IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CRI 2009-443-32

	BETWEEN	PHILLIP GARSDEN LE MARQUAND Appellant
	AND	NEW ZEALAND POLICE Respondent

Hearing: 11 February 2010

Counsel: K Marriner and LG Iggulden for Appellant
ST Ellis for Crown

Judgment: 11 February 2010

ORAL JUDGMENT OF RODNEY HANSEN J

Solicitors: Ms K Marriner, P O Box 110, Hawera for Appellant
Auld Brewer Mazengarb & McEwen, P O Box 738, Taranaki Mail Centre, New Plymouth 4340 for Crown

Introduction

[1] On 11 December 2009, Mr Le Marquand was sentenced to twelve months imprisonment by Judge Roberts in the Hawera District Court on a charge of assault with a weapon under s 202C of the Crimes Act 1961. He appeals against sentence on the ground that the sentence was manifestly excessive. On his behalf, Mrs Marriner contends that the Judge should have imposed a sentence of home detention.

Facts

[2] In the early hours of the morning of 14 June 2009, Mr Le Marquand went uninvited to a party at a house in the street where he lived in Hawera. It was occupied by the victim, Dale Hooper, and his partner. Mr Le Marquand was extremely intoxicated. As the party was starting to wind down, he went into the bedroom of Mr Hooper's partner, who was comatose, and sat down on the bed beside her.

[3] Mr Hooper entered the bedroom and found Mr Le Marquand leaning over his partner. He became enraged and dragged Mr Le Marquand outside. An altercation occurred, in the course of which Mr Le Marquand was punched in the head. He then left the address and walked to his home, which is diagonally opposite. On arrival he began yelling insults at Mr Hooper, who then crossed the road. He said he did not know Mr Le Marquand lived there and wanted to find out why he was going into the house.

[4] Mr Le Marquand picked up a metal window weight that was lying in a pile outside the house. He was approached by Mr Hooper who asked him what he was doing at the address. He told Mr Hooper to leave and he did so.

[5] As he was walking away, Mr Le Marquand struck Mr Hooper twice across the back of the head with the window weight. He fell face-down to the ground.

Mr Le Marquand then struck him a third time between the shoulder blades. At this point Mr Hooper managed to disarm Mr Le Marquand and held him down until the police arrived.

[6] Both men were hospitalised. Mr Hooper required stitches to his head. Scans showed there was no more serious injury. However, he was left feeling unwell and had to take a week off work.

[7] Photographs suggest Mr Le Marquand suffered a black eye and abrasions from the earlier altercation. In his victim impact report, Mr Hooper admitted to "losing it" and punching Mr Le Marquand about the head a few times. He pleaded guilty to a charge of assault.

Judge's decision

[8] After dealing with the background facts, Judge Roberts reviewed Mr Le Marquand's personal history and background. He is a 37-year-old man who had had a number of previous convictions, including one for aggravated robbery in 1990 but had not appeared before the Court since 1999. The Judge referred to a previous incident involving Mr Le Marquand and Mr Hooper which occurred some ten years earlier. He accepted that Mr Le Marquand had suffered serious injuries as a result.

[9] The pre-sentence report noted that Mr Le Marquand had been living in a *de facto* relationship for the last fourteen years and has two daughters. Although then living apart, he and his partner were making an attempt at reconciliation and were residing together. The probation officer reported that Mr Le Marquand's partner said he had made positive changes to his lifestyle. He had been employed by the same firm for ten years.

[10] The Judge referred to Mr Le Marquand's problems with alcohol and steps he had taken to address it. At the time of sentence he had attended two counselling sessions. The probation officer had concluded that Mr Le Marquand was at low risk

of reoffending and had recommended that he be sentenced to community work and supervision.

