IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY **T NO. 3347/02**

03/863

R

v

JOHN ARTHUR BURRETT
MATTHEW NORMAN PAYNE

Sentencing: 18 June 2003

Counsel: K G Stone & G J Burston for Crown
Accused Burrett in Person
N J Sainsbury for Accused Payne

SENTENCING NOTES OF HAMMOND J

Solicitors:

Crown Solicitors Office, Wellington for Respondent
N J Sainsbury, Wellington for Accused Payne

Mr Burrett

Introduction

[1] Mr Burrett you are for sentence before me today on two charges.

[2] The first is that you did conspire with Matthew Payne and Simon Phillpott to unlawfully detain a person (Mr Bill Trotter) without his consent, with intent to cause him to be confined. (Section 310 and 209(1)(a) Crimes Act 1961).

[3] The second charge is that of being in possession of a pistol (a cut down shotgun) otherwise than for some lawful, proper and sufficient purpose. (Arms Act 1983, s.45(1)(b)).

[4] You were found guilty on both of these charges by a jury on Friday last.

[5] An alternative count of a conspiracy to unlawfully detain for ransom (s.209(1)(c) and s.310 Crimes Act 1961) resulted in a not guilty verdict.

[6] It is common ground that the maximum sentence in this instance on the conspiracy charge is seven years imprisonment. On the Arms Act charge it is four years imprisonment.

[7] I tell you at the outset Burrett, that it is my intention to impose on you the maximum sentence which, in my view, it is open to this court to impose: seven years imprisonment, and there will also be an order for an extension of the usual parole period. The burden of this sentencing is therefore to explain why I am taking that course.

The Facts

[8] The facts of the offending can be shortly stated. You conspired, along with your step-son Simon Phillpott, and your nephew Matthew Payne – and by that I

mean that you came to an agreement with them – to kidnap Bill Trotter, a Wellington businessman, and to hold him confined.

[9] This by an extraordinary scheme, the essential elements of which were as follows. A shotgun was acquired and cut down into a vicious pistol. A bunker was constructed in the Tunnell Gully Recreation Reserve outside Upper Hutt. This bunker was a wooden construction which was emplaced underground, in the bush. It was camouflaged. It had a primitive ventilation system and toilet, and it was designed so that the lid would be screwed down.

[10] This was not just a simple agreement, without more. Highly detailed planning to effect the kidnapping was put in train. You reconnoitred the surrounding area of the victims home, on at least three occasions. Live ammunition was procured for the shotgun. You had disguises in the form of workman's uniforms, obviously to enable you to approach the victim's home, and balaclavas. There were various items for tying up the victim and/or his wife. And arrangements were put in train, with the necessary items, to enable one of the victim's motor vehicles to be torched after it had been utilised to take him away from his home.

[11] The plan was an audacious one. Phillpott was a bit player – the car driver. He was to drop you at the West Gate to the Wellington Botanical Gardens. You would proceed across those gardens to Wesley Road on the other side of the gardens, to where Mr Trotter lived. You would enter his home and take him away by force, if necessary in Mrs Trotter's Lexus 4WD vehicle and deposit him in this appalling bunker. The Lexus would be taken to a remote site off Akatarawa Road. You had bolt cutters to get through gates and the like, and an accelerant and the necessary incendiary materials to set the vehicle on fire.

[12] I need to add a word here about the question of a ransom. Mr Phillpott made a full and free confession to the police in which he stated that a ransom demand was to be made for $1M (of which he was to receive 10%).

[13] Mr Phillpott said:

(Page 12)

DW: (Police Interviewer)

What was in it for you?

SP: In theory, some money at the end of the day.

DW: How much?

SP: About a hundred grand or something.

DW: That was gonna be you your part of it?

SP: (nods yes)

(Page 14)

DW: How much did they tell you they were gonna get?

SP: They were talking about a million dollars or something.

(Page 23)

DW: How long did the, how long was their plan intended for to get the get the million dollars or whatever it was, how long did they think it was gonna take?

SP: Oh they were talking about three or four days or something.

[14] As it transpired, Mr Phillpott pleaded guilty and was sentenced to imprisonment by me before your trial. I took a starting point of four and a half years and reduced the sentence to two and a half years for the guilty plea, and other mitigating factors.

[15] For whatever reason, the Crown elected not to call Mr Phillpott at your trial. And, contrary to a report in a national newspaper, this Court was not asked to rule on the admissibility or otherwise of that statement. There was some evidence before the jury at your trial from which it could have inferred a ransom was to be demanded, but the jury may have taken the view that there were not sufficient details in front of

it. The Crown had obviously contemplated just such a possibility by framing the counts in the alternative.

