

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT WHANGAREI**

**CRI-2017-088-001210
[2017] NZDC 19604**

NEW ZEALAND POLICE
Prosecutor

v

[RILEY BURKE]
Defendant

Hearing: 6 July 2017

Appearances: Sergeant S Wilkes for the Prosecutor
S Ellis for the Defendant

Judgment: 6 July 2017

ORAL JUDGMENT OF JUDGE G L DAVIS

[1] [Riley Burke] appears before the Court today to answer three charges, one that he injured [the victim] with intent to injure her, one that he threatened to kill her and one that he being a male assaulted a female. All of the charges arise out of the same incidents which are alleged to have occurred in April 2017.

[2] [The victim] says that Mr [Burke], during the course of an argument, punched her on numerous occasions in the back, around the head area and in a second incident he pushed her down a hill, kicked her down a hill area and in a third incident he threatened to bury her next to her [relative].

[3] Mr [Burke] says that none of these incidents occurred and if there were any injuries to [the victim] he says that she caused those injuries herself. It is those issues that I need to decide today.

[4] The police have the onus of proving each of the charges and each of the elements of each of the charges to a standard beyond a reasonable doubt. If I am satisfied that each of the elements of each of the charges have been proved then it is my duty to enter a conviction. Equally, if I am not satisfied that the elements of one or the elements of more than one of the charges have not been proved it is my duty not to enter convictions. There is, of course, the third scenario that some charges may be proved and some may not be proved.

[5] Mr [Burke] has chosen to give evidence in Court but that does not displace the fundamental obligations that fall upon the police to prove each of the elements of each of the charges to the standard beyond a reasonable doubt. If I do not accept the evidence of Mr [Burke] for any particular reason I must put the evidence that I do not accept to one side and proceed only on the basis of the evidence that I do accept and it is if that evidence meets the standard beyond a reasonable doubt then I am entitled to enter convictions.

[6] Mr [Burke] does not have the onus of proving he is innocent, he does not have the onus of disproving any of the ingredients of the charges they, as I say, fall fairly and squarely on the shoulders of the police to prove. The factual narrative is more complicated than I have described it and I will return to that in a moment.

[7] What is not in dispute for the purposes of this charge is that Mr [Burke] and [the victim] were in a relationship, on the morning of [date deleted] April 2017 [the victim] had been consuming alcohol, there may have been as little as three and a half Cody's pre-mixed drinks consumed, there may have been as much as six. I do not need to make a definitive finding on that point.

[8] [The victim] alleges that an argument developed between her and Mr [Burke] and during the course of that argument Mr [Burke] said that he would bury her next to her [relative]. It is not in dispute that [the victim's relative] had passed away in a short

period of time prior to this incident. The argument continued and it does not appear to be in dispute that Mr [Burke] picked up a child that he and [the victim] have and put that child in the car. The purpose for the child being put in the car was in dispute.

[9] [The victim] said that Mr [Burke] had said that he was going to [the victim's] brother's place in [details deleted] to pick up a phone, Mr [Burke] says that he was going to take the children to the park, he did not want [the victim] to come with him. Whatever the situation may have been, and it does not, in my view, require a finding of fact on that point, [the victim] got in the car with Mr [Burke].

[10] It is during the course of the argument prior to getting in the car that [the victim] says Mr [Burke] said that he was going to bury her next to her [relative]. Ms Ellis says that it defies common sense for somebody to have been threatened in that way and to have taken the threat seriously to have simply got in the car and gone in the vehicle with Mr [Burke]. Bear in mind Mr [Burke's] defence is twofold, firstly it did not occur and secondly, as an alternate, if it did occur then [the victim] was not frightened by it.

[11] They left the address at [address deleted], which is infer is in central Whangarei, and drove to [details deleted], one of the outlying suburbs. As they approached [details deleted] it appears they have driven past the turnoff to where [the victim's] brother lived, there were arguments continuing along the journey and they have travelled past the turnoff and gone out in to the Whangarei Heads area.

[12] At some point along the way to Whangarei Heads is a driveway which leads up a hill into a paddock. The precise location of that driveway could not be established. [The victim] said she did not know the names of the streets in the area but she knew where the driveway was. It was somewhere around the Fisherman's Point area.

[13] Little turns on the location, it is more what occurred when they got there. Mr [Burke] accepts that they went to this isolated area. They drove up the hill area, [the victim] was continuing to argue with Mr [Burke], she has got out of the car, she has been thrown face first into the ground, her head has hit the ground, she has then

been pushed and kicked down a hill. The allegation is, from the photos that I have seen, that there were injuries to [the victim's] shoulder area, grazes to her shoulder area, there were also grazes to her forearm and bruises to her forearm area.

[14] She has gone back to the car, Mr [Burke] has attempted to drive off, she was concerned about that and it appears that she has reached into an open window to remove the car keys from the ignition. Bearing in mind Mr [Burke] and [the victim's] daughter was in the car at the time.

[15] What has happened, it is said, is that Mr [Burke] has then wound up the window to the vehicle and he has, according to [the victim], bitten her on the shoulder. A photograph booklet has been given to the Court which shows grazes and bruising to the [shoulder] area of [the victim] which she says were the bite marks that Mr [Burke] inflicted in that area. Again, I emphasize Mr [Burke] says this simply did not occur.

[16] Then matters move on from there, Mr [Burke] leaves this isolated area that I have made reference to, [the victim] walks down onto the road and begins hitchhiking home, a matter of moments later Mr [Burke] comes back along the road and sees [the victim] on the road, he stops, she gets into the car and they return back to the [details deleted] area. She retrieves a cellphone that she says Mr [Burke] had smashed earlier in the morning, assembles it somehow, inserts a new SIM card and rings her sister-in-law and other members of her family.

[17] She says that she rang to say farewell because she believed she was going to be killed. The police were not rung by [the victim]. Eventually [the victim's] family tracked down the car in the [details deleted] area, it is said by [the victim] to be speeding off around the road from [details deleted] to Whangarei. Mr [Burke] is said to be, "Making his own lanes," I was not particularly clear what that may have meant.

[18] It culminates in the vehicle stopped outside the Whangarei Police Station, [the victim's] family catching up with her and she had been removed from the car. She then is seen by a police officer who has been alerted to an incident outside the police station and statements are taken. I also heard from two other witnesses that are of significance. That second witness that I heