SUPPRESSION OF THE FORMER OCCUPATION OF COMPLAINANT

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CRI-2011-025-001335
[2012] NZHC 752

THE QUEEN

v

NIGEL SHANE JOHNSTONE

Appearances: JNP Young and E Riddell for Crown
S Claver for Accused

Judgment: 23 April 2012

REMARKS ON SENTENCE OF CHISHOLM J

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[1] Nigel Johnstone, following trial before a Judge alone I found you guilty on nine counts: four of male assaults female; one of causing grievous bodily harm with reckless disregard; one of intentional damage; two of threatening to kill; and one of breaching release conditions.

[2] You had been in a relationship with the victim since August 2010 (that was shortly after you were released on parole in June 2010). Initially the relationship seems to have been fine, but unfortunately between January and May 2011 a number of incidents occurred which gave rise to these charges. Without going into any detail the charges involved: an incident where the victim was flung across a room and broke her wrist; punching to the head of the victim (two counts); kicking her on the

thigh; throwing her onto a driveway; kicking in a door; threatening to kill the victim and a neighbour; and breaching special release conditions.

[3] As I indicated when I was delivering the verdict, I accept that the victim exaggerated in some respects. Nevertheless, I was satisfied beyond reasonable doubt that the charges were proved. I take the element of exaggeration into account when considering the sentence that should be imposed.

[4] You are 40 years of age with well over 50 previous convictions. They include murder in 1996, in respect of which you were sentenced to life imprisonment. There are six other convictions involving violence. On my reading of your record four of those (assault on the police and male assaults female) were before you were sentenced in 1996. Another two, arising from the same incident (assault with intent to injure and male assaults female), occurred after you had been released from prison on parole. You were recalled to prison as a result.

[5] The pre-sentence report makes pretty dismal reading, Mr Johnstone. It seems that you are still blaming the victim for this offending. You do not accept that it did occur, and overall you do not appear to have a lot of insight into the offending. You have, of course, spent a lot of your life in prison and one would only hope that the time will come where you can get out of this cycle of offending. Of course, that would benefit everyone.

[6] The aggravating features of the offending are that there was multiple offending. It included violence, especially attacks to the head. Finally, injuries both of a physical nature and an emotional nature were suffered by the victim.

[7] As far as the mitigating factors are concerned, as I have already said, I take into account that your victim has exaggerated and perhaps more importantly it was clear from the evidence that as she put it, she "pushed your buttons" on some occasions. So I accept that it was not totally one-sided.

[8] As far as your personal aggravating factors are concerned, you offended while on parole. However, I am going to entirely discount that factor and put it out

of my mind because you were recalled to prison in May after the offending occurred. Your previous convictions are for violence and cannot be taken lightly.

[9] Everyone agrees that it is appropriate to take the grievous bodily harm by reckless disregard as the lead charge. That is count 2. I agree with Mr Young and Mr Claver that a decision of the Court of Appeal, *R v Harris*[1] provides the greatest assistance. Clearly you are within band 2. The Crown says that the starting point should be two years. Mr Claver says 18 months. I think Mr Claver is closer to the mark.

[10] Then it is necessary to take into account the other offending. On the Crown's methodology, this other offending coupled with your previous convictions should increase the starting point to around four years and nine months to five years. Mr Claver says that by and large the other offending should attract concurrent sentences. He considers that the starting point should be increased to around two and a half years.

[11] In terms of sentencing methodology, I agree with the Crown, that the other offending, by and large, should attract cumulative sentences. They arose from separate incidents. The exception is that the offending involving the threatening to kill (two counts) and wilful damage, which between themselves should attract concurrent sentences. The breach of release conditions should also attract a concurrent sentence.

[12] But the starting point is really academic. When I step back and look at the totality of the offending there is no way that I would be justified in imposing a sentence of around five years or possibly more. That is agreed by both the Crown and Mr Claver. For the Crown Mr Young suggests that the sentence should be somewhere between three and a half and four years. Mr Claver says two and a half years.

[13] In my view the appropriate starting point is three and a half years. That will also be the end result because there are not any mitigating factors. So you are

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[1] *R v Harris* [2008] NZCA 528

sentenced for the grievous bodily harm by reckless disregard (count 2) to three and a half years imprisonment. On each of the male assaults female counts (that is counts 1, 3, 4 and 5) you are sentenced to six months imprisonment, concurrently with the three and a half years and concurrently with each other. On the intentional damage (count 6) and the two counts of threatening to kill (counts 7 and 8) you are sentenced to concurrent sentences of three months imprisonment which are also concurrent with the other sentences. On count 9, which is the breach of a special condition, you are convicted and discharged. So the total sentence is three and a half years imprisonment. That will commence to run today.

[14] The Crown seeks a protection order in favour of the victim pursuant to s 123B of the Sentencing Act 2002. There is no opposition to that protection order which is granted. There will be no order for restitution.

[15] One final word. Mr Claver raised the issue of endeavouring to avoid a situation like this arising again. Responsibility for that cannot rest entirely with Corrections and Mr Claver accepts that. You have a part to play in this sort of thing. If you re-offend when you enter into a relationship following release I am afraid the future for you is bleak indeed. You have the greatest ability to get out of this cycle, which I am sure you do not find any more palatable than anyone else.

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