[16] In any event, the bunker was emplaced and provisioned prior to 11 July (when Mr Payne went on a trip for several days to Fiji). The evidence was that this plan would likely have proceeded in the period sometime after 15 July and before 22 July, but for the fact that you were unsure as to Mr Trotter's movements.

[17] There was no question however that on 22 July 2002, you put your plan into operation. The three of you proceeded to the Botanical Gardens, in Mrs Burrett's car. You Burrett, and you Payne, dismounted the car at the West Gate and were actually proceeding into the Botanical Gardens when you were apprehended by special groups of the Police.

[18] This interception had come about this way. First, a Wellington Regional Council officer had come across the camouflaged bunker by pure chance when laying poison baits for possums in the bush. The police had been alerted, and had swiftly put on foot an efficient and highly effective police investigation. Your vehicle had interception devices placed in it pursuant to a warrant issued out of this Court. This is a case in which the actual discussions on the way to commence this operation are therefore recorded. The content of those conversations was not challenged at trial, and was utterly damming evidence against you. You actively go over the plan and how it is to be carried out, and the sheer nastiness of what is contemplated was exemplified by a menacingly uttered statement by you, Burrett, that Mr Trotter could be made to comply by "shoving a shotgun up his nose".

[19] How you could seriously have entertained the proposition that a New Zealand jury would hold this to be nothing but a game – the only defence offered – is quite beyond me. The case against you Burrett, was sound and completely overwhelming. And yet for several weeks you maintained the absurd pretence that it was all a game.

[20] An accused is of course entitled to test the prosecution case. But the way you ran your defence Burrett, meant that large numbers of police officers and persons

providing auxiliary services to the police had to be brought here for trial, where they were cross-examined at inordinate length (even on routine matters such as chain of evidence points), where there was not the slightest suggestion that evidence had been contaminated, or anything of that character. You derided a number of police offices for incompetence and you attacked their integrity in a way which would not have been permitted by a member of the bar, without some proper basis. You were able to get away with that to an extent only because you are an accused in person, and you were given the traditional latitude afforded under that head. But for the fact that you are impecunious I would have awarded substantial costs against you under s.4 of the Costs in Criminal Cases Act 1967.

[21] But for a first rate police operation, I entertain not the slightest doubt that this appalling plan of yours would have proceeded to complete fruition on 22 July. The police were faced with a difficult decision in this case, as to precisely when to intervene. The difficulty for the police was that if they intervened too soon they might deflect further incriminating evidence; leave it too late and harm to a victim or other members of the public might come about. For whatever it is worth, my own view is that the police intervened at the right point. In my view you were clearly underway with an actual attempt. Originally you were also charged with attempted kidnapping. For reasons which I need not enlarge on here, and which are of a technical legal character, I took the view that the charge of attempted kidnapping would have to be dismissed. I discharged you under s.347 of the Crimes Act 1967 (as I did Matthew Payne) on that charge. That said, this was a full blooded attempt in all but name.

[22] The short point for present purposes is that I am quite sure that but for the police intervention this dreadful endeavour would have been prosecuted to whatever unfortunate end it may have come to. It was not just a mere agreement.

Personal Circumstances

[23] I did not find it necessary to call for a formal probation report in this case. This because both accused led a great deal of evidence as to their personal circumstances at trial.

[24] You left school when you were 18. You worked in planning and transportation in the South East of England. In 1968 you joined the territorial army. You were commissioned as a Second Lieutenant in October of 1970 and served for a time as an ordnance officer with the British Army of the Rhine in Germany. Although the jury was doubtless entertained by your claimed dashing exploits, I would be surprised if it was entirely accepting that a munitions storage officer had quite the field role you claimed. In any event, after a relatively short stint in that role you went to University. You were then called to the English bar. You left the United Kingdom and lived in Australia for a short time. You then came to New Zealand in October of 1993.

[25] You apparently came to New Zealand on a tourist visa; you then worked for a Wellington law firm as a consultant. You got a work visa for six months, and were then granted permanent residence.

[26] You said in evidence that "up until 1999 I devoted myself almost exclusively to working at the bar doing planning cases or Environment Court cases". Your legal career seems to have come to an abrupt halt in 1999, for whatever reason. You confirmed that you did not have income beyond that point. You then worked at a nine lot subdivision (the property to which stood in your wife's name) called Sapphire Grove in the Upper Hutt area.

