IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

CRI-2009-476-000020

JAMES KEVIN EDWIN MCGRATH
Appellant

v

POLICE
Respondent

Hearing: 16 October 2009

Appearances: M J de Buyzer for Appellant
C A O'Connor for Respondent

Judgment: 16 October 2009

ORAL JUDGMENT OF HON. JUSTICE FRENCH

Introduction

[1] This is an appeal against sentence.

[2] Following pleas of guilty, the appellant was convicted in the District Court of two charges of threatening to kill, one charge of receiving, one of resisting and one of disorderly behaviour. He was sentenced to a term of ten months' imprisonment, comprised of six months in relation to the threatening to kill charges and four months cumulative on the receiving charge.

Factual background

[3] The facts of the offending are that on 10 May 2009 the appellant received four stolen personal computers valued at $2500. The computers had been stolen in a burglary. The appellant knew they had been stolen, and he arranged for all data to be deleted so the computers could be on-sold for profit.

[4] He was charged with receiving and appeared in Court, where he was granted bail.

[5] While on bail, the appellant became involved in a physical fight with his brother in an Oamaru street. Police were called, separated the two and spoke to them. The appellant flared up at police and began to yell out "Westside, Westside, Westside". He then became aware of a crowd of people exiting nearby licensed premises and began to advance towards them, directing a torrent of abuse. As a result of that action, he was arrested. Upon being arrested, the appellant physically flared up at the police, attempting to strike police officers. However, he was physically restrained. He continued to struggle and fight with police throughout the whole procedure and was eventually taken to the Oamaru Police Station.

[6] Upon arrival at the police station, police became concerned about the appellant and as a result called an ambulance. Due to the appellant's antagonistic and aggressive demeanour, he was restrained with a restraint belt and physically carried to an ambulance to be transported to the hospital. While he was in the back of the ambulance, the appellant threatened to kill two police officers, stating "I'm going to shoot you with a 4.2". He turned around and repeated the words to a third officer. After some time, the appellant eventually calmed down and returned to the police station.

The District Court

[7] The information before the District Court Judge included a pre-sentence report. It told the Judge the appellant was only 18 years of age at the time of the offending, with previous convictions for failing to answer police bail, obstructing

police, excess breath alcohol, driving while holder revoked, disorderly behaviour and careless driving.

[8] The appellant was reported as having advised the probation officer he was motivated to change. The appellant had expressed a wish to resume a dairy farming course which he had not completed, and also expressed a willingness to address his alcohol and drug consumption. That was something the probation officer identified as a contributing factor to his offending.

[9] As regards sentencing options, the report stated:

> Community Work is available to the Court, up to the 400 hours maximum available. Mr McGrath indicated a willingness to complete such a sentence and Community Work centre advise of no concerns towards Mr McGrath completing another sentence.
>
> It is recognised that the Court may wish to impose a short sentence of Imprisonment. If the Court were to impose such a sentence, it is recommended Mr McGrath attend a drug and alcohol rehabilitative programme on release.
>
> As requested by the Court, electronic monitoring was canvassed with Mr McGrath. He declined to consent to the canvassing of Home Detention, however, accepted canvassing of Community Detention as a possible sentencing option. Due to Mr McGrath being assessed as requiring a rehabilitative sentence, this is not recommended at this time. An appendix is attached, detailing suitability and conditions.
>
> Due to Mr McGrath having no identified complex rehabilitative needs, Intensive Supervision is not recommended.
>
> Supervision is available to the Court, where Mr McGrath could undertake an assessment with Community Alcohol and Drug Services, where his ongoing alcohol and drug issues could be addressed.

[10] In his sentencing notes, the Judge referred to the pre-sentence report and stated he could not accept the assessment of the offender being at low risk. The reason why the Judge took that view was because the appellant had been involved in four discrete incidents of offending within a six-month period from February to June 2009. This showed a concerning trend of offending increasing in terms of seriousness.

[11] The Judge then continued:

[3] In terms of the aggravating factors there is the fact that your actions were directed against Police Officers. There were two charges involving threatening to kill Police Officers and that nature of the threat was to shoot them. In addition this was offending which occurred while you were on bail.

[4] In terms of the mitigating factors there is your age. You were 18 at the time, you are now 19. You have pleaded guilty to the charges. You have no previous convictions for dishonesty. You have a previous conviction for obstructing Police, although no other of what could be described as violent offending. There have been letters of apology written by you and I also have a letter indicating that a business currently has a vacancy and would be interested in interviewing you for that position.

[5] In terms of the principles of sentencing I must impose the least restrictive sentence. I must also take into account the seriousness of the offending, the gravity of your offending and your culpability. There are various purposes of sentencing set out in the sentencing act. Rehabilitation is a purpose of sentence, so is the need to denounce, deter and to hold you accountable. In appropriate cases rehabilitation, is an apt purpose of sentencing. The view that I have taken is that wholly rehabilitative sentence in this case would not be appropriate. This is because of the seriousness of the offending and the need to deter you and others from making out threats against Police Officers. The Police Officers were acting in the execution of their duty, they were concerned about [sic], they were in the process and did take you to hospital. Nothing was subsequently found or discovered as to the reason why you were acting in the way that you did but in my view an important aspect of sentencing is the need to deter you and others from acting in this way against the Police.

