IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CRI 2009-470-35

	BETWEEN	ERIC JAMES WHETU DODD Appellant
	AND	NEW ZEALAND POLICE Respondent

Hearing: 9 December 2009

Appearances: Francie Fenton for Appellant
Hayley Derrick for Respondent

Judgment: 9 December 2009

JUDGMENT OF HARRISON J

SOLICITORS
Adams & Horsley (Tauranga) for Appellant
Ronayne Hollister-Jones Lellman (Tauranga) for Respondent

Introduction

[1] Mr Eric Dodd appeals against a sentence of 18 months imprisonment imposed upon him following a plea of guilty in the District Court at Tauranga on 1 October 2009 to a charge of threatening to kill. He does not appeal against a concurrent sentence of nine months imprisonment imposed on a charge of carrying an airgun without proper, lawful and sufficient purpose. In reality the circumstances of the second offence are subsumed in the sentence for the first.

[2] Ms Fenton for Mr Dodd raises two issues: first, whether the length of the sentence of imprisonment was manifestly excessive and, second, whether an alternative sentence of home detention should have been imposed.

Facts

[3] The facts are not in dispute. At about 9 am on 2 March Mr Dodd was walking with a relative long Windermere Drive, Tauranga. On the way he stopped at another address. He walked to the sliding door of a living room and opened it. Inside a young woman and her boyfriend were seated.

[4] Mr Dodd raised in an agitated fashion the issue of money owed to him by the young woman's sister. While doing so he reached behind his back. He revealed an airgun shaped like a Glock model firearm. He then withdrew the weapon and pointed it towards the floor. He shouted at the young woman to tell her sister to repay the debt by midday, otherwise he would shoot the sister, her boyfriend and his family. Mr Dodd then returned the weapon to his clothing and departed.

[5] Mr Dodd admitted the offending. He advised the police that he wanted to secure revenge for a fight which had taken place on the previous day. At the time Mr Dodd was 26 years of age. He was living in a permanent relationship with a young woman. Together they have two infant children with a third due within the next two months.

Starting Point

[6] The primary issue to emerge in argument today is whether or not the starting point adopted by Judge Crosbie was excessive. Without any disrespect to the Judge, it has been difficult for counsel and me to identify the starting point actually adopted. The best indicator is that the Judge applied an adjusted starting point, that is a base figure compounded for previous convictions, of what he called "in the area of two-and-a-half to three years and, I suspect, probably more".

[7] Ms Derrick for the Crown accepts that the adjusted starting point is "at the upper end" but, by reference to recent Court of Appeal authority, she submits that it is sustainable: *R v Chiyabi* [2008] NZCA 10 and *R v Penny* CA24/04 4 August 2004. In the brief time available to read those two decisions, I am satisfied that the facts are distinguishable in each.

[8] A more analogous authority is *R v Sykes* HC CHCH CRI 2008-009-2603 19 May 2009, cited by Ms Fenton. In that case French J adopted a starting point of 12 months for the offence of threatening to kill. The circumstances were arguably more extreme than this. Mr Sykes pointed a pistol at the victim's head and used very menacing words to communicate his intention to kill. He continued with this behaviour for some time until leaving the address. French J identified three aggravating features - the repeated nature of the threats, the immediate proximity between Mr Sykes and his victim, and, most importantly, the use of a pistol. On that basis the Judge adjusted the starting point upwards by six months to a total of 18 months.

[9] The circumstances of Mr Dodd's offending are not so severe. The threat to the intended victim was indirect rather than direct. Those to whom the airgun was presented would not themselves have considered they were in immediate danger. The purpose was to communicate a message to a third party. Also there was no repetition of the type in *Sykes*. However, common to both cases was the use of a weapon.

[10] In *Sykes* also the Judge made a further upward adjustment of three months to a total of 21 months to take account of previous criminal history. Again an upward adjustment would be appropriate in this case.