[27] You claimed that this was a rosy venture which would have seen you and Mrs Burrett comfortably situated in life. The facts led in evidence suggest that the venture was much more problematic. Indeed by the first half of 2002, you were facing very real difficulties in the way of mounting debts, and even the issuance of a bankruptcy notice. Those were your personal circumstances when you were arrested in July of 2002.

[28] A second reason I did not call for a report is that a psychiatric examination was carried out at my request on 30 May 2003 to assist the Court with various difficulties which had arisen relating to your remand status at Rimutaka Prison. It is on the Court file.

[29] The consultant forensic psychiatric noted (page 2, para 3):

> There is a significant history of depression. Three years ago or thereabouts [Mr Burrett] tells me that he was assessed by his General Practitioner. This followed some financial difficulties as a result of the abrupt termination of a major contract that he and his wife were both working on. [Anti-depressant medication was prescribed]. He was able to provide me with documentary evidence of this from two general Practitioners who had assessed him and had diagnosed him as suffering from depression and anxiety.

[30] Dr Walsh found that at the time he examined you, you were not depressed, not disorganised, and showing no evidence of psychotic illness, or mental disability. You denied any suicidal ideation, and you were optimistic about the outcome of your case.

[31] Doubtless, the public would be bemused as to how somebody with a seemingly respectable background could have come to the pass of pursuing this appalling venture. Unravelling any human psyche is extraordinarily difficult, and a necessarily incomplete undertaking. This I think, however can be said with confidence in your case: you are "infused with self and vain conceit" as Shakespeare once said in Richard II. You are also a highly manipulative person. This has led to a third unfortunate trait – you create havoc in the lives of those around you, and you are seemingly oblivious to the consequences for others of your entirely self-centred actions. It was you who involved Payne and Phillpott in this thing. And then you showed complete cowardice when caught with your pants down, in trying to distance yourself from your mess, and blame it onto Payne. Payne has to take some real responsibility in this, and this will be reflected in the sentence on him. But there should be no doubt as to who the central villain in this piece is, and it is you Mr Burrett.

Aggravating and Mitigating Factors

[32] I identity the aggravating features in this case as being as follows:

- There was a conspiracy in this case of the vile character I have noted. To actually contemplate taking a person by force from his home and family and

transporting him to this contraption buried in the earth in the forest is a perverse conception of the most deeply concerning kind.

- The scheme was not just contemplated and agreed to. It was advanced in the most meticulous way so far as planning is concerned. And it was in train when you were apprehended.

- The objective was to be advanced by force, if necessary, and with a weapon of a murderous variety, for which live ammunition was to hand.

- The safety, possibly of the family, and certainly of the victim, was to be hugely imperilled. This bunker is a mad headed device, and in and of itself would have imperilled the physical and psychic safety of the victim. And the danger of sawn off shotguns with live ammunition is that accidents can occur as well as by deliberate usage.

- You were the ringleader Burrett – I am in no doubt about that at all. Phillpott said, and the audio tapes confirm it, that his was a minor role. He had a reluctance to get involved, and yet you taunted him. And the same tapes also reveal quite clearly that it was you who was running the show.

- You are an ex-army officer; and an enrolled barrister, in this and other jurisdictions. Conduct of this character from someone with that background is disgraceful.

[33] The only mitigating factor is that these were first offences.

Sentencing Considerations

[34] Section 310(1) limits the maximum sentence for a conspiracy to the lesser of seven years imprisonment, or the maximum punishment for the offence the accused has conspired with any person to commit. Hence, although kidnapping itself carries a maximum sentence of 14 years, this Court is constrained by the legislation to a maximum of seven years imprisonment with respect to a conspiracy directed to a

kidnapping. There may be persons who would consider that to be a surprisingly low maximum, in the circumstances of our age.

[35] I gave serious consideration to whether it might be appropriate in this particular case to pass a firm sentence on the conspiracy charge along with a cumulative sentence under the Arms Act. The difficulty here, without going into an extensive legal dissertation, is that although under the Sentencing Act 2002, a Judge may in some circumstances impose cumulative sentences, such sentences are not appropriate unless the offences for which an offender is being sentenced are different in kind. And they are not appropriate under our present law where the two offences are part of an integral or connected transaction. It is this latter feature which is the real difficulty in this instance – the procurement and place of the firearm in this offending was an integral part of the conspiracy, and cannot really be separated out from it. To put it another way, the conspiracy to kidnap using a firearm was "all of a one", so to speak.

