IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CRI-2009-443-000026

BETWEEN	SAM JOSHUA O'HANLON Appellant
AND	THE QUEEN Respondent

CRI-2009-443-000027

AND BETWEEN	WIREMU DAVID TAMAKI MAXWELL Appellant
AND	THE QUEEN Respondent

CRI-2009-443-000030

AND BETWEEN	SHAYNE EDWARD KETEKIA BEHAN-KITTO Appellant
AND	THE QUEEN Respondent

Hearing: 15 December 2009

Appearances: P Keegan for O'Hanlon
K Pascoe and C Sargeson for Maxwell
K Pascoe and C Sargeson (representing S Hughes QC) for Behan-Kitto
S T Ellis and J Marionvich for Crown

Judgment: 18 December 2009

RESERVED JUDGMENT OF PRIESTLEY J

This judgment was delivered by me on 18 December 2009 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: …………………………

Counsel: P Keegan P O Box 8252 New Plymouth for O'Hanlon
Nicholsons (K R Pascoe and C Sargeson) P O Box 68 New Plymouth 4340 for Maxwell
S W Hughes QC P O Box 8213 New Plymouth 4340 for Behan-Kitto
Crown Solicitors (S T Ellis and J M Marinovich) P O Box 738 New Plymouth 4340 for the Crown

The appeal

[1] On 21 October 2009 Judge A C Roberts imposed sentences of imprisonment on all three appellants in the New Plymouth District Court.

[2] All three were young men. All three had pleaded guilty to charges arising out of disgraceful and disturbing conduct in the streets of New Plymouth, over seven months earlier, on the night of 1 March 2009.

[3] All three appellants challenge the sentences imposed. Their counsel submit that imprisonment was a clearly excessive sentence and that the home detention alternative should have been imposed.

[4] All three appellants were convicted of disorderly behaviour, the charges being laid under the Summary Offences Act 1981 carrying a maximum of three months imprisonment. Their offending in that regard was unrelated to more serious offending which occurred later the same evening.

[5] Two of the three appellants were convicted of wounding with intent to injure (s 188(2) of the Crimes Act 1961). The maximum penalty for that offence is seven years imprisonment. One of the appellants was convicted with assault with intent to injure under s 193 of the Crimes Act carrying a maximum of three years imprisonment.

[6] A table helps display salient features.

Appellant	**Age when offending**	**Available maximum sentence**	**Relevant previous convictions**	**Sentence imposed**
O'Hanlon	18	7 yrs; 3 months	Excess breath alcohol	1 yr 8 mths
Maxwell	17	3 yrs; 3 months	Assault (Jan 2009)	12 months
Behan-Kitto	19	7 yrs; 3 months	Male assaults Female (Dec 2008) 5 x breach community work 2 x breath alcohol	1 yr 8 months

The District Court's approach

[7] Running through the offending is mindless violence, thuggery, cowardly and dangerous assaults by kicking and punching innocent victims on the ground and around the head, drunken behaviour, and driving through the streets of New Plymouth in a hoon-like fashion looking for trouble.

[8] The Judge in his sentencing notes commented on previous and recent offending of this type with which he had dealt. He categorised as common features of the recent offending young men aged around 20 committing "elevated acts of indiscriminate and indescribable violence". He referred to "booting" people on the ground who were unable to protect themselves. He mused that offending of this type might be indicative of a widespread problem, particularly "young men only too willing to put the boot into defenceless people".

[9] Counsel inform me that there was a general perception that the Judge has been rightly concerned about the prevalence of this type of offending in Taranaki, which was seen as a legitimate matter for community concern in respect of which the courts needed to impose sentences which highlighted denunciation and deterrence.

[10] I consider that District Courts, exercising their criminal jurisdiction in the many disparate regions of New Zealand, are perfectly entitled, in a measured and principled way, to deploy sentences under the aegis of the Sentencing Act 2002 to respond to prevalent offending in communities which is of legitimate community concern. All counsel appearing before me agreed that this was a legitimate judicial function.