[6] In your case Home Detention is not consented to. It is not an option. The issue is whether or not Community Detention and/or Community Work would achieve the purposes and principles of sentencing. My view is that threats to kill two police officers must be met with a stern response by the Court. I am not satisfied that a sentence short of imprisonment would achieve the purposes and principles of sentencing. I therefore take into account the need to impose the least restrictive sentence. I take into account your age. I take into account your previous convictions. I take into account the sentencing hierarchy as set out in the Sentencing Act. But in light of this now being what is in effect your fourth separate and discrete set of offending from February of this year, in my view a sentence of imprisonment is warranted and I intend to impose a sentence of imprisonment on you Mr McGrath, in order to bring home to you the need to live in the community without offending. You have convictions now for driving offences, offences for violence and offences involving dishonesty offending. It needs to come to a stop and hopefully a sentence of imprisonment will achieve that. I take the offending on 20 June as the more serious of the offending. I intend to take a starting point of 9 months imprisonment on those matters. I intend to reduce that by 3 months to take into account your plea of guilty, your age and the other mitigating factors. On the two charges of threatening to kill you will be sentenced to six months imprisonment. On the charge of resisting Police, two months imprisonment and on the charge of disorderly behaviour you are convicted and discharged. On the charge of receiving you are sentenced to imprisonment for four months, that will be cumulative and in addition to the sentence that I have imposed on the offending on 20 June.

> [7] In terms of your rehabilitation I intend to impose standard and special conditions of release. The standard and special conditions of release will be until 6 months past the sentence expiry date. The special condition of release that I impose will be that you attend and complete an appropriate drug and alcohol programme, to the satisfaction of your Probation Officer and Programme Provider, details of that will be determined and provided to you by your Probation Officer.

The grounds of appeal

[12] Counsel, Mr de Buyzer, advances two main grounds of appeal.

[13] First, that the sentence itself was manifestly excessive. Secondly, and alternatively, that new facts have come to light since the sentence was imposed which now make the sentence manifestly excessive.

[14] In support of the submission that the sentence itself was manifestly excessive, Mr de Buyzer submitted the following arguments:

i) The Judge paid insufficient regard to the mitigating factors, including the appellant's age and lack of relevant previous convictions.

ii) The Judge overstated the level of culpability having regard to the facts.

iii) The Judge failed to have regard to the hierarchy of sentences, the appellant's previous Court appearances having been dealt with by way of fine and community work.

iv) The Judge failed to have regard to the fact the appellant had already spent six weeks in custody prior to being sentenced.

v) The Judge failed to have adequate regard to alternative electronically monitored sentences.

[15] In relation to home detention, the pre-sentence report informed the Judge that the appellant did not consent to the canvassing of home detention. He did, however,

consent to the canvassing of community detention. The Judge therefore did not consider home detention. As regards community detention, the Judge considered that was an inappropriate response given the seriousness of the offending involving, as it did, a threat to shoot police officers.

Discussion

[16] Turning first to the issue of the sentence itself, there is no guideline judgment in relation to the offence of threatening to kill. That is because the circumstances are so variable. There is, however, some Court of Appeal authority to endorse the proposition that the starting point for making a threat to kill on the first or second occasion is one to two years' imprisonment: see *R v Penney* CA24/04, 4 August 2004. Threatening to kill is a serious offence and is treated seriously by the Courts. In this case it could arguably be said that in taking a starting point of nine months, the Judge was adopting a relatively lenient approach, especially given that the offending involved a threat to law enforcement officers and, moreover, occurred while the appellant was on bail.

[17] The fact the Judge imposed a cumulative sentence in respect of the receiving charge is also justifiable in terms of s 84 of the Sentencing Act 2002.

[18] Where, however, I think the appellant is on stronger ground is in relation to his alternative argument, namely the existence of new circumstances.

[19] What has happened since the sentencing is that the appellant has obtained a full-time permanent position with a local company. Mr de Buyzer himself has spoken to the employer in question and the employer is well aware of all the current circumstances. The appellant is indeed fortunate that this employer is prepared to give him a chance.

[20] The other new circumstance is that it now appears the reason why the appellant did not originally consent to home detention was because of a misunderstanding that home detention would preclude him from being able to obtain work on a dairy farm, which at that time was his proposed course of action. There

may be room for some scepticism in relation to that explanation, given the appellant was prepared to countenance community detention. The Crown has a concern that offenders may be refusing to consent to home detention in the hope that such refusal will then pressure the Court into imposing a less serious penalty.

[21] However, in this case I am prepared to give the appellant the benefit of the doubt. He is young and it is possible he did indeed have a misapprehension about the implications of home detention. I am satisfied that this would have been an appropriate case for home detention had it been available. I have carefully read the Judge's sentencing notes and it seems to me they are capable of being interpreted as being to the effect that the Judge would also have taken that same view had home detention been available.

[22] There is some suggestion in the appellant's written submissions that the Judge should be criticised for not enquiring further as to the reason why the appellant was not consenting to home detention. I do not accept that criticism. It is particularly unfair given that the appellant was represented at the time of the sentencing. However, as I have said, the circumstances have now changed and I am satisfied it is highly arguable that home detention was and is an appropriate sentence.

[23] In all the circumstances, I have decided the most appropriate course of action is for me to adjourn this appeal hearing to enable the probation service to prepare an appendix for the purposes of considering the suitability of the address proposed at 28 Wye Street, Oamaru, for home detention.

[24] I ask the Service to address conditions relating to this appellant's drug and alcohol problem, and also for them to consider the situation of the new employment and how the sentence of home detention can best be managed having regard to the fact he may be required, during the course of his employment, to go out in vehicles.

[25] The hearing is accordingly adjourned to ***4.30 p.m. on Tuesday 27 October 2009***. It will be dealt with by way of a conference call, and a final determination of this appeal will then be made following receipt of the probation services appendix.

[26] In the meantime, bail is to continue until that date on the same conditions as currently prevail.

Solicitors:
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