IN THE COURT OF APPEAL OF NEW ZEALAND

CA40/06

THE QUEEN

v

PENE RUKA AKARANA

Hearing: 28 August 2006

Court: William Young P, Panckhurst and Ronald Young JJ

Appearances: P H B Hall for Appellant
B M Stanaway for Crown

Judgment: 2 October 2006 at 2.15pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Panckhurst J)

The issue in this appeal

[1] The appellant appeals against a sentence of preventive detention imposed by Fogarty J on 19 December 2005. The sentence was imposed in relation to an offence of injuring with intent to cause grievous bodily harm. At the same time the appellant was sentenced to concurrent terms of imprisonment in relation to offences of assaulting a female, threatening to kill and unlawfully detaining, all committed against the same victim, the appellant's then partner.

[2] In 1997 the appellant had pleaded guilty to manslaughter. He was sentenced to six and a half years imprisonment. The killing occurred in the aftermath of the break-up of a personal relationship. Mr Akarana, in the course of a bedroom struggle, killed a man who had commenced a relationship with his former partner.

[3] The present offending also occurred in the context of a personal relationship of a few months duration. In the first incident the appellant head-butted his partner for no apparent reason. In the second incident, about two months later, the appellant subjected his partner to a prolonged, sadistic and violent assault. The Judge observed in the course of his sentencing remarks that "Your partner is very lucky to be alive".

[4] The primary issue at sentencing, and on appeal, was whether a lengthy finite sentence would have been sufficient to achieve the protection of female members of the community, or whether only a sentence of preventive detention would achieve that end. For reasons which he articulated in some detail, Fogarty J concluded that the appellant's inability to control his anger in the context of intimate relationships dictated the imposition of a sentence of preventive detention. Mr Hall on behalf of the appellant challenged that conclusion on a number of grounds.

The present offending

[5] The appellant and the complainant were in a relationship for about five months before the first offence was committed. They lived together for about one month before the offence of assaulting a female occurred. That was on 11 December 2004. That morning the appellant awoke in an agitated state. He was about to leave home on a trip to Auckland. The appellant got out of his vehicle and assaulted the complainant by head-butting her in the face. She was knocked to the ground but was otherwise uninjured.

[6] After the assault the appellant and his partner were apart for about a month. Their relationship resumed and, on 2 February 2005 in the early hours of the morning, the further offences were committed. Both parties were intoxicated. Without warning the appellant became enraged, told the complainant he was going to kill her and began to throttle her about the neck.

[7] The complainant was then separately threatened with a dinner knife and a paring knife. The appellant said that he would use the paring knife to repeatedly stab the complainant, who pleaded with him to spare her life.

[8] The assault continued in the bedroom. The appellant punched the complainant in the face, causing a broken nose and profuse bleeding. He said:

> I have just given you the death punch and I can't believe you're not dead.

A short while later the appellant told the victim that he was going to tie her up. She remained fearful for her life, but was told it was too late as the appellant had no choice but to kill her.

[9] Rope was obtained from the garage. The complainant's ankles were bound. She was forced to lie on the floor. Her wrists were bound behind her back and the rope was then looped around her neck and secured to the leg of a bed. The appellant briefly left the room. During his absence the complainant partially untied herself, but the appellant returned and kicked her in the stomach.

[10] The complainant's underwear was then removed. The appellant threatened to cut the complainant from her vagina to her navel using the paring knife. Instead, however, she was transferred to the bed, rebound and told that she would be killed when the appellant awoke in the morning. Before going to sleep the appellant threatened, and made out, to ignite a sheet with a cigarette lighter so as to burn the house down but, as previously, he responded to the complainant's pleas not to do so.

[11] Both then fell asleep on the bed. Sometime later the complainant awoke, managed to untie herself and escape to a nearby neighbour. The police were called. The appellant was located still asleep in the bedroom.

The statutory criteria for preventive detention

[12] Section 87 of the Sentencing Act 2002 governs the imposition of the sentence. It relevantly provides:

> **87 Sentence of preventive detention**
>
> (1) The purpose of preventive detention is to protect the community from those who pose a significant and ongoing risk to the safety of its members.
>
> (2) This section applies if –
>
> (a) a person is convicted of a qualifying sexual or violent offence (as that term is defined in subsection (5)); and
>
> (b) the person was 18 years of age or over at the time of committing the offence; and
>
> (c) the court is satisfied that the person is likely to commit another qualifying sexual or violent offence if the person is released at the sentence expiry date (as specified in subpart 3 of Part 1 of the Parole Act 2002) of any sentence, other than a sentence under this section, that the court is able to impose.
>
> (4) When considering whether to impose a sentence of preventive detention, the court must take into account –
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> (a) any pattern of serious offending disclosed by the offender's history; and
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> (b) the seriousness of the harm to the community caused by the offending; and
>
> (c) information indicating a tendency to commit serious offences in future; and
>
> (d) the absence of, or failure of, efforts by the offender to address the cause or causes of the offending; and
>
> (e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.

