IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CRI-2009-442-26

NEIL DAVID JONES
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 14 December 2009

Appearances: R Ord for the appellant
H Boyd-Wilson for the Crown

Judgment: 17 December 2009

JUDGMENT OF CLIFFORD J

Introduction

[1] Mr Jones pleaded guilty to three charges of threatening to kill under s 306 of the Crimes Act 1961. Two of those charges were laid on a representative basis, as Mr Jones threatened the victims in question on more than one occasion.

[2] On 13 November 2009 Mr Jones was sentenced to 20 months' imprisonment on each charge concurrently.

[3] Mr Jones now appeals against that sentence. The points on appeal argued before me, which were different to the original points on appeal filed by Mr Jones, were that the sentence was manifestly excessive when compared with relevant precedent and that the District Court Judge failed to take account of the fact that no physical violence had occurred.

Background

[4] On 12 March 2009 Mr Jones phoned his former girlfriend, who had recently terminated their relationship, at her workplace. When she answered the phone by name he said to her "you're dead" and hung up. He rang his former girlfriend three times the next night, each time hanging up without speaking. On 14 March his former girlfriend was with the Police when she received a phone call from Mr Jones. He twice said to her "I'm going to kill you", and ended the call shortly after.

[5] As a result of that behaviour in March Mr Jones faced one charge of threatening to kill.

[6] On 6 September 2009 Mr Jones made a series of phone calls to his, by then, former wife and her, then, new partner. During those conversations he said, amongst other things, that he knew his wife's partner's address and was going to get him and kill him, that he was going to chop his wife's partner up and bury him in a forest and that his former wife was his property, that she should return to him and that, if she did not, he would kill her.

[7] As a result of that behaviour Mr Jones faced the two further, representative, charges.

[8] The threats had a powerful impact on the complainants. From their point of view (the District Court Judge found) there was a high probability that Mr Jones' threats would be carried out. It was the experience of those close to Mr Jones that he had gang connections. He also had convictions for violence, including for assault and for breaches of protection and non-molestation orders. His former girlfriend (the subject of the first charge) has located to Australia in fear of her safety.

[9] Whilst Mr Jones pleaded guilty, his pre-sentence report writer (in relation to the first offence) stated Mr Jones did not accept responsibility for his offending, had little empathy for the victim and was at a high risk of re-offending.

District Court decision

[10] The Judge approached the sentencing exercise on a totality basis. He adopted a starting point of two and a half years' imprisonment and allowed a 33 per cent discount for Mr Jones' guilty pleas, on the basis that they were entered at the first reasonable opportunity.

[11] The Judge also imposed release conditions for six months after the sentence expiry date, and a special condition that Mr Jones undertake and complete a Stopping Violence programme.

Discussion

[12] In arguing that the sentence imposed on Mr Jones was, by reference to "relevant precedent", manifestly excessive, Mr Ord referred me to *R v Meek* [1981] 1 NZLR 499 (CA), *R v Rolander* [1989] 1 NZLR 366, *R v Penney* CA24/04, 4 August 2004, *R v Cherri* (1989) 5 CRNZ 177 (CA), *R v McLean* HC Gisborne CRI 2003-016-6769, 8 October 2004 and *Reihana v NZ Police* HC Auckland CRI-2009-404-205, 21 September 2009.

[13] In addition, at the hearing I was also referred to other cases that had been put before the Judge, including *R v Terry* CA45/00, 8 June 2000.

[14] I do not think it is necessary to analyse all those cases in close detail. There is no general tariff authority for threatening to kill offending. Each of those cases depends very much upon its own facts.

[15] By reference to the factual patterns of those cases, the following features of Mr Jones' offending are to be noted:

a) Mr Jones threatened to kill three people. On each occasion he conveyed those threats not face to face, but by telephone.

b) Mr Jones directly threatened the people concerned, as opposed to conveying those threats to third persons (as in a number of the cases above).

c) In my judgment, the words used conveyed the threats directly, unambiguously and in frightening terms. In particular, the threats against his former wife and her now partner, which formed the basis of the latter charges, were particularly specific.

d) Mr Jones has previous convictions for contravening protection orders and breaching non-molestation orders, albeit against a different victim, as well as prior convictions for assault, extortion and dishonesty offending. At the time of the second offending, Mr Jones was on bail for the earlier charge of threatening to kill.

