the sentencing Judge attempted to impose in the original sentence, namely that Mr Taniwha must:

a) attend a pre-programme interview and, if suitable, attend a complete Tikanga Maori programme to the satisfaction of the programme facilitators;

b) attend a alcohol and drug assessment, and thereafter such counselling as may be directed to the satisfaction of the Probation Officer;

c) attend anger management counselling; and

d) attend any other counselling or treatment programme that may be deemed appropriate by the Probation Service.

Dobson J

Solicitors:
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