IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2008-004-17744

THE QUEEN

v

PETER CLEVEN

Hearing: 17 December 2009

Appearances: Mr T Simmonds for Crown
Mr R Mansfield for Prisoner

Judgment: 17 December 2009

SENTENCING REMARKS OF LANG J

Solicitors:
Crown Solicitor, Auckland
Counsel:
Mr R Mansfield, Auckland

[1] Mr Cleven, you appear for sentence today having pleaded guilty to a charge of criminal harassment. The charge in the indictment avers that, with intent to cause Stephen Kent Beston to fear for his safety and the safety of Danielle Lin Beston, you did harass the said Stephen Kent Beston. The maximum penalty for this charge is one of two years imprisonment.

[2] Originally you faced a charge of blackmail. That charge carried a maximum sentence of 14 years imprisonment. You went to trial on that charge before a jury but the jury was eventually unable to reach any verdict in relation to that charge. As a result the jury was discharged and you were remanded for a new trial.

[3] Thereafter discussions ensued between your counsel and the Crown and the charge of criminal harassment was laid as a result. You promptly pleaded guilty to that charge. Obviously the fact that the charge of criminal harassment is a much less serious charge must inform the way in which the Court approaches sentencing. Had you been found guilty on the original charge of blackmail, you would have been facing a much greater sentence.

The facts

[4] The facts that give rise to the charge occurred between 17 and 23 May 2007. They had their genesis, however, in a series of events that occurred in or around May 2006. In order to provide the context within which you are to be sentenced it is necessary to say something about those events.

[5] The victim in this matter, Mr Beston, was involved in a business that imported four wheel drive motor vehicles from Japan. Through his importing activities he came into contact with a person by the name of Mr Jellie. Mr Jellie acted as Mr Beston's agent in sourcing motor vehicles in Japan and importing them into New Zealand. By May 2006 Mr Beston's business was in financial difficulty. This led him, on 15 May 2006, to place his company into voluntary liquidation.

[6] By that stage, however, a shipment of cars that Mr Jellie had sourced was already on its way to New Zealand. When those vehicles arrived they were sold by

the liquidator and the proceeds of sale were used to pay the company's only secured creditor. That creditor happened to be Mr Beston's family trust. As a result there were no funds left for other creditors, including Mr Jellie. Mr Jellie was forced to meet the cost of the shipment because he or his company was personally responsible for paying for the cars that he had purchased in Japan.

[7] Given the fact that the debt to Mr Jellie had been incurred by the company, Mr Jellie did not seemingly have a direct cause of action against Mr Beston. There was evidence at trial, however, about a guarantee that Mr Beston may have given to Mr Jellie or his company. Ultimately, it seems that this may not have been any real value either, because all of Mr Beston's assets are owned by his family trust.

[8] That background is important because it explains how you came to be involved with Mr Beston. You came to be involved because Mr Jellie engaged a firm of debt collectors to try to recover the debt that he believed was owing by Mr Beston to him. That firm of debt collectors was operated by an associate of yours, Mr Sisson. He engaged you to assist him in his endeavours to recover the debt from Mr Beston. He paid you $5,000 for your involvement in this regard.

[9] On the morning of 17 May 2007 you went to Mr Beston's residential property in Epsom. You had never met him before or had anything to do with him. When he answered the door you showed him photographs. The summary of facts is not accepted by you, because it records that the photographs depicted animals that were dead and mutilated. You say, and your evidence at trial was, that you gave Mr Beston photographs of live animals. You said that you did that in order to have Mr Beston thinking "out of the square" and to "put him off guard". You believed that that would provide you with a means to engage Mr Beston in conversation and to impress upon him the fact that he needed to talk to Mr Sisson about the debt that he owed to Mr Jellie.

[10] At trial Mr Beston was adamant that the photographs were of a goat and a dog. He described in some detail the extent to which those animals had been mutilated. He explained his background with animals that enabled him to say with confidence why this was the case.

[11] I reject your explanation that you showed Mr Beston photographs of live animals and your explanation that this was simply a device to keep him interested in what you had to say. I have no doubt that you showed him dead animals.

