IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CRI 2009-412-000030

TIMOTHY PETER CURRY
Appellant

v

POLICE
Respondent

Hearing: 18 November 2009

Counsel: J A Westgate for Appellant
R D Smith for Respondent

Judgment: 18 November 2009

JUDGMENT OF FOGARTY J

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[1] This is an appeal against sentencing. The appellant was sentenced to three years nine months effectively on all matters that were before the Court. There were three incidents before the Court, all relating to the dysfunctional relationship between the appellant as father, and the victim (the mother of his two children).

[2] The victim, essentially as a result of the breakdown of the relationship, had had limited visitation with his two children, a two year old child and, by November 2008, a two month old baby, and was under bail conditions which prohibited any contact with the mother, the victim.

[3] He faces a charge of threatening to kill the mother on 16 November, which was a serious threat; secondly, a breach of protection order on Christmas Day by a telephone call; and thirdly, and most significantly, a very serious home invasion which was premeditated where he travelled some long distance to Omarama, walking several kilometres, to surreptitiously take up a position outside the victim's house. When observing that she was alone at 6 am he entered the house with a backpack which contained, amongst other things, a roll of tape and two knives. He tied the victim up after climbing on top of her and straddling her and pinning her to the bed. If that was not bad enough, things got worse. I do not think it is necessary to detail all of the events but he ended up sitting in the baby's bedroom with the two year old on his lap holding a knife blade to the two year old's chest dealing with a confrontation by a relative who had arrived and later the police. After some time he surrendered.

[4] He was either threatening to kill himself and the children or he was possibly intending to kill himself and the children. As a result of the third incident he was charged with kidnapping, and aggravated burglary, and breaching a protection order.

[5] The facts of this case are very similar to a decision: *R v Nevin* HC AK 12 September 2007, Courtney J. I am satisfied that the only material difference is that there is arguably a greater culpability by reason of him having to travel a long distance thereby having time to reflect on the seriousness of his plan, than occurred in *Nevin*.

[6] I do not think there is much difference between his coming into the house in this case where he knew only the victim and the two children were there, her sister having left the house at 6 am, and in the case of *Nevin*, the man coming into the house on the pretext that he was bringing a gift for his daughter.

[7] *Nevin* therefore is the comparable case to apply for a starting point. In this case the Judge took a starting point of three and a half years which included as aggravating features the presence of the knife, the duration of the offending, the premeditation and planning, the effect on the victim, the vulnerability of the victim, and the tying up of the victim with tape. To that three and a half year imprisonment

he added a year for the fact that the offending took place in the victim's house, and that it took place while he was on bail and was prohibited from having access to the victim (as I mentioned earlier), and it was in breach of the protection order.

[8] It seems to me to be splitting hairs to take an additional aggravating factor that it took place at the victim's house. Very often it is very material that the offence occurred as part of a home invasion but in substance and keeping in mind that *Nevin* is the comparable, I think that factor is effectively built in to the three and a half year starting point. An uplift of one year for this occurring on a breach of bail and in the existence of a protection order does seem to me to be rather high. But I will move on for reasons which will become apparent, except to say that, to my mind, keeping in mind that the Judge does not have to follow *Nevin* exactly and also because *Nevin* is slightly different, I would have thought that there was a case for an uplift on *Nevin* for the greater premeditation in this case which I would have thought could have justified an uplift to a four year starting point and that would include the fact that it was done in breach of the bail condition.

[9] The whole thing was in breach of the protection order. One has to be careful about starting to double count on aggravating features. The basic principle contained in s 10 of the Crimes Act 1961 is that people should not be punished twice for the same conduct.

[10] The Judge at that point then discounted for the guilty plea. This was a decision written by the Judge in August and so prior to *R v Hessell* [2009] NZCA 450. *Hessell* now makes it clear that the guilty plea discount is the last step. That is not a criticism of this Judge but following *Hessell* I put that to one side for the moment and turn on to the other two earlier incidents being the threatening to kill on 6 November, a charge on which the Judge felt justified in imposing 12 months imprisonment, and it seems to be a very serious threat; then the breach of protection order on 25 December, where he imposed three months imprisonment. Speaking for myself that seems pretty severe for a call on Christmas Day.

[11] In any event, taking into account the totality principle the Judge reduced the 12 months indicative imprisonment on the threatening to kill to six months, added

three months for the breach of protection order on 25 December, and having earlier applied the discount on four and a half years imprisonment for the incident on 20 April, he reached an effective sentence of three years nine months.

[12] By comparison, were I the original sentencing Judge, I would have taken four years for the starting point for all the events that took place in the house on 20 April, and added nine months for the threatening to kill on 16 November, and the breach of protection order, having four years nine months, and then applied a full discount of 30% which would indicate a sentence of three years two months.

[13] I then step back and consider whether or not this alternative analysis justifies interfering with his sentence of three years nine months. In this kind of sentence analysis the sentencing Judges at first instance and on appeal are essentially resolving questions of degree over which reasonable Judges can differ and it is not the role of the appeal Court to intervene unless the decision contains some serious errors of analysis or is manifestly wrong.

[14] It is again a judgment call but I have decided that this is a case where the judgment of this sentencing Judge should not be disturbed and for this reason the appeal is dismissed.

Solicitors:
J A Westgate, Dunedin, for Appellant
Crown Solicitor, Dunedin, for Respondent