[13] Section 88 provides that the offender is to be notified that the sentence is under consideration and requires that two health assessors provide reports including future risk assessments. Section 89 requires the imposition of a minimum period of imprisonment of at least five years or more where the gravity of the offending or risk profile of the offender indicates the need for a greater minimum term.

[14] The argument in this case centres upon the criteria for the imposition of the sentence contained in s 87. It is common ground that the appellant qualifies for the imposition of the sentence in terms of his age and his commission of a qualifying offence. The real question is whether he is likely to commit a further qualifying violent offence when released from a finite sentence. This question falls to be answered in light of the protective purpose of the sentence of preventive detention and after taking into account the considerations identified in s 87(4).

The challenge to the Judge's reasons

The sentence

[15] The appellant was sentenced to preventive detention in relation to the most serious charge of injuring with intent to cause grievous bodily harm. The charge of unlawfully detaining the complainant was met with a four year sentence, arrived at from a starting-point of six years with a one-third reduction for the pleas of guilty, and the remaining charges of assault on a female and threatening to kill incurred concurrent one year terms.

[16] The lead sentence reflected the Judge's conclusion that if the appellant was sentenced to a finite term he would pose a significant and ongoing risk to the safety of members of the community, particularly females, upon release. That conclusion was expressed after reference to the considerations identified in s 87(4), to which we will turn in a moment.

[17] The Judge summarised his conclusion in these terms:

> [29] … in my view there are two reasons why such a determinate sentence with or without s 86 would not be preferable. They are that you are 41 or 42 years of age. I think you are still in the grip of this anger management problem. I have to consider how you are likely to behave with a female partner when you are say 45 years old, in three years time. I am not satisfied, against your history that such a female partner would be safe. You could love her, she would be safe most of the time, but if you got into one of these anger fits you could kill her, just as your partner earlier this year could easily have died.
>
> [30] Second, I am of the view that while you have undergone anger management programmes in the past you do have to do it again. And you have to put all your effort into beating this, for your own sake, so you can live a decent life for the rest of your life. I think that you have to be under a huge incentive to do so, which you will be, if under a sentence of preventive detention.

A pattern of serious offending?

[18] Contrary to the Crown's submissions the Judge did not view the appellant's history of violent offending when he was a young man as a "particularly reliable indicator" of the future. However, he viewed the manslaughter conviction in 1997 as significant, although insufficient to constitute a recent pattern of serious offending.

[19] Mr Hall supported the approach of the Judge, but continued that in cases of violent offending a cluster, or spree, of offences was necessary to provide the basis for a conclusion that a pattern of serious offending was disclosed in terms of s 87(4)(a).

[20] We disagree. Indeed, we regard the approach which the Judge took as benevolent. The appellant has an awful history of violent offending. It includes two robberies in 1981, injuring with intent to cause grievous bodily harm in 1982, assault with intent to injure in 1985, four assaults in the period 1987 to 1991, injuring with intent to injure in 1991, threatening to kill in 1993, manslaughter in 1997 and contravention of a protection order in 2002. Clearly, offences committed in 1981 (when the appellant was aged 17 years) may be less relevant than more recent offending. But here there is a consistent pattern of violent offending, starting when

Mr Akarana was a youth and continuing, largely unabated, to early February 2005, the date of the most serious current offences.

[21] In our view the appellant's history does disclose a pattern of serious violent offending and a corresponding absence of anything to suggest an increasing level of self control gained with maturity.

The seriousness of the harm caused by the offending

[22] Based on the victim impact report the Judge was satisfied that the offending had an "enormous impact" on the complainant. He took this into account, but observed that he would not attach a great deal of weight to this consideration, since although the impact was terrible, his focus was on the future not the past.

[23] Mr Hall supported this assessment and without belittling the impact on the complainant, stressed that the effects were confined to facial injuries from the blow which broke her nose and caused underlying injuries. In particular, he noted that despite the threat to use knives, no actual injuries of this nature were inflicted.

[24] The absence of knife wounds is significant. But the fact remains that the complainant was the victim of a prolonged, sadistic assault. She was justifiably in fear of her life throughout. This was, therefore, very serious offending which involved significant harm to a member of the community. Unlike the Judge we see no need to make an assessment of this factor in isolation. Rather, all the relevant considerations must be the subject of an evaluative assessment in deciding the need for a sentence of preventive detention.

Was there information indicating a tendency to commit serious offences in the future?

[25] There was considerable information at sentencing as to the risk which the appellant posed in the future. Reports were obtained from a clinical psychologist

and a psychiatrist, as required by s 87. A further psychiatric assessment was obtained on behalf of the appellant.

[26] The Crown psychologist concluded that Mr Akarana was at high risk of reoffending following his release from prison. The Crown psychiatrist considered there were a number of historical factors which were predictive of future violence. These were the early onset of violent behaviours, repeated and severe violent offending, antisocial personality disorder, alcohol dependency and persistent relationship instability.