[12] I have difficulty, however, in accepting that the animals were mutilated in the way that Mr Beston claims. I say this for two reasons. The first is that Mr Beston telephoned the police not long after your visit. He spoke to the police about what had occurred during the visit but he told the police that at the time he was shown the photographs he did not have his glasses on and could not see what was in the photographs. Importantly, too, his son Nicholas, who was present in the house at the time of your visit, confirmed in cross-examination that his father had told him that you did not see what was in the photographs because you did not have your glasses. It seems to me that on this particular point I must give you the benefit of the doubt. It is impossible for me to be satisfied beyond reasonable doubt that the animals were mutilated in the way that Mr Beston described.

[13] The nature of the conversation that you held with Mr Beston had obviously been carefully thought out in advance. You told him that you had been planning to carry out the visit on Anzac Day, but that ultimately you had elected not to do that because it was his wife's birthday. This, obviously, was designed to ensure that Mr Beston knew that you had carried out research on him and you even knew the date of his wife's birthday.

[14] Then you said words to the effect that you knew that he or his trust had purchased a property in Onehunga and that his daughter, Danielle, lived at that address. You also said that Danielle was a lovely looking girl, and I am satisfied that you said something to indicate that you would not want to see something happen to Danielle along the lines of what was shown in the photographs.

[15] These remarks, I am satisfied, were designed to achieve two objectives. The first was to show that you also knew that Mr Beston's trust owned a property in Onehunga and that his daughter Danielle lived in it. This, again, would reinforce in Mr Beston's mind the extent to which you had carried out your research before your visit. In addition, I have no doubt that it was to raise a fear in Mr Beston's mind that

Danielle might somehow be at risk if Mr Beston did not co-operate in what you wanted him to do.

[16] I am also satisfied from the evidence of Nicholas Beston that, when you left the property, your parting remark was to the effect that "that is fine, Steve, if your daughter's life is dispensable".

[17] There is an issue as to the extent to which Mr Beston was immediately affected by your visit. Mr Beston's evidence at trial, and as now confirmed in this victim impact statement, is that he was left terrified and devastated by what you had told him. The evidence of Nicholas Beston, however, was that his father had remained calm during the course of the conversation and that this was what had probably caused you to "up the tempo" so to speak, and to speak in a more convincing manner when telling him that he needed to deal with Mr Sisson.

[18] This issue was unable to be properly explored with Mr Beston in cross-examination until such time as the 111 recording was played to the jury. That recording demonstrates, in my view, that Mr Beston spoke in a calm manner and did not at that stage, outwardly in any event, appear to have been terrified by what had occurred. Rather, he appeared to have been bemused by what had happened but was obviously sufficiently concerned to call the police.

[19] The view that I take of it is the latter. I think that Mr Beston was understandably concerned by the fact that a stranger had been able to come to his door knowing so much about him. He was also clearly concerned about the fact that you knew where his daughter lived and you also appeared to know what she looked like.

[20] I consider that Mr Beston's real concern arose as a result of events that occurred six days later, on 23 May 2007. On that date you went to the address where Mr Beston's daughter, Danielle, was living in Onehunga. You deposited in the letterbox a handwritten note addressed to her, although her name was spelt wrong. The letter said:

> … TELL YOUR DAD NOT TO BE AN OLD GOAT, ITS NOT SUTCH [sic], A DOGS LIFE.
>
> IT'S NOT ABOUT BONDAGE. ITS ABOUT DISAPLINE [sic] FOR BUSINESS AND FAMILY INTEGRITY ETC.

The note was signed "Mr $480,000".

[21] By this stage Ms Beston knew about your visit to her father six days earlier. She was naturally extremely alarmed by several facts. The first is that you had demonstrated that you knew where she lived. You had decided to bring her into the equation even though she had absolutely nothing to do with her father's business dealings. I am satisfied that the reference in the note to "goat" and "dog" were references back to the animals depicted in the photographs that you had shown to Mr Beston on 17 May 2007. The reference to "bondage" and "discipline" also carry, in my view, sinister overtones.

