

**IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY**

CRI-2009-442-25

BRUCE ANDREW MORTIMER
Appellant

v

THE QUEEN
Respondent

Hearing: 14 December 2009

Appearances: S Zindel for the appellant
H Boyd-Wilson for the respondent

Judgment: 17 December 2009

JUDGMENT OF CLIFFORD J

[1] Mr Mortimer was sentenced to 16 months' imprisonment on a charge of unlawful possession of a pistol. He was sentenced to concurrent terms of 16 months' imprisonment on charges of unlawful possession of ammunition (two rounds for the pistol) and possession of an offensive weapon (a knife). He was sentenced to concurrent terms of six months' imprisonment for possession of a "P" pipe, possession of a utensil (electronic scales) and on each of three charges of breach of parole release conditions.

[2] He now appeals against those sentences.

Background

[3] On 12 December 2008 Mr Mortimer was paroled from a three year prison sentence imposed by Goddard J on 20 February 2006 (HC Nelson CRI 2005-042-1821, 20 February 2006) for serious drug offending. He had also been sentenced by Goddard J to (concurrently) 1 year's imprisonment for common assault and 2 years' imprisonment for possession of an offensive weapon (having been stopped by the police with three large knives and a wooden baton).

[4] Conditions of his parole were that he was not to communicate or associate with his former partner and her children and he was to undertake and complete alcohol and drug treatment and counselling.

[5] On 28 May 2009 the Police received information that Mr Mortimer was at his partner's house and that he had a firearm in his possession. At about 6pm an armed Police cordon was put in place surrounding the property. At 8.15pm Mr Mortimer attempted to slip through the cordon. He had with him a backpack containing a .22 calibre semi-automatic firearm, which had the stock removed and the barrel cut down. Members of the Armed Offenders Squad challenged Mr Mortimer and he ran. He was apprehended with the help of a Police dog. His backpack contained two rounds of .22 ammunition, a large pocket knife, and a compact set of digital scales. A search of his person found a glass methamphetamine pipe.

[6] Six ounces of white powder was also found in Mr Mortimer's possession. The Police initially thought that powder was methamphetamine. It transpired that the powder was, in fact, baking soda. Given Mr Mortimer's previous convictions for methamphetamine offending, the Police's initial conclusion is understandable. The significance (if any) of the fact that the white powder was baking soda was not explained to the District Court Judge or to me.

[7] Charges were laid by the Police against Mr Mortimer under the Arms Act 1983 and the Misuse of Drugs Act 1975 following those events.

[8] Mr Mortimer was separately charged by the Department of Corrections for breach of parole offending in February, April and May 2009 respectively. The February charge was based on photographs of Mr Mortimer with his partner found during a search of his partner's home by the Police. The March charge was based on Mr Mortimer's failing to attend alcohol and drug treatment appointments as required, following written warnings. The May charge was based on Mr Mortimer having been at his partner's home on 28 May.

[9] Mr Mortimer pleaded guilty to all charges at or about the time that a depositions hearing had been set down.

District Court sentencing

[10] The District Court Judge sentenced Mr Mortimer on a concurrent basis. Taking the unlawful possession of a pistol charge as the lead offence, he adopted a starting point sentence of 15 months. In deciding on that starting point the Judge reasoned that deterrent sentences for this type of offending were called for. He did not accept defence submissions that a starting point of nine to twelve months would be appropriate, which he acknowledged was similar to that suggested by the Crown.

[11] The Judge then added six months to that starting point to take account of

- a) Mr Mortimer's breaches of his parole release conditions; and
- b) Aggravating features identified by the Judge in respect of the Arms Act offending, namely previous convictions for possession of offensive weapons and serious drugs offending, and the fact that this offending was committed whilst Mr Mortimer was on parole and that he had previous offending whilst on bail.

[12] The Judge then allowed a discount of approximately 25% on account of the guilty pleas, resulting in the 16 month sentence.

This appeal

[13] For Mr Mortimer, Mr Zindel advanced this appeal on the basis that the 15 month starting point adopted by the Judge, and the six month uplift which Mr Zindel attributed to the breach of release condition offending, were too high. A starting point sentence in the vicinity of nine to twelve months would have been appropriate.

