IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CRI 2009-419-80

JACKIE HEMOPO
Appellant

v

POLICE
Respondent

Hearing: 3 February 2010

Appearances: A J Hamblett for appellant
S Cameron for respondent

Judgment: 15 February 2010

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 12 pm on Monday 15 February 2010

Solicitors:
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[1] Mr Hemopo appeals against a sentence of 10 months imprisonment imposed upon him by Judge Harland in the Hamilton District Court on 6 November 2009, on a charge of unlawfully possessing a firearm. The sentence was cumulative upon a sentence of 18 months imprisonment imposed for a variety of other offences, to which the appellant had also pleaded guilty. In broad terms that offending involved two charges of unlawfully taking a motor vehicle, attempting to unlawfully take a motor vehicle, aggravated assault, theft, breach of Court bail, and finally of failing to undertake a sentence of community work for which the probation officer sought a substituted sentence.

[2] Only brief details need be canvassed of this other offending. The assault and the offences relating to the motor vehicles (including theft) arose on 9 June 2009 when the appellant was endeavouring to make his way back in the early hours of the morning from Te Teko to Hamilton. Having had difficulty in hitching a ride, he unlawfully entered a motor car on a rural property and endeavoured to drive it to Hamilton. It proved unsatisfactory and the appellant then attempted to take another vehicle from another property. The owner of that vehicle was alerted to the appellant's activities, went to investigate and in the course of a struggle the victim was wounded with a screwdriver which the appellant had been using to facilitate his entry to the vehicle.

[3] The Judge accepted that these offences, together with the separate charges relating to non-compliance with earlier Court orders, could be dealt with together. She took a starting point of two years imprisonment, allowed a discount of 15% for the guilty plea, and a further discount for youth, remorse and evidence that the appellant was taking significant steps to turn away from his offending pattern, and so reached an end sentence of 18 months imprisonment on all of those other charges.

[4] The Judge considered the offending involving the weapon (an airgun) to be in a different category and called for a cumulative sentence. Mr Hamblett for the appellant does not criticise the Judge's decision to impose a cumulative sentence; he simply argues that the sentence imposed in respect of the airgun was, in all the

circumstances, manifestly excessive. There is no appeal against the end sentence of 18 months imprisonment imposed in respect of all the other offending. Rather, the argument is that the cumulative term imposed in respect of possession of the airgun ought to have been of the order of three to six months, and that the total term imposed ought not to have exceeded two years.

[5] Instead, the Judge adopted a starting point of 12 months on the airgun charge, reduced by two months to reflect a relatively late guilty plea and other mitigating factors, and imposed a cumulative sentence of 10 months imprisonment.

[6] The facts fall within a narrow compass. On 15 April 2009, the appellant approached a house in Te Aroha Street, Hamilton. He had had an altercation with a male occupant at that address some two days earlier. The appellant, who was in a somewhat agitated state, spoke to the female occupant of the house. The male occupant sought by the appellant was not at home. Thereupon, the appellant left the property, but was observed by a neighbour to be carrying a black and white jersey wrapped around his left hand. As he reached the end of the driveway he was seen to unwrap the jersey, so revealing a dark coloured airgun that looked to the neighbour like a pistol. The appellant placed the weapon in a black backpack, and left the scene on foot. The neighbour contacted the police; the Armed Offenders Squad was called. The airgun was located at the appellant's address. He admitted possession of the airgun but said that he was carrying it around with him because he had to return it to a friend who owned it. The appellant explained to the police that he had not presented the weapon to any person, nor had he threatened anyone with it.

[7] For some time the appellant maintained a not guilty plea. A defended hearing in July 2009 was abandoned by reason of police witness unavailability and limitations on Court hearing time. The appellant, having failed to attend the Court on the fixture date, was subsequently apprehended and remanded in custody for trial on 22 September. That fixture was in turn vacated to await the outcome of the sentencing hearing in respect of the other charges to which the appellant had pleaded guilty. Eventually, having taken legal advice, the appellant also pleaded guilty to the present charge.

[8] The foregoing procedural history has some relevance to the assessment of the appropriate discount for his ultimate guilty plea.

[9] Mr Hamblett argues that the Judge fell into error, both in selecting a starting point that was too high, and in allowing an insufficient discount for mitigating factors and in particular the guilty plea.

[10] I consider first the question of the starting point. Counsel referred to several authorities but were agreed there is no tariff for this offending, and that only limited assistance is to be gleaned from the authorities. Counsel referred to several cases, some of which were clearly more serious than the present case.

[11] In conducting the comparison exercise Mr Hamblett emphasised two features; first, the airgun was inoperative and the appellant was in possession of no ammunition. The second point was the absence of any evidence that the appellant had deployed the airgun in the presence of any other person.