[11] I agree with Ms Derrick that, if the end sentence of 18 months imprisonment is used as the marker and on the assumption that the Judge allowed a 33% discount for pleas of guilty, the actual adjusted starting point adopted must have been two years and three months. After giving this issue careful consideration I am satisfied, particularly by comparison with *Sykes*, that that figure was excessive. At the most a starting point of 21 months was justifiable, applying a base starting point of 12 months adjusted upwards for use of a weapon and Mr Dodd's previous convictions for violence (although not particularly serious). For the avoidance of doubt, I regard that figure as at the outer permissible limit. An allowance must be made for Mr Dodd's pleas of guilty. The appropriate end sentence would be one year and two months imprisonment.

Home Detention

[12] Judge Crosbie considered with care a submission that a sentence of home detention should be imposed. He expressly acknowledged his obligation to fix a sentence with the least restrictive outcome. Included in the sentencing exercise was, of course, a consideration of the statutory purposes and principles of sentencing. The Judge acknowledged the principle against imposing a sentence of imprisonment unless there was no other alternative and then for the shortest period possible. However, the Judge then emphasised at particular length the principles of deterrence and denunciation.

[13] Ms Fenton submits that the sentence of imprisonment imposed by the Judge was inconsistent with his earlier acknowledgement about the least restrictive outcome. While acknowledging that the Judge considered home detention, she submits that he did not in fact give any or proper weight to the relevant principles.

[14] In a case like this the Judge, as he recognised, must form a judgment on whether imprisonment is necessary (an important requirement) or home detention

can respond adequately to the seriousness of the offending: *R v D* [2008] NZCA 254 at [65]. As the Court acknowledged in that case, imprisonment is a hybrid sentence, neither custodial nor community based. The sentencing Judge must undertake a balancing approach when the defendant falls into the marginal zone between imprisonment and home detention. However, it should be emphasised that the latter sentence imposes a serious limitation on an individual's liberty. It is not a soft or easy option, particularly for a young man who may have to serve it within the physical confines of a residential property and subject to the constant emotional demands of a young family.

[15] Appellate Courts are reluctant to interfere where a sentencing Judge has undertaken his or her evaluative exercise by giving particular weight to the sentencing principles of denunciation and deterrence. However, in this case I agree with Ms Fenton. All sentencing carries an element of personal deterrence. The Judge gave particular weight to Mr Dodd's previous history and what he called a propensity or willingness to be violent.

[16] However, some perspective is necessary. Mr Dodd has five previous convictions for common assault and one for assaulting a female. He has served community sentences on all. Accordingly I infer that they were not particularly serious. Moreover, as Ms Fenton emphasises, his last conviction for assault was in April 2006, some three years before he committed this offence. Mr Dodd deserves some credit for the changes made in the interim and, most importantly, an incentive to continue.

[17] The pre-sentence report presents a mixed picture. Some aspects are positive; others are negative. It is not insignificant that Mr Dodd's twin sister has assessed him as having an anger problem as a result of a serious head injury sustained when he was seven years of age leading to his hospitalisation for a year and temperament changes. Also Mr Dodd suffers from literacy and anxiety problems. Against that he is in a stable domestic relationship and he has some motivation to change. There is scope for optimism that he might find rehabilitation if he remains in the community.

[18] Accordingly I am satisfied that Judge Crosbie erred by placing undue weight upon the features of deterrence and denunciation in this particular case. A sentence of home detention coupled with community work would have been appropriate.

[19] Accordingly I quash the sentence of 18 months imprisonment on the charge of threatening to kill. In substitution I impose a term of home detention equivalent to one year and two months imprisonment. Bearing in mind that Mr Dodd has served two months of that term, the appropriate term of home detention is five months, which I now impose, together with a sentence of 200 hours of community work which I am satisfied will also serve the principles and purposes of sentencing. The sentence is to be served at the address of 3B College Place, Windermere, Tauranga. The conditions imposed upon release in the District Court remain.

[20] I thank Ms Fenton and Ms Derrick for the quality of their argument today.

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Rhys Harrison J