[11] Those (and there have been some in recent time holding office on the Law Commission) who regard regional variations in sentencing levels as a matter of concern and who are disposed to promulgate schemes designed to trammel the sentencing discretion of judges with sentencing guidelines, seem to overlook that New Zealand is a nation of diverse geography and demography, and that regional differences (sometimes even inside large cities), are an unmistakeable feature of our nation's tapestry. Deterrence and denunciation may in some regions have a powerful

influence on some types of crime. In other regions those purposes may be ineffective.

[12] The function of appellate courts is to ensure that sentencing disparities are not too marked; that the policy of the Sentencing Act is applied uniformly; and that sentencing methodologies remain uniform. In assessing sentences, it would be wrong, and damaging to the judicial arm of government, to screen out relevant regional and local factors.

[13] There is nothing in the Judge's sentencing notes to suggest that his approach to the three appellants has been anything other than measured and principled. Nor is there any suggestion that his desire, if there is one, to respond sternly to mindless street violence by young men, has led him astray. Nor did counsel submit to that effect.

The offending

[14] The disorderly behaviour carried out by all three appellants occurred around 10:30 pm. They and two others were occupants of a van. Some of the occupants were leaning out of the vehicle windows shouting slogans. A beer bottle was thrown at a member of the public who was abused as "nigger". The vehicle returned to the scene, again with occupants hanging out of the windows. Further bottles were thrown and slogans shouted. Two further passes were made by the vehicle, accompanied by yelling and thrown bottles. A bottle hit a member of the public on the shoulder.

[15] The second offending involved initially the same van. It occurred approximately 40 minutes later. The victims had not been the subject of the abuse and bottle throwing of the earlier incident. Three victims were involved.

[16] The first two were Mr C and Mr E, who were walking home. The van pulled up abruptly. The occupants alighted, calling out slogans. Mr E was set upon. He was punched about the head and knocked to the ground and repeatedly kicked in the head and face by one of the occupants, Oorthius, who was dealt with by the Judge,

but has not appealed. Mr E's shoes and cap were taken from him. He received bruising, skinned knees and elbows, and swollen lips and cheeks.

[17] Mr C went to Mr E's aid. He, thus, drew the assailants' attention. He was attacked by the appellants, Behan-Kitto and O'Hanlon. He was punched from behind, hit on the right side of the jaw, and felled to the ground. On the ground he was repeatedly kicked on the head, face and ribs. He attempted to stand up and was hit on the left side of the jaw and knocked unconscious. Whilst he was unconscious, his shoes and cap were taken. As a result of this assault, he received two fractures to his jaw, which required surgery in hospital.

[18] The third victim was an older man, Mr J, who was sitting nearby and witnessed these assaults. He spoke briefly and was set upon by the appellant, Maxwell, and a juvenile who was dealt with in the Youth Court. Mr J, too, was punched numerous times around the head and was knocked to the ground. Whilst he was unconscious, his trousers and underpants were pulled down. Mr J was unconscious for a lengthy period and sustained facial lacerations, a haematoma on the right eye and facial swelling. He was hospitalised overnight.

[19] The Judge correctly summarised and identified the offending. The attacks on all three victims were clearly a group enterprise, random, and totally unprovoked. Regardless of the culpability of all three appellants as parties, the Judge was aware of, and mentioned, the specific involvement of the appellants O'Hanlon and Behan-Kitto, so far as Mr C (the most severely injured victim) was concerned, and the involvement of the appellant Maxwell as the principal assailant of Mr J.

Pre- sentence reports and personal circumstances

[20] The Judge had the benefit of three pre-sentence reports. He was alert to the previous convictions of all three. He had the benefit of submissions.

O'Hanlon

[21] Mr O'Hanlon's pre-sentence report was the most favourable of the three. He had been convicted and sentenced to community work in December 2008 for excess blood alcohol. Two months later he was convicted and fined for breaching a local liquor ban.