[12] The first of those points is not in dispute; I accept it is of some relevance. I accept also the relevance of Mr Hamblett's second argument, although of course the airgun was seen by a neighbour who was sufficiently concerned to call the police. Whether or not the appellant intended to threaten or frighten others, his actions were in fact seen by at least one other person who was plainly concerned.

[13] Mr Hamblett is critical of the Judge's comment to the effect that "The airgun offending is very worrying … so I think this has got extremely sinister overtones actually".

[14] In my view the Judge was perfectly entitled to express herself in that way. The appellant was plainly visiting the Te Aroha Street property for the purpose of carrying forward his altercation with the male occupant of that residence. He took the airgun onto the property covered by a garment. It is a logical inference that he intended, if he thought fit, to brandish the airgun, or at least reveal it to occupiers of that property, for the purpose of gaining some advantage over them.

[15] I turn to a brief consideration of the authorities. In *Solicitor General v Lyon* HC AK CRI-2004-404-77A, 11 July 2006, the offender was apprehended in a public place in possession of a loaded pistol and ammunition. He was in the company of gang members. There were a number of aggravating factors; the offender had been consuming P (a matter of particular concern), weapons were being carried in a public place, the pistol was loaded, there were several weapons, there were two separate incidents and the offender had a significant list of previous convictions, including one for possession of a knife in a public place.

[16] In the High Court Frater J accepted that the case had called for a prison sentence (as is indeed the norm in cases of this type) of 18 months. She therefore determined that the learned District Court Judge had gone wrong in principle in imposing a sentence of community work and supervision and substituted a sentence of 15 months imprisonment, with leave to apply for home detention.

[17] I accept that that case was clearly more serious than the present one.

[18] In *Harrison v Police* HC Hamilton CRI-2007-419-101, 27 September 2007, the appellant had been a member of the Mongrel Mob for 20 years. He had a lengthy history of violence and of offending involving the possession and use of weapons. He faced one charge of unlawful possession of a shotgun and one of unlawful possession of ammunition. Underneath his bed the police found a dismantled shotgun and 16 rounds of 12 gauge shotgun ammunition.

[19] Randerson J upheld a sentence of two years imprisonment in respect of the charge of possession of the shotgun, and a sentence of nine months imprisonment on the charge of possession of the ammunition, but allowed the appeal to the extent of directing that the nine months sentence was to run concurrently with the two year sentence, rather than cumulatively as had been ordered in the District Court.

[20] The charges were laid in conjunction with a charge of assault, for which the appellant was also sentenced. Some care is accordingly necessary in assessing this case, but on any view the circumstances there were again significantly more serious than arise here.

[21] In *R v Wright* (1991) 7 CRNZ 624, to which I was also referred, the offender was in unlawful possession of a number of weapons and a great deal of ammunition. He had gang connections and was sentenced to a total of 41 months imprisonment. The case was plainly very serious and is of little assistance for present purposes.

[22] Mr Hamblett places greater reliance on three further decisions. The first is *R v Taputoro* HC Wellington T935/99 22, October 1999. The offender, a 28 year old female, had been found guilty at trial of unlawful possession of an air pistol. She was at odds with her neighbour. On the night of the offending she enlisted the assistance of a gang member and his wife. A fight ensued. During the fight the offender ran to her car and returned with the air pistol which she discharged a number of times in the direction of the victim. But it was unloaded, and there is no evidence that its presence was even noticed. The offender's intention was to use it in an attempt to intimidate. The fight continued to its conclusion when the neighbour was hit over the head with a softball bat.

[23] For sentencing purposes it was accepted that the pistol had always been unloaded and was kept only as a deterrent. The victim had not suffered in any direct way. The offender had care of three children and came from a severely dysfunctional background that had involved a number of personal tragedies. Although she had some previous convictions, they were mainly for minor offences.

[24] McGechan J accepted that as a general rule the aggressive use of firearms would result in imprisonment, but in the special circumstances of the case, it was appropriate to impose a sentence of eight months periodic detention, together with 18 months supervision.

[25] In my opinion it is a proper inference that the personal circumstances of the offender played a significant role in the ultimate determination that a non-custodial sentence was appropriate.

[26] In *R v Douglas* HC Christchurch T21/89, 19 December 1989, the offender had pleaded guilty to a charge of unlawful possession of a firearm. The offender's step-brother had been arrested by police officers, whereupon the offender went to the

boot of a nearby car and unwrapped and took out a rifle with the intention of intimidating the police officers. He was successful to the extent that the arrest was abandoned and the officers fled the scene. The rifle was unloaded and the bolt was not in it, but the bolt and ammunition were in the vehicle and there was the potential for serious harm. The offender, who was 24 years old, had no relevant previous convictions, but had problems with drugs and alcohol.