[27] The defence psychiatrist did not dissent to any extent from the views expressed by the Crown experts. However, he brought attention to a new dimension, that in his opinion the appellant suffered from a degree of alexithymia, being an inability to appreciate or describe his own emotional situation with any degree of accuracy.

[28] Fogarty J referred to the reports of all three experts. He accepted the view that there was a real risk of further offending upon the appellant's release. With reference to the diagnosis of alexithymia he considered this significant, in the sense that the appellant did not realise when he was "about to lose it" and "didn't have the same skills as most people to verbalise … anger rather than resort to physical violence". On a more positive note the Judge considered that all three experts held out hope for the appellant, provided he underwent appropriate treatment interventions of which he is capable and which could ameliorate his risk profile.

[29] The thrust of Mr Hall's submissions under this head was that the Judge erred in failing to bring to account the possibility of a release (from a finite sentence) to an extended supervision order of up to 10 years duration. Hence, it was said, with appropriate interventions while in prison and the added security of a supervision order, there was no need for a sentence of preventive detention.

[30] However, as Mr Stanaway pointed out in his written submissions, Mr Akarana is not eligible for an extended supervision order at the conclusion of his

sentence. Violent offending does not render an offender liable to extended supervision. More generally, we see no basis for complaint in relation to the Judge's assessment of the future risk information. It provided an ample basis for the conclusion that the appellant would pose a significant and ongoing risk following release, particularly to females with whom he might form an association.

Efforts by the offender to address the causes of his offending

[31] Fogarty J found the existence of both positive and negative signs in relation to this aspect. On the one hand the appellant successfully completed a course of residential treatment for alcohol abuse in 1992, after which he abstained from use of both alcohol and drugs for almost 11 years. Given Mr Akarana had suffered from an alcohol addiction from his middle teenage years, this was a considerable achievement.

[32] On the other hand the appellant's involvement in initiatives to address anger management had obviously not been successful. Even during the period he was abstinent from alcohol and drugs he continued to offend, although with less frequency. However, it was during this period that, in 1997, he committed manslaughter.

[33] We did not discern much in the way of criticism by Mr Hall in relation to this consideration. He rightly pointed out that the reports prepared for the sentencing identified some issues which may enable future intervention initiatives to be more focussed. The experts emphasised that the appellant suffered from depression of moderate severity in the period leading up to the present offending. He also probably suffered from alexithymia, which diagnosis may be of relevance in relation to the treatment of Mr Akarana's anger management problem. But we are unpersuaded that the Judge was not alive to these aspects, much less that he was unsympathetic to the positive steps taken by the appellant to redress the causes of his offending.

Was a lengthy determinate sentence to be preferred?

[34] This, the Judge recognised, was the ultimate question. He assessed the likely finite sentence which the offending would have attracted in terms of *R v Taueki* [2005] 3 NZLR 372 (CA). He concluded that the criminality which the offending entailed fell within band two and indicated a likely sentence of about four years imprisonment, after bringing to account that injuring with intent to cause grievous bodily harm carries a maximum penalty of ten years imprisonment, rather than 14 years. The Judge considered that even with a minimum period of imprisonment fixed at two-thirds, the sentence would not be sufficient to secure the future protection of the community. His reasons were those we have set out at [17].

[35] Mr Hall argued that the Judge misdirected himself in making the observation that a sentence of preventive detention would place the appellant "under a huge incentive" to accept treatment while in prison. Counsel submitted that the indeterminate sentence "should not be imposed to force an offender to undertake any course (of treatment)". Further, he submitted that a finite sentence of substantial duration would provide sufficient incentive, in that the appellant's actual release would be at the discretion of the Parole Board in light of its assessment of the ongoing risk he posed at that time.

[36] We do not read Fogarty J's observation that a sentence of preventive detention would give rise to a huge incentive to accept treatment as the governing reason for his sentencing conclusion. By that point he had already expressed the view that upon release, perhaps at age 45 years, the appellant would still pose a significant and ongoing risk to female partners. That formed the essential basis for his evaluative assessment. Read in context, his further observation about a huge incentive was a reference to the obvious fact that, subject to an indeterminate sentence, the appellant would be better motivated to take steps towards his own reformation. We see no misdirection in this process of reasoning.

Conclusion of the Court

[37] We have considered both individually and cumulatively the various criticisms of the Judge's reasoning in this case. While we differ to some degree in relation to some matters, we are not persuaded that the Judge erred in reaching the conclusion that preventive detention was the proper sentence. To the contrary, we are satisfied that there was a more than adequate basis upon which to reach the view that a finite sentence, even one significantly longer than that considered appropriate by the Judge, would not adequately have met the protection of the community in relation to this offender.

[38] No complaint was levelled at the five year minimum period of imprisonment, which may not be less than five years: s 89(1). The appeal against sentence is dismissed.

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