[22] The pre-sentence report recommended home detention at an Auckland address in the home of his cousin and her family. He was, at the time of sentencing, attending a Foundation course at Unitec in Auckland, preparing for further tertiary studies. He admitted to being intoxicated at the time of the offending. He appeared to the probation officer to exhibit minimal insight, nor was much remorse expressed. He did, however, state he would like to take part in a restorative justice conference. His risk of reoffending was assessed as being low, partly because of his minimal criminal history and partly, too, because of his engagement with supporting organisations and friends.

[23] Mr O'Hanlon, through his counsel, also made an offer of amends under s 10(1) of the Sentencing Act, which I shall detail later.

Maxwell

[24] Like Mr O'Hanlon, Mr Maxwell had a conviction for breach of a local liquor ban. He was additionally convicted of assault in January 2009 (a mere five weeks before the offending) and sentenced to community work. That assault, so I am informed, arose out of an altercation with a person who had taken his bicycle. Apparently Mr Maxwell's pre-sentence report speaks of a close relationship with his parents. They were described as supportive. He admitted to having a difficulty with alcohol abuse. Alcohol is seen as a factor in his offending.

[25] The probation officer assessed Mr Maxwell's risk of reoffending as medium, observing this would reduce if he curtailed his consumption of alcohol and was more selective about his associations. Home detention was recommended with appropriate conditions, including attending the Te Wairua Programme.

Behan-Kitto

[26] Mr Behan-Kitto had a formidable list of convictions for a 19-year-old. He had been sentenced to community work for a breath alcohol offence in early 2008. He clearly did not respond to that sentence, since five convictions for breach of community work followed. A further breath alcohol conviction was entered in April 2009 (the offence date apparently being the same as the offending before the Court). He has a conviction for having assaulted his female partner in December 2008.

[27] The pre-sentence report recommended home detention. He lived with his family in Waitara, and has a son. Abuse of alcohol was identified as a problem. However, a month before he was sentenced, Mr Behan-Kitto had been remanded in custody for breaching curfew and alcohol consumption conditions of his bail. The probation officer noted a pattern of heavy binge drinking. He was assessed as being as high risk of reoffending.

[28] Mr Behan-Kitto was willing to offer $1,000 reparation. His counsel at sentencing (Ms Hughes, QC) so advised the Court. No reparation order was made.

[29] The Judge correctly summarised these issues. So far as Mr O'Hanlon was concerned, a number of favourable references were received, including references from his lecturers. Mr Keegan, who appeared as counsel in the District Court, stressed Mr O'Hanlon's intention of leaving his associates in Taranaki and building a life elsewhere.

Mr O'Hanlon's offer of amends

[30] Although not recorded, the Judge apparently indicated when he was leaving the Bench that he did not intend to impose any reparation sentences. Mr O'Hanlon had in fact furnished his counsel with a cheque for $2,000. This money, so I was informed from the bar, had not been provided by Mr O'Hanlon's family. Rather, it represented the proceeds of an entitlement he had from a trust fund derived from the estate of his late father. After the Judge left the Court, the court's Victims' Adviser

approached Mr Keegan and indicated a hope that the offer of amends would not go to waste. In the event, on Mr O'Hanlon's instructions, the $2,000 cheque was made out in favour of Mr C, the worst affected victim whose jaw had been fractured in two places. He has cashed the cheque.

[31] The relevance of this is that, although the Judge was probably aware of Mr O'Hanlon's offer of amends, there was no reference to it in his sentencing notes. Sections 10(1)(a) and 10(3) require the Court to take an offer of amends into account when sentencing an offender. There has thus been an error.

Sentencing methodology

[32] There is no criticism by counsel of the Judge's approach to sentencing. The Crown had submitted an end sentence for Messrs O'Hanlon and Behan-Kitto of between 18 months and two years' imprisonment, and for Mr Maxwell (who had pleaded guilty to a lesser charge) of between nine to 12 months.