[16] Of the various cases referred to above, and against that factual pattern, the decisions of the Court of Appeal in *Terry* and *Penney* are, in my view, of particular relevance.

[17] In *Terry*, the Court of Appeal considered a sentence of 16 months' imprisonment imposed on Mr Terry. During the course of a conversation with an off-duty Police constable, Mr Terry had said that by Christmas there would be a Police officer laid out on a concrete slab. That was not a threat, it was a promise. That Police officer would be one of two named officers. In upholding the 16 month sentence, the Court of Appeal noted that the sentence was intended to reflect the seriousness of the offence, the particular remand background – including the circumstances that Mr Terry had spent time in custody in relation to offences upon which he was acquitted at another trial – and relevant aspects of his personal circumstances. A dominant consideration was that the trial Judge had sentenced Mr Terry in August 1998 for threatening to kill a local body officer. The sentence

imposed on that occasion was nine months' imprisonment. In all the circumstances, a sentence of 16 months' imprisonment was "well within the appropriate range".

[18] In *Penney*, the Court of Appeal considered a sentence of two and a half years' imprisonment imposed on Mr Penney. It did so in the following terms (at [16]):

> Judge Singh, in his sentencing notes, referred to a number of other decisions in coming to the conclusion he did. They included *R v Rolander* [1989] 1 NZLR 366 (CA) and *R v Meek* [1981] 1 NZLR 499 (CA). Judge Singh explained that, had this been the first occasion on which Mr Penney had threatened to kill, the sentencing range would have been "between one to two years". That certainly appears consistent with the authorities to which His Honour referred. But His Honour concluded that a sentence in that range would be plainly inadequate for Mr Penney. He noted that Mr Penney had breached protection orders on no fewer than 25 occasions. Mr Penney also had two previous convictions for threatening to kill this same victim. On the first occasion Mr Penney had been sentenced to supervision for 18 months. On the second occasion he had been sentenced to imprisonment for 18 months. Clearly those sentences had not worked to discourage Mr Penney. Those previous convictions relating to threats against the same victim were clearly "aggravating factors" in terms of s 9(1)(j) of the Sentencing Act 2002. Because of those factors, Judge Singh considered that the starting point (before considering mitigating circumstances) should be lifted to three years. We do not consider that reasoning can be faulted.

[19] Given that Mr Jones threatened to kill three people, and that at the time of threatening to kill his former wife and her then partner he was on parole for an earlier charge of threatening to kill his former girlfriend, and given the nature and circumstances of the threats he made, I do not consider that a starting point sentence of two and a half years was manifestly excessive by reference to the cases I have been referred to and, in particular, to those I find of most direct relevance.

[20] Mr Ord further submitted that the Judge should have taken account of the fact that Mr Jones' threats were not accompanied by any violence. Furthermore, he submitted that the Judge had been wrong to take account of the impact the threats had had on the victims, namely that the threats had been taken seriously and had caused the victims considerable concern. It was his submission that, as it was an element of the offence that the threat be intended to be taken seriously, it could not be an aggravating factor that it was taken seriously, relying on *R v Reihana*.

[21] I do not regard the absence of violence as being a mitigating factor. If Mr Jones' conduct had been accompanied by violence, then no doubt he would have been charged with violence offences.

[22] As for the account taken by the Judge of the impact Mr Jones' behaviour had on his victims, I do not consider that to be an irrelevant factor. *R v Reihana* is authority for the proposition that, in considering the mens rea element of threatening to kill offending, the Judge is to have regard to the intent of the alleged offender, and not the mental state of his or her victim. That case is not, in my view, authority for the proposition that the impact the offending has on the victims is not a relevant factor in assessing the overall criminality of that offending.

[23] There was no challenge to the discount for guilty pleas given by the Judge. Therefore, I dismiss Mr Jones' appeal against his sentence.

"Clifford J"

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