[11] Judge Roberts accepted that Mr Le Marquand was remorseful. He said he was minded to disregard previous convictions as "ten years is not a bad time in which to maintain an incident-free record". He was asked to consider a sentence of home detention, having regard to Mr Le Marquand's expressions of remorse, the low risk of reoffending and his motivation to change. After fixing the starting point for sentence at 18 months, he rejected the submission in the following passage of his judgment:

> [36] The issue for me is whether, having fixed an end sentence of 12 months' imprisonment, I consider it appropriate to transfer essentially that sentence into one of home detention. I am not going to do that. I regard the offending as serious. The potential for real, significant, ongoing harm was elevated at the time you chose to strike this man about the head whatever the rights and wrong of his position before you might have been.
>
> [37] I consider that your offending is serious and is not able to be met other than by a sentence of full time detention.
>
> [38] The end sentence I impose on you is one of 12 months' imprisonment.

Grounds of appeal

[12] In submitting that home detention is the appropriate sentence, Mrs Marriner refers to the context in which the offending occurred. She points out that the violence was initiated by Mr Hooper who then followed Mr Le Marquand when he left the scene. She refers also to the earlier incident ten years previously which, Mrs Marriner says, left Mr Le Marquand with a broken ankle and requiring facial reconstructive surgery.

[13] Mrs Marriner submits that the Judge gave no or insufficient weight to mitigating features of the offending and the offender and, in particular, to Mr Le Marquand's need for and commitment to rehabilitation. She emphasises his strong motivation to change, referring in particular to the alcohol counselling he had undertaken. She refers to the support he enjoys from his partner who described him to the probation officer as "a changed man and an excellent father and good

provider". She advises that, having been granted bail pending the hearing of this appeal, Mr Le Marquand has continued to work and to undergo counselling for his alcohol problem. She supports the conditions proposed to be associated with a sentence of home detention which include an alcohol and drug assessment and/or counselling as directed by the probation officer.

[14] In summary, Mrs Marriner says that, while the circumstances of the offending may favour a full custodial sentence, when consideration is given to the unusual circumstances in which the offending occurred and Mr Le Marquand's personal circumstances, a sentence of home detention is appropriate and that the Judge erred in principle in refusing to impose that sentence.

Crown's submissions

[15] Ms Ellis reminds me that the Judge was exercising a discretion and of the limited basis on which the Court can review a refusal to impose a sentence of home detention. She refers me to a passage from the judgment of Lang J in *Woods v New Zealand Police*[1] in which he pointed out that the Court on appeal may intervene only if the Judge has erred in principle or omitted to take into account a relevant factor or his decision can be shown to be plainly wrong.

[16] In his judgment Lang J went on to say that, in exercising the discretion, matters of weight are very much for the sentencing Judge in drawing the line in favour of the principles of denunciation and deterrence. In that particular case, he said the Judge could not be said to have exercised his discretion on an erroneous principle – at [24] and [25].

[17] Ms Ellis also referred me to comments to similar effect in the judgment of French J in *Ebdell v Police*[2]. At [35] she referred to recent Court of Appeal decisions such as *R v Edmonds*[3] and *R v Taiepa*[4] which make it clear that in cases

[1] HC TAU CRI 2009-470-19 [25 March 2009]
[2] HC CHCH CRI 2009-409-004831 [30 July 2009]
[3] [2009] NZCA 152
[4] [2009] NZCA 120

where denunciation and deterrence are of particular significance, the Court will seldom interfere in the sentencing Judge's assessment of whether home detention is appropriate.

[18] Ms Ellis submits that, in the course of his decision, Judge Roberts turned his mind to all relevant considerations and declined home detention based on the serious nature of the offending and, inferentially, the principles of denunciation and deterrence. She submits that there has been no error shown in his approach.

Decision

[19] An assault involving the use of a weapon, directed to the victim's head, was rightly assessed by Judge Roberts as in a serious category. Even taking into account the history between the appellant and his victim and the initiating act of violence by the Mr Hooper, 18 months imprisonment was, as Mrs Marriner accepts, an appropriate starting point. Nor can there be any quarrel with the allowance the Judge made for mitigating factors. Twelve month was an appropriate term of imprisonment. The question is whether the Judge was right to hold that other considerations did not warrant a sentence of home detention.