[22] I consider that Danielle Beston, her partner and Mr Beston were justified at that point in becoming extremely concerned for their safety. You had demonstrated that you knew where they lived and were prepared to involve yourself in their lives in the most dramatic way.

[23] I am told today, although it did not form part of the evidence at trial, that these concerns were heightened because Ms Beston's parter made enquiries and found that you had associations with persons of dubious reputation. This, too, undoubtedly aggravated the situation so far as they were concerned. They were under the impression that their physical wellbeing was at risk.

[24] Those then reflect the essential facts that underlie your offending. As I have said, I have no doubt that you and Mr Sisson set about a deliberate plan to unnerve Mr Beston and his family. Your part in that was essentially to act as a "paid heavy". You received a significant sum of money for doing that and the amount that you were paid reflects the fact that you knew that you would be crossing the line of acceptable behavior in your dealings with Mr Beston. I have no doubt that the object of your visit on the morning of 17 May was to soften Mr Beston up for a visit that Mr Sisson planned to make later in the day.

[25] I interpolate to say that Mr Sisson was initially charged with blackmail but he was discharged at the end of the Crown case. That occurred because the Crown could not show that he had instigated your offending or that he himself made any threats towards Mr Beston or his family. The topic of his visit was the debt that Mr Beston allegedly owed to Mr Jellie.

Sentencing Act 2002

[26] In selecting the sentence to be imposed upon you, I need to have regard to the purposes and principles of sentencing set out in the Sentencing Act 2002. Several of these come to the fore in the present case.

[27] The first is the need to hold you accountable and to promote in you a sense of responsibility for what you have done. These principles and purposes are coupled with the need to denounce what you did and to deter both you and others from contemplating becoming involved in similar conduct in the future.

[28] I do not have to tell you, Mr Cleven, that members of the public would be horrified if they knew the course of conduct that you became involved in. Any right-thinking person would take the view that threatening another person and his family implicitly with violence in this way is completely unacceptable even when there may have been a genuine belief that a debt was morally owed. It is simply not acceptable for debt collectors to engage in behavior such as this, particularly when it involves parties who are completely unconnected with the underlying issues. The sentence that I impose must demonstrate to people who are prepared to cross the line in this field that if they are caught the likelihood is that they will receive a significant sentence.

[29] It is important also that I have proper regard to the manner in which your offending has affected your victims. I have detailed victim impact statements from Mr Beston, his son and his daughter. I do not propose to refer to them directly other than to say that they demonstrate that your behavior had a devastating effect on this whole family. I consider that a significant part of this was caused by the fact that it involved not just the first visit, but also the subsequent visit to Danielle's house

when you left the note in the letterbox. This is a family that has been deeply affected by your offending.

[30] Importantly, however, I need to bear in mind the need to impose a sentence that is consistent with other sentences imposed in this area. That is not an easy task, because there is no guideline judgment of the Court of Appeal or other authority of this Court that really assists in the circumstances of the present case.

[31] I need also to impose the least restrictive outcome that is appropriate in the circumstances so far as you are concerned. I also have to give due consideration to the hierarchy of sentences and orders that are available to a sentencing Court under s 10(a) of the Act. Finally, I must provide, so far as I can, for your rehabilitation and reintegration into the community.

Starting point

[32] As I have said, it is not an easy matter in the circumstances of this case to pick a starting point for the sentence to be imposed in relation to your offending. The maximum sentence is one of two years imprisonment.

[33] Criminal harassment, by its nature, intrudes upon the mental wellbeing of its victims. I consider that there are some aggravating aspects about this matter that need to be taken into account. The first is the extent to which the offending was premeditated. As I have said, I am satisfied that either you or Mr Sisson carried out significant research on this family in order to ascertain where they lived and who they were related to. You then planned the way in which you approached Mr Beston by equipping yourself with photographs and then following a structured conversation with him. You then "ratcheted up" the pressure by visiting Danielle's house six days later to deliver the note. This was clearlya determined attempt to seriously harass Mr Beston and his family.