[27] The Judge referred to the maximum penalty provided in the Arms Act (three years imprisonment), and to *R v Wootton* CA42/89, 15 June 1989, and *R v Corner* CA291/87, 17 March 1988. In those cases a non-custodial sentence was held to be inappropriate, despite the personal circumstances of the offenders. Fraser J considered that the need for deterrence justified a prison sentence which he fixed at nine months imprisonment. I will return to *Wootton* shortly.

[28] In *R v Walker and Garden* HC Hamilton CRI-2006-019-8473, 30 November 2007, Asher J imposed a cumulative sentence of six months imprisonment on a charge of unlawful possession of a firearm, when sentencing the prisoners on a variety of charges, including Class A drug dealing. Mr Walker had been in unlawful possession of a sawn-off .22 rifle adapted to create a crude pistol. The pistol was in the car and was not loaded, but ammunition was available in the car. The prisoners had been selling methamphetamine from the vehicle. Mr Walker had a significant criminal history. The Judge also imposed a six month concurrent sentence for unlawful possession of ammunition.

[29] I return to *Wootton*. There, a guilty plea had been entered to one charge of unlawfully carrying a weapon in a public place. The offender had been asked to leave a hotel; he returned carrying a sawn-off shotgun, which he pointed at the licensee. The firearm was unloaded. A number of other patrons in the hotel witnessed the incident and were also potential targets of the offender. Mr Wootton had previous convictions for dishonesty and drugs, but not for violence or for the use of firearms. He had not previously served a term of imprisonment.

[30] The Court of Appeal emphasised the fact that there could never be an excuse for the presentation or carriage of firearms in public. The Court was obliged to take

a serious view of the offence. The firearm had been presented at close quarters to a person in a public place. The Court upheld the sentence of nine months imprisonment imposed after taking into account the appellant's plea of guilty.

[31] Mr Hamblett contends that this case is comparable with *Taputoro* in that the weapon involved was an air pistol, it was not loaded and there was no likelihood of any serious harm to anyone as a consequence of the appellant's possession of the air pistol in a public place. He says that this case is less serious than *Douglas* and *Walker*, and that the starting point of 12 months chosen by the sentencing Judge cannot be justified.

[32] For her part Ms Cameron argues that the case is comparable to *Wootton* and that the starting point fell within the available range.

[33] I accept that there are some similarities with *Wootton*, but there the firearm was not actually presented with the intention of intimidating, whereas in the present case the air pistol was actually presented, although I accept that the appellant may well have intended to do so if the need arose. Nevertheless, that is a relevant point of distinction.

[34] In my opinion this case was less serious than *Douglas* (where the firearm was actually presented and the bolt and ammunition were readily available nearby), and *Walker* (where the prisoner was in possession of the pistol in the context of drug offending carried out from his motor vehicle and there was ammunition in the car). I also consider *Wootton* to have been somewhat more serious because again the firearm was actually presented.

[35] The starting point of 12 months imprisonment selected by the Judge was, I consider, too high. A starting point of eight to nine months imprisonment is appropriate.

[36] Mr Hamblett argued also that the Judge allowed an insufficient discount. She deducted two months from her starting point of 12 months imprisonment for mitigating factors, which she identified as a late guilty plea together with "remorse

and other things". Mr Hamblett says this discount, equivalent to about 17%, was inadequate. Ms Cameron suggests that it was generous, having regard to the very late guilty plea entered after a defended hearing had been adjourned.

[37] Having regard to the guidelines set out in *R v Hessell* [2009] NZCA 450, no more than 10% could be allowed for a guilty plea entered at such a late stage as occurred here. There is some evidence of genuine remorse on Mr Hemopo's part. On the face of it he seems to have recognised that the interests of his partner and very young family are not compatible with his offending lifestyle. There is also the fact that at 22 years of age, despite his most unimpressive record to date, he could not be said to have become a hardened criminal. But it is difficult to see how a significantly greater discount could have been allowed by the sentencing Judge. In the light of the starting point which I regard as appropriate, and the application of a discount of the same order as was allowed by the Judge, the proper outcome is a sentence of seven months imprisonment.

Result

[38] For the foregoing reasons the appeal is allowed. The cumulative sentence of 10 months imprisonment imposed in respect of the charge of unlawful possession of an airgun is quashed. I substitute a sentence of seven months imprisonment, to be served cumulatively upon the term of 18 months imprisonment imposed in respect of the appellant's other offending.

C J Allan J