[36] As to relevant considerations on the conspiracy count there is a helpful decision of the Court of Appeal in *R v Henry* [1997] 1 NZLR 150 (Eichelbaum CJ, Richardson P, Tipping J). There Sir Ivor Richardson noted that:

> In assessing culpability for the purposes of sentencing, the nature and scope of the conspiracy and the extent to which the offender participated and assisted in it, must be relevant considerations. (Page 152, line 50).

[37] And in *Savva v R* [1995] 183 CLR 1 at page 6, the High Court of Australia accepted that:

> Any considerations which advert to the content and duration and reality of the conspiracy are proper to be taken into account. (Emphasis added).

[38] As to the starting point, if I am correct that seven years is the maximum the Court can impose in this case, s.8(c) of the Sentencing Act 2002 provides:

> [The Court] must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate ...

[39] As a matter of penal policy, the concern here is (in a general way) to reserve maximum sentences for the gravest offence of its kind and to retain flexibility in sentencing courts to be able to deal with such an offence when and if it comes before the court.

[40] It does not at all follow that a lesser penalty must be imposed if it is possible to envisage a worse case – ingenious defence counsel always seem to be able to envisage a case of greater heinousness.

[41] The proper approach was directed by our Court of Appeal in *R v Martin* [1992] 3 NZLR 513: in determining whether to impose the maximum sentence in a case that qualifies for it, this Court must necessarily address issues of parity and even-handedness, and objectivity and balance.

[42] It is possible to think of worse cases than this one. For instance, there might have been multiple victims to be taken to a bunker, or perhaps put into a container, or something like that. But on any view of the matter, this conspiracy was at or near the top of the range. And when there is added in the extent to which it was advanced, the way in which it was to be advanced, and the plain need for a condign sentence in a case like this, in my view this is a case which requires a seven year sentence.

[43] Even if the question of a ransom is put entirely to one side (on an argument that it is inconsistent with the actual jury verdict) in my view this would still be an offence of the gravest kind. I agree with Mr Stone that detentions without ransom in New Zealand are usually of a short term character. They are normally associated with domestic altercations, or presage some other crime, such as sexual violation. Hence the line of argument that the actual jury verdict must reduce the sentence in this case, is both unconvincing and unrealistic.

[44] It is to Mr Burrett's credit that he apologised for the distress which has been caused both to the victim's family, and to his own. He is right to note that he has lost a great deal as a result of what has happened in this case. He is left without honour and he will be disbarred. He also rightly said that 22 July 2003 will continue

to live with him for the rest of his life, both in terms of the physical scars and the psychic trauma to him.

[45] But notwithstanding all of that in my view, I must impose in this case a sentence of seven years imprisonment on the conspiracy count; on the arms charge there will be a sentence of two years, concurrent.

[46] That is not the end of the enquiry. Under s.86 of the Sentencing Act 2002, Parliament has provided for the imposition of minimum periods of imprisonment in relation to determinate sentences of imprisonment.

[47] In simple terms, under ss.1 of s.86 the Court may order the offender to serve a minimum period of imprisonment in relation to the particular sentence. It may do so under ss.2 if the Court is satisfied "that the circumstances of the offence are sufficiently serious to justify a minimum period of imprisonment". What is meant by "sufficiently serious" is provided for in ss.3 – the circumstances must be such as to take the offence out of the ordinary range of offending of the particular kind. And then, under ss.4, in the circumstances of this case, the minimum period of imprisonment to be imposed must not exceed two thirds of the full term of the sentence.

[48] Trial Judges have been assisted by a five Judge Court decision of the Court of Appeal in *Brown* (CA 238/02, 25 September 2002). There, the judgment of the Court, delivered by the President of the Court of Appeal, noted:

> This suggests that the power to impose a minimum sentence for a serious offender must be intended for cases of such seriousness that the Court considers that, even if there has been no danger to the community, release after one third of the sentence has been served would represent insufficient denunciation, punishment and deterrence in all the circumstances. This means that sentencing Judges are empowered, in effect, to override the general policy that all offenders, including violent offenders, are to be eligible for parole after serving one third of the sentence imposed. (Para 23)

[49] The Court was also quite clear that Courts have a duty to give effect to this provision. The Court of Appeal said:

> We are not persuaded that it should be regarded merely as a reserve measure to safeguard against possible Parole Board misjudgements. (Para 28)

[50] But it has to be borne in mind that:

> The focus is on the circumstances of the offence. (Para 29).

[51] Further:

> The Judge must review the circumstances as a whole ..... The central consideration must be culpability which necessarily is increased by matters such as unusual callousness, ... and serious actual or intended consequences. (Para 32)

[52] And the Court of Appeal held, specifically, that the overall assessment need not be constrained by the particular charge brought in respect of the particular conduct giving rise to the charge.