[33] The Judge considered the various aggravating factors set out in *R v Taueki* [2005] 3 NZLR 372 which were relevant, including violence directed at the head, consequential harm, a group attack, and a degree of premeditation. The Judge considered counsel's submissions. Counsel for Mr Behan-Kitto questioned whether premeditation was really a factor. She submitted that Mr Behan-Kitto was at a crossroads. Counsel for Mr O'Hanlon referred to his lack of role models (as a result of his father's death) and submitted that the atmosphere of a prison would be totally contrary to the rehabilitative consequences which would flow from a home detention sentence. Counsel for Mr Maxwell too, urged the least restrictive sentence and referred to her client's motivation.

[34] In imposing sentence, the Judge stressed the extreme violence involved in a group attack on a smaller group, attacks to the head, the deployment of the boot, the earlier disorderly behaviour, and the overarching description of the offending as gratuitous street violence. He referred to the sentencing purposes of denunciation and deterrence.

[35] For Messrs O'Hanlon and Behan-Kitto, and the offender, Oorthius, he deployed a start point of two and a-half years' imprisonment and discounted it by a third to reflect guilty pleas (a somewhat generous discount in the light of the seven month delay and the Court of Appeal judgment of *R v Hessell* [2009] NZCA 450), arriving at the end sentence of one year and eight months.

[36] On the home detention issue, the Judge declined to impose home detention. He regarded the offending as "far too serious", given the "pack" element involved and the merciless beating of younger people. He correctly referred to Mr Behan-Kitto's breaches which flowed from previously imposed community sentence.

[37] The Judge did not mention, in respect of Mr O'Hanlon, his offer of amends. Given the nature of the charge, the Judge considered it was "far too serious" to consider home detention.

[38] With Mr Maxwell, the Judge saw the balancing exercise as a fine one. He wrongly stated that Mr Maxwell had kicked his victim (Mr J) whilst he was on the ground. The summary of facts makes it clear that Mr J was punched about the head until he was unconscious, and then his lower garments were removed.

[39] The Judge fixed as a start point for Mr Maxwell 18 months' imprisonment (being half the maximum) and discounted by one-third to reflect the guilty plea, arriving at the end sentence of 12 months. The Judge gave close attention to the home detention option for Mr Maxwell. Again, he decided that the offending was far too serious. He regarded the scales as being tipped by the appellant's January conviction for common assault.

Discussion

[40] I need not replicate counsel's helpful and focused submissions. The sole issue for the three appeals was whether the Judge, by imposing imprisonment, had wrongly turned his back on a home detention sentence, resulting in the imprisonments being clearly excessive.

[41] As I have indicated earlier, I do not consider the Judge can be faulted by giving considerable weight (given the nature of the offending) to the Sentencing Act purposes of deterrence and denunciation. Arguably, the s 7(1)(g), purpose of protecting the community from drunken and indiscriminate attacks of this type, could also be given weight.

[42] Although the Judge was aware of the age of the appellants, it is unclear whether he gave much weight to the s 9(2)(a) mitigating factor, their age. The Judge reminded himself of the s 8 principle of imposing the least restrictive outcome. Particularly as this is important, given the specific wording of s 8(g), which requires the Court to consider the least restrictive outcome that is *appropriate*, and in accordance with the *hierarchy* of sentences which, of course, has home detention sitting in the immediately below imprisonment in the hierarchy.

[43] Regrettably, no weight was given by the Judge at all and (in terms of s 10(3)) it was a mandatory requirement), to Mr O'Hanlon's offer of amends. The sum involved was substantial and it has found its way to the most seriously affected victim. The money was Mr O'Hanlon's, not his family's. The Judge did refer to Mr Behan-Kitto's willingness to pay the money for emotional harm suffered. In the event, the offer of amends was not paid across.

[44] It is clear law that an offer for amends, although of significant relevance in sentencing, must not be deployed as a device to "buy" a more lenient sentence. It must, however, be taken into account (s 10(3); *R v Fisher*, CA169/03, 15 September 2003; *Burke v Police* HC TGA CRI 2006-470-32 16 November 2006, Venning J).