[14] In arguing that the starting point was too high, Mr Zindel noted that the pistol had not been deployed, that Mr Mortimer had his partner's consent when he had visited the premises in breach of his release conditions and that he had been bitten by a police dog during his arrest, that being some measure of punishment for him. Mr Zindel also referred me to some 14 Court of Appeal and High Court decisions in respect of Arms Act offending.

[15] In his written submissions Mr Zindel had also questioned the discount afforded by the Judge for the guilty plea. At the hearing, Mr Zindel did not pursue that aspect of this appeal.

Discussion

[16] As has been said on many occasions, and as Mr Zindel himself acknowledged, although I was referred to many cases, each of those cases relates to its own particular facts and is not necessarily of great assistance in considering the particular facts and circumstances before me here.

[17] If there is a general theme from those cases, it is that the Courts regard Arms Act offending, particularly involving a loaded firearm, and firearms such as pistols which have no lawful purpose, as a serious matter indeed. As Gendall J commented in *Hastie v Police* HC Palmerston North AP56/97, 7 October 1997:

Offences such as these under the Arms Act are serious because pistols such as these exist for one purpose, that is to kill or wound. They do not exist as collectors' items or for sports shooting or other innocent purposes.

[18] Further, and in my judgment, a hardening of attitude to this type of offending over time can be discerned (compare *Edwards v Police* HC Christchurch A196/99, 5 October 1999 and *R v Rapana* CA7/06, 22 May 2006).

[19] Turning now to the 15 month starting point identified by the Judge for the Arms Act offending, the following comments can be made by reference to some of the more relevant cases referred to.

[20] Aggravating features in relation to Arms Act offending will include where there is presentation of the firearm(s), gang association, direct involvement in other crime, and previous convictions for similar offending: *Long v Police* HC Palmerston North CRI-2009-454-39, 8 October 2009 at [18]. Other features identified as being significant are where the firearm is loaded and the offender is intoxicated (see, *Edwards v Police*). Whether or not the firearm is operative will be relevant (*Long v Police*).

[21] In *R v Rapana* it was appropriate to focus on the presence of a loaded weapon in a vehicle that was being driven around a central city area, particularly at night. It would seem, therefore, that a firearm found in a person's possession in a more public place is likely to be more serious than where the weapon is found, for example, during a search of the person's residence (compare *R v Richardson* CA450/02, 25 March 2003 and *Long v Police*).

[22] Here, the offending involved three Arms Act offences and an attempt to evade the Police cordon. Mr Mortimer was taking the weapons out into a public place. On the other hand, the pistol (or knife) was not brandished (there was in fact no attempt to use them), there was no resisting or assault and the pistol was not loaded. Mr Mortimer did, however, also have ammunition. As has been noted, pistols have no lawful purpose. There was no gang association and only low-level drugs offending involved.

[23] In my view, and in light of those considerations and by reference to applicable cases, it was open for the Judge to take a starting point of 15 months on

the lead pistol offence, and, by implication, on the totality of the Arms Act (and drugs) offending.

[24] An uplift of six months was also within the available range, in my view, for the *totality* of the aggravating features, namely the breach of release condition offending, Mr Mortimer's 15 previous drug-related convictions, and one previous conviction for possessing an offensive weapon, and that this offending occurred while on parole. That uplift was not, as Mr Zindel initially submitted, imposed simply by reference to the breach of release condition offending.

[25] Looked at overall, the Judge took the view that a deterrent sentence was called for. In taking that approach, I think it is fair to say he imposed a stern sentence but in doing so he did not, in my judgment, impose a sentence that was manifestly excessive.

[26] I therefore dismiss Mr Mortimer's appeal.

“Clifford J”

Solicitors: Zindels, P O Box 1023, Nelson for the appellant (steven@zindels.co.nz)
The Crown Solicitor, P O Box 42, Nelson for the respondent
(h.boyd-wilson@pittandmoore.co.nz)