[53] I believe this Court has already sufficiently identified the relevant factors which come into play in this case. In this case I resort to s.86. I order that you be required Burrett to serve two thirds of the seven year sentence I have imposed upon you. I have not worked out the exact number of days; but the actual sentence you will be required to serve is something like four and a half years in prison.

[54] I have therefore imposed on Mr Burrett the maximum sentence, which on my appreciation could be imposed by law at this time.

[55] Stand please Mr Burrett. Burrett, on the conspiracy charge you are sentenced to seven years imprisonment; on the firearms charge two years concurrent. Under s.86 of the Sentencing Act 2002 you are required to actually serve two thirds of the sentence imposed on the conspiracy count.

Stand down.

Mr Payne

[56] Payne, I regret that you have had to spend time sitting in the dock wondering what sentence will be passed upon you, whilst I have been dealing with Burrett. For humanitarian reasons I would have preferred to have reached your case more quickly. But I was bound to give a proper explanation as to why I have dealt with Mr Burrett in the way in which I have.

[57] In your case, the charges are the same. I tell you now that I intend to sentence you to five years imprisonment. And you will be required also to serve two thirds of that sentence. That is something just under three and a half years actual imprisonment.

[58] The circumstances of the offence have already been set out by me in relation to Burrett, and need not be repeated here. Your culpability falls somewhere between that of the ring leader Burrett, and Mr Phillpott, who had a bit part and received a sentence of two and a half years imprisonment.

[59] It is entirely regrettable that a man in his early 20's and of previously blameless character should have been embroiled in this lunatic scheme. But you were, and you knowingly took part. You must now face the consequences.

[60] Mr Payne, you grew up in London and then Hastings. Your parents separated when you were four or five. You went to school in the Hastings area. You had at least respectable grades in High School. You had an interest in joining the RAF on the engineering side, and indeed passed the preliminary test but was not selected.

[61] John Burrett is your uncle. After Burrett's move to New Zealand, you Payne came to visit them from time to time. In England, you continued work in retail stores, and then as a maintenance engineer in a fabricating company. By March of 2000 you had broken up with your girlfriend, and you were somewhat bored with your work. You wanted to get away from England, and do something different.

You were also interested in flying training, and it is a lot cheaper in New Zealand than it is in England.

[62] Thus it was that you came to live with Mr and Mrs Burrett. You became involved in working in Mr and Mrs Burrett's subdivision at Sapphire Grove on what was described by you in evidence, as "donkey work". You also took flying lessons. You were wanting to work towards your commercial pilots licence.

[63] How did a young man of this background get involved in this criminal scheme? I am satisfied that you were fully cognitive of what you were doing, but you were to an extent, under the malignant influence of Burrett.

[64] That said Payne, you knowingly and fully entered into this conspiracy, and acted on it. You built the bunker; you were fully implicated in all of the planning; you went to the gardens; you were carrying the shotgun; and the audio tapes from the interception show you to have been fully committed and determined.

[65] Mr Sainsbury has made full and able submissions on your behalf. He suggested to me that this conspiracy was not in the most serious category, and it was not well along the continuum of an actual offence. I believe have already addressed those submissions. He rightly stressed that this was a first offence; that you are unlikely to reoffend; that you had good qualities; and he touched on, although he was constrained by his instructions, the relationship between you and Burrett. Notwithstanding the constraints which operated with respect to Mr Sainsbury's instructions, in my view I am entitled to have regard to the reality of what I saw and heard in the evidence, as to the influence of Mr Burrett.

[66] You are a young man on whom this sentence will fall heavily. It is a first offence. I would be surprised if you were to reoffend.

[67] Nevertheless, for the same sort of reasons as I have given in relation to Mr Burrett, I take the view that the approach in your case should be the same, but discounted for your youth and for the Burrett influence.

[68] There is no scientific way to arrive at a proper figure. One can only say that a discount should be made off the figure adopted for Mr Burrett, as a matter of judicial judgment.

[69] Stand please Mr Payne. Mr Payne, in your case I consider the appropriate sentence on the conspiracy charge to be one of five years imprisonment; on the firearms charge, two years concurrently. I impose those sentences. Pursuant to s.86 of the Sentencing Act 2002 you will be required to serve two thirds of the sentence on the conspiracy charge. Again I have not worked out the time exactly but it is I think, just under three and a half years which will actually have to be served.

Stand down.

[70] I direct under s.27 of the Victims Rights Act 2002 that the Victim Impact statement not be searched from the Court file; and it may not be published.

R G Hammond J