[45] In addition to the Judge's failure to weigh the offer for amends (he was not to know, as I now know, that the $2,000 went straight to the victim), I have concerns over the effect of imprisonment on Mr O'Hanlon running counter to the demonstrable rehabilitative benefits which would have flowed to him personally from the home detention regime. Unlike the other two appellants, Mr O'Hanlon was in a position where suitable arrangements had been made to get him out of Taranaki and to support him with his Unitec courses. Relocation, said the pre-sentence report, might result in a low risk of reoffending. Even in prison, Mr O'Hanlon's

determination to persevere with those courses has been demonstrated. I can understand the Judge's approach that the offending was too serious to contemplate home detention. But the material in the pre-sentence report points towards a supervisory sentence, which would reinforce Mr O'Hanlon's determination to turn the corner in a new environment, as being of great assistance in rehabilitation. Such a sentence would certainly be less restrictive that imprisonment.

[46] Were it not for the fact that an offer for amends was made and paid, and that the money involved was from Mr O'Hanlon's own resources, I probably would not have interfered with the Judge's sentencing discretion. However, the offer for amends, in my judgment, tips the balance. Undoubtedly, two months spent in prison (effectively six months of his pre-parole sentence has been served) will have been salutary in any event.

[47] I thus consider, by a small margin, that in all the circumstances the one year, eight month term of imprisonment imposed on Mr O'Hanlon was clearly excessive. That sentence is to be quashed. A sentence of eight months home detention, on the same recommended conditions, is to be substituted, such home detention sentence to take effect, so far as its duration is concerned, from the date of Mr O'Hanlon's release from prison.

[48] Turning to Mr Maxwell, I note Ms Pascoe's submission that although the start point deployed by the Judge in respect of the more serious s 188(2) offending was just over 35 per cent of the available maximum, the start point deployed for Mr Maxwell's s 193 offending was 50 per cent of the maximum. However, given Mr Maxwell's involvement as a party, I consider the 18 month start point as being in range.

[49] It is clear from the Judge's sentencing notes that he gave close consideration to the home detention option in the exercise of his discretion. The pre-sentence report referred to supportive whanau. As is apparent from the sentencing notes, the Judge ruled out home detention because of Mr Maxwell's common assault conviction a few weeks earlier.

[50] I accept that for a young man this sentence is severe. The appellant's attack on an older man was unprovoked, cowardly, and severe. The victim was knocked unconscious and was humiliated. Despite some benefits which might have flowed to Mr Maxwell as a result of the imposition of a home detention regime, I do not consider the Judge has erred in the exercise of his discretion. Nor do I consider the sentence crosses the clearly excessive threshold.

[51] With regard to Mr Behan-Kitto's appeal, his offending was indeed serious. He had repeatedly flouted the obligations imposed by an earlier community work sentence. His criminal record was the worst of the three appellants. His involvement in the attack on Mr C was significant and the effect on him substantial.

[52] I consider the sentence imposed on Mr Behan-Kitto was well within range and that the Judge was correct to decline to sentence him to home detention.

Result

[53] The appeal brought by Mr Behan-Kitto is dismissed.

[54] The appeal brought by Mr Maxwell is dismissed.

[55] The appeal brought by Mr O'Hanlon is allowed. The sentence of one year, eight months imprisonment is quashed and a sentence of eight months home detention is substituted, to run from the date of his release.

[56] This appeal judgment, insofar as it relates Mr O'Hanlon, is to lie in Court until such time as the Department for Corrections confirms that the home detention address (4 Angeline Place, Massey, Waitakere City) is still available. The Registrar and Mr Keegan are directed to confer and expedite such confirmation.

[57] The home detention conditions applicable are to be those specified in the Appendix attached to Mr O'Hanlon's 7 October 2009 pre-sentence report, being the seven conditions specified on pages 2 and 3 of the Appendix.

[58] If any difficulties arise with Mr O'Hanlon's transition from the quashed sentence to the home detention sentence, they are to be referred forthwith to the Auckland Vacation Judge for resolution.

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Priestley J