IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CRI 2009-425-000028

X

v

POLICE
Respondent

Hearing: 17 November 2009

Counsel: P B McDonald and R R Smith for Appellant
B M Stanaway for Respondent

Judgment: 17 November 2009

JUDGMENT OF FOGARTY J

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[1] The appellant appeals against his conviction and sentence of supervision on a charge laid under the Arms Act 1983. He was charged with carrying a firearm, namely, a shotgun, except for some lawful, proper or sufficient purpose. The events occurred at the appellant's home in a rural area. He had been sitting in his home playing a video of his mother's funeral. Without going into detail he was clearly, at the least, pretty depressed that day. His partner was not. She in her life had had a rather successful day and came back home and remonstrated at him for being

depressed. He went out to his garage, removed a shotgun from a locked gun cabinet and loaded the shotgun with one cartridge.

[2] It would appear on the facts, and I think it is relevant, that he loaded the gun out of view of his partner, either outside the house or, on the summary of facts, in the foyer area of the house. He told his partner that he was going to kill himself.

[3] She obviously took the threat seriously at the time and a struggle ensued while she attempted to wrestle the firearm from him. During the course of the struggle the firearm discharged into the air. She went back inside the house and phoned the police.

[4] He placed the firearm back in the locked gun cabinet.

[5] When spoken to by the police he advised them he had had a particularly emotional day, it being the anniversary of the death of his mother, and other recent family bereavements. He further stated at the time to the police that getting the firearm was a cry for help and he had no intention of using it and he has said as much in an affidavit that he has filed in these proceedings. These events took place this year.

[6] I have had placed before me some of the family history of bereavements and other difficulties he has had. He has had the assistance of consultation with a clinical psychologist since 2004.

[7] He entered a plea of guilty to the firearm charge together with an application to be discharged without conviction pursuant to s 106 of the Sentencing Act 2002 which application cannot be granted without first passing through the threshold of s 107 of the Act, which provides:

> **107 Guidance for discharge without conviction**
>
> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[8] Judge Flatley correctly identified the order of analysis being: first the gravity of the offending; second the direct and indirect consequences of a conviction; and third, whether those consequences would be out of all proportion to the gravity of the offence.

[9] In respect of the gravity of the offence the Judge said:

> [3] As far as the gravity of the offending is concerned, this was a serious offence. It carries a maximum of four years imprisonment. It could have had serious if not fatal consequences. I acknowledge that it did not but it was very dangerous behaviour on your part. I refer to the summary; you were at an address with your partner. You became involved in an argument. You went out to the garage and removed a semi-automatic 12 gauge shotgun from a locked gun cabinet. You loaded the shotgun with one cartridge and came back into the foyer of the house and told your partner you were going to kill yourself. A struggle ensued between yourself and your partner with your partner attempting to wrestle the firearm from you. During the course of the struggle the firearm was discharged and your partner rang the Police.

[10] There is no difficulty with that reasoning if one ignores the law of suicide and suicidal behaviour.

[11] Objectively looking at the facts there is a dimension that raises in my mind a real possibility that this was attempted suicidal behaviour. One must keep in mind that suicidal behaviour manifests itself in a number of ways. Sometimes it can be calm, deliberate and planned. Sometimes it is an impulsive response to an ongoing period of depression, and it is not always admitted to. That is why I noted that the loading of the shotgun was outside the presence of his partner because it does seem to me a dislocation, at best, between saying that he was only using the firearm to, in his words, in his affidavit "*get her attention*". Certainly his partner took his behaviour seriously at the time.

[12] The common law regarded suicide as a crime and a person could be convicted of attempting to commit suicide. Parliament has changed the common law. Persons can be convicted of assisting or abetting persons to commit suicide. But a person cannot be charged with attempting to commit suicide. That is the deliberate decision of Parliament. It probably reflects the understanding now that suicides tend not to be morally wrong but are usually the outcome of disturbed states

of mind at the time, and are best treated as problems of mental health than criminal behaviour.