[20] As Ms Ellis pointed out, an appellate Court will not lightly interfere with a decision to refuse home detention, particularly when the decision is finely balanced. But the final sentence must be examined to ensure that it is consistent with the principles and purposes of the Sentencing Act. It is not enough for the sentencing Judge simply to record that all relevant matters have been taken into account or to recite the relevant circumstances. Like any other sentencing decision, a refusal to impose a sentence of home detention must survive evaluation against all relevant criteria.

[21] Judge Roberts obviously saw the offending as so serious that the applicable sentencing purposes could only be achieved by a prison sentence. He seems to have taken the view that the various matters relied on by Mrs Marriner could not outweigh the needs of denunciation, deterrence and the other factors in s 7 of the Sentencing

Act which, by s 16(2)(a), must be taken into account. Having reached that position, there is no indication that he attempted to weigh the countervailing considerations which favoured home detention. Had he done so, it is my respectful view that he would have reached a different conclusion.

[22] Among those countervailing considerations, is the requirement in s 8G of the Sentencing Act to impose the least restrictive outcome that is appropriate in the circumstances - see *R v Bishop*[5] at [12]. Another is to aim for a sentence that will assist in the rehabilitation and reintegration into the community of the offender. - s 7(1)(h) of the Sentencing Act and *R v Hill*[6], at [37] – [39]. Even in cases where there is a presumption of imprisonment, such as arises under the Misuse of Drugs Act 1975, a sentencing Judge can give significant, even decisive, weight to the prospects of rehabilitation - *Hill* at [38]. In every case, an assessment of all the relevant factors should be made.

[23] In my judgment, such an assessment in this case points clearly to a sentence of home detention. The circumstances of the offence and offender weigh against a prison sentence. The assault was not an isolated, gratuitous act of violence. It has to be seen in the context of the history of bad blood between the two protagonists which included the serious injury earlier inflicted on Mr Le Marquand; the initiating violence of the victim on the night; and his subsequent threatening behaviour in crossing the road and advancing towards Mr Le Marquand.

[24] The offending was quite out of keeping with the law abiding lifestyle which Mr Le Marquand has adopted over the last ten years. It can truly be said that he has turned his life around. Between 1988 and 1995 he appeared frequently before the Court on a range of offending – drug-related, burglary and, as earlier mentioned, one of aggravated robbery which led to a prison sentence. Apart from a sentence for driving with excess blood alcohol in 1999, he had not offended since 1995. Seen in this context, the assault of Mr Hooper was something of an aberration.

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[5] [2008] NZCA 97
[6] [2008] NZCA 41

[25] Plainly, Mr Le Marquand has an alcohol problem. He acknowledges this. He is taking steps to address it. With the support of his partner and his history of stable employment, the signs are positive. The probation officer, and Judge Roberts himself, recognised that Mr Le Marquand was both remorseful and motivated to address the underlying causes of his offending.

[26] Taking all matters into account, I am satisfied that a sentence of home detention was both appropriate and desirable and that the Judge erred in principle in refusing to impose it.

[27] Both Mrs Marriner and Ms Ellis agree that were I to substitute a sentence of home detention, the appropriate range is between six and nine months, although Ms Ellis advocates for a term towards the upper end of that range. I consider that an appropriate term, having regard in particular to the serious nature of the offending, is one of eight months. Both counsel support, responsibly in my view, the imposition of the special conditions proposed by the probation officer.

Result

[28] The appeal is allowed. The sentence of 12 months imprisonment is quashed. In its place Mr Le Marquand is sentenced to a term of eight months home detention on the following special conditions:

a) To reside at 52 Waihi Road, Hawera, for the duration of the home detention.

b) To attend an alcohol and drug assessment and/or counselling as directed by the probation officer.

c) To undertake any counselling and/or programmes as may be directed by the probation officer.

d) Not to be in possession of or consume alcohol or illicit substances while subject to home detention.

[29] Mr Le Marquand is to be present at his residential address tomorrow, 12 February, at 4.00 p.m. for the purpose of making all necessary security arrangements.