[34] This is not a case that has arisen out of a dispute between neighbours that has turned sour or a domestic relationship that has resulted in one partner becoming

obsessive. Rather, it is calculated offending to achieve a commercial result. Those, in my view, are aggravating factors that mean a deterrent sentence must be imposed.

[35] The only case that comes anywhere near this is *George v New Zealand Police* HC WHG CRI 2005-488-0053 Keane J 27 October 2005. That case, however, involved a long running dispute between neighbours that had had very severe ongoing effects for the victim. The Judge in the District Court selected the maximum sentence namely, two years imprisonment, as the starting point before reducing it by six months to reflect mitigating factors.

[36] I accept that the offending in that case was, viewed overall, more serious because of the length of time over which it occurred and the personal nature of it. Nevertheless, the premeditation and commercial aspects of this offending operate so as to result in a reasonably significant starting point being required in this case.

[37] Having regard to all the factors that I have referred to I select a starting point of 15 months imprisonment on the charge to which you have pleaded guilty.

Aggravating factors

[38] I now turn to consider aggravating factors personal to you that could operate to increase the starting point that I have selected. It has to be said that you have a very significant list of previous convictions for a variety of offences including carrying a firearm, assaulting females and breaching protection orders. Ordinarily I would have no hesitation in applying an uplift to reflect those factors.

[39] In the present case, however, I am satisfied that the offending was so vastly different to what you have done in the past that I am not going to apply an uplift. This means that I am left with the starting point that I have selected, namely 15 months imprisonment.

[40] You need to know, however, Mr Cleven, that if you become involved in offending such as this again there can really be no doubt a significant uplift will be applied.

Mitigating factors

[41] I now need to consider personal factors that are personal to you and that operate to reduce the starting point that I have selected.

[42] You appear for sentence at the age of 47 years. As I have said, you have clearly been in trouble with the law before. This, I am told, is as a result of your association with criminal groups. You say that you are now determined to cease your involvement with these groups and, obviously, if you are to stay free from trouble in the future that will be essential.

[43] You live on a property in South Auckland where you have had difficulties in recent times meeting your financial commitments. I am told that this was the reason that you agreed to become involved in the present case. I am also prepared to accept that you may have believed that a debt was genuinely owed by Mr Beston to Mr Jellie.

[44] You share the custody of a 5 year old daughter with whom you have a very strong relationship. You are anxious to ensure that you are able to retain both your property and your relationship with your daughter. To that end you live in a state of semi-reclusion operating a wood-turning business in which you produce furniture.

[45] Your previous convictions, however, are such that I cannot really give you any credit for personal factors. I consider that in not imposing an uplift I have given as much recognition as I can to your desire to stay free from trouble in the future.

[46] I must, however, provide you with the appropriate discount in relation to your guilty plea. You pleaded guilty at the earliest opportunity to the charge of criminal harassment. For that reason, and in accordance with the recent judgment of the Court of Appeal in *R v Hessell* CA 170/2009 2 October 2009, I am obliged to reduce your sentence by 33 per cent. This means that the end sentence that I arrive at after taking into account all factors is one of ten months imprisonment.

Home detention

[47] This means that you are eligible for a sentence of home detention. Your counsel urges that I should impose that sentence, and that in doing so I should also take into account the fact that you have already spent three months in prison.

[48] I consider, however, that the gravity of your offending in this case is such that home detention is not a realistic option. It would send, in my view, entirely the wrong message to members of the community. This was calculated offending for commercial gain, albeit not gain by you other than to the extent of your agreed fee. It involved significant elements of premeditation and it involved completely innocent victims.

[49] In those circumstances, and bearing in mind the fact that you have already served several sentences of imprisonment, I regret that I am unable to impose the sentence of home detention that your counsel seeks.

[50] Your counsel also urges me to take into account the fact that you have already spent three months in prison on remand and that you have also been subject to strict bail conditions. The prison authorities will take the three months period that you have spent on remand into account when setting your release date, which I understand to be automatic at the end of one-half of your sentence. I am not prepared, however, to make any other modification to the end sentence that I have arrived at.

Sentence

[51] On the charge to which you have pleaded guilty you are sentenced to ten months imprisonment.

[52] Stand down.

Lang J