[13] Judge Flatley, I am sure, did not have this argument put to him and I think I have failed to obtain any acknowledgment of this dimension from Mr Stanaway. He argues that taking all of that into account nonetheless one can focus upon the use of the firearm. He said the Judge was entitled to see the handling of the gun as posing a serious risk of harm and thus justifying it as very dangerous behaviour on the appellant's part, whatever the purpose for which he was using the gun.

[14] With respect to Mr Stanaway's argument, I think having to add the qualification: "*whatever the purpose*" unwinds the proposition. It is no part of this Court applying criminal law to punish, or treat as going to the gravity of offence, suicidal conduct. There is, I am satisfied, a dimension of that in this case. It poses, in my mind, a particularly difficult task in assessing the gravity of the offending.

[15] If I thought on the facts that this was simply bravado conduct in a domestic argument then this would be a case where I would accept Judge Flatley's reasoning in paragraph [3]. But the history of consultation with the clinical psychologist going back to 2004, of the bereavements and the immediate history of the day, have satisfied me that this was not some kind of reckless bravado conduct in the course of a domestic argument, designed to frighten a partner.

[16] The Judge went on to say that from the letter he received on the file from the clinical psychologist that:

> ... There is no suggestion that there were any over-riding psychological or psychiatric issues for you at the time of this offending.

I cannot accept that proposition. If the Judge meant by that that there was no evidence that he was mentally disordered to a degree relevant to the criminal law then that is one thing. But obviously from the history that I have traversed there was a history and a mood of serious depression going on on that day.

[17] The Judge went on to say that he considered it reasonable to conclude that the appellant might have a propensity to act in this way. Mr Stanaway argued that the

Judge was not saying that it was reasonable to conclude that he had a propensity to use firearms in response to emotional situations. But that is the way I read the phrase "*in this way*" which the Judge repeats twice at paragraphs [6] and [7]. "*In this way*" it seems to me is a reference to the behaviour on the day. It is also developed by the Judge going on to repeating the description of going and getting the gun and loading it.

> [6] It is, in my view, reasonable to conclude therefore that you may have a propensity to act in this way. What concerns me about that, having regard to the summary is that you responded in this way to an emotional situation. You had had an argument. You went and got this gun and you loaded it. Whilst it is said that on this occasion you indicated that you were going to use the gun to kill yourself, it is not unreasonable to take the view that you may have done something other with that firearm.

[18] To the contrary of this propensity the psychologist reports her understanding that the local police were prepared to consider the return of the appellant's firearms and she says, as part of her report:

> .. I am supportive of this decision and believe he is in a fit state to take responsibility for these.

That opinion, it seems to me, is inconsistent with any proposition that this man has a propensity to use firearms in response to emotional situations.

[19] This part of the Judge's reasoning appears to have influenced his judgment for he says in paragraph 13:

> [13] I am also concerned that offending of this type is kept from relevant immigration authorities. Those authorities exist for the purpose of considering applications for immigration status, temporary or permanent, and it is precisely this sort of information which they are required to consider, and should consider. It is not up to this Court to usurp those authorities and processes.

[20] That paragraph appears to suggest that because of the view of the Judge that this man has a propensity to act in this way relevant authorities should know about this and make judgments accordingly.

[21] I am not satisfied that there is any such propensity and to the contrary accept the advice of the psychologist. I also take into account the obvious attitude of the

local police. I am impressed that a very senior retired police officer, well known personally to me as a Judge who has tried cases here in Invercargill for some years, has written in support of the appellant and obviously regards the situation as an aberration. At the end of his letter he says:

> It is an aberration that I can only put down to the demise of his family and the stress finally getting to him. I would totally trust him today with firearms. I believe unconditionally that this incident was a one-off and [the appellant] poses no threat to anyone in the community.

[22] Moving on to the consequences. At the time of the application before the Judge, counsel for the appellant, noting that the police were not opposing a discharge, did not provide any materials as to the consequences to the appellant's career of a conviction. The Judge was right to note that he was not provided with any materials. The Court of Appeal in the recent decision of *R v Hughes* [2008] NZCA 46 has made it plain that applicants should provide the Court with materials, where they reasonably can.

[23] On appeal I have received an affidavit from an expert in the occupation of the appellant and I am satisfied from that that a conviction would likely have real consequences should the appellant seek employment overseas.

[24] Mr Stanaway correctly concluded his submissions by saying that analysis under s 107 does not leave out of account the principles of the purposes of sentencing in the Sentencing Act and in particular offender accountability promoting a sense of responsibility, denunciation and specific and general deterrents.

[25] These matters, to a degree, depending on the facts of the case, tend to be taken into account in examining the gravity of the offence and principally they are there. The scheme of the Sentencing Act is that gravity is a combination of examining the harm and culpability. The focus on harm and culpability usually lead directly to a judgment as to the need for accountability, denunciation, deterrence and so on.

[26] In this case I have obviously been persuaded from all the materials to the same conclusion that I read out from the police officer's testimony in support. This

was a most unfortunate incident. It was potentially serious. It arose out of a combination of stress and depression. It is the sort of conduct which Parliament has principally decided should be treated clinically as a health issue rather than approached as a criminal issue. That said, I can understand that it has a criminal dimension because of the scope of the Arms Act. But it is very important, by focussing on the criminal dimension of it, not to impose a penalty in an area where Parliament decided it should not be. I have regard to s 10 of the Crimes Act 1961 which provides that where conduct is capable of being charged as two different offences the prosecutor can only select one. That can indirectly flag my concern here. Where conduct could have been charged with the offence of attempted suicide or the like of it, which Parliament has then decided not to be an offence, I must be very careful not to undermine a decision of Parliament not to prosecute attempted or suicidal conduct which comes into the range of attempted suicide by prosecutions under other offences. The task when establishing the gravity of the offence is, in this case, it seems to me, to address sympathetically the stress and mental state which in my view is the principal explanation for this conduct in a way which discounts from the gravity of the offence of using the firearm without lawful or proper purpose, rather than treating it as an irrelevant factor.

[27] Mr Stanaway was of the view that it was neither one nor the other. Having thought about it, in my view it is a relevant dimension which, as I say, discounts or lessens the degree of gravity of the offending. Once one comes to that conclusion then it seems to me that the employment consequences of the conviction are disproportionate to the gravity of the offence and the s 107 threshold comes into play. I am directing myself to the words of s 107. I am satisfied that the direct and indirect consequences of a conviction in this case would be out of all proportion to the gravity of the offence.

[28] Turning to the criteria in s 106 there are none which in my view stand in the way of making an order for discharge without conviction. This is the case of the application of a standard. This Court is obliged, as the Supreme Court has pointed out in *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [4] [5], to come to one's own view, though taking into account, as I have done, the reasoning of the Judge in the District Court.

[29] For these reasons the appeal is allowed and the appellant is discharged without conviction under s 106.

[30] Before the District Court, the Judge, at the end of his decision, made a final name suppression order. I am of the view that the question of suppression arises before me again. It follows, however, from the order that I have just made, that a final name suppression order should be confirmed in this judgment. In addition to the facts already set out in this judgment, the appellant is a public figure. As the Court of Appeal has recognised in a number of decisions, including *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, [42], (second and fifth bullet points), publication does have a harming effect and in this context would be an added consequence which would be out of all proportion to the gravity of the conduct which is at the heart of this case.

[31] Accordingly an order is made suppressing the name of the appellant and also any details which might lead to his identification, in this small tightly knit community. I have endeavoured to dictate my reasons in a manner which would enable the judgment in its entirety to be reported because I have endeavoured to keep out any details which would identify the appellant. But I am just going to discuss with counsel now whether they are of the view that there are any details in the judgment that I have delivered which might lead to the identification of the appellant.

[Discussion between Judge and counsel]

[32] [Judge to Press bench] That means that you are free to print the whole of the judgment if you want to or any part of it. I thank counsel for their assistance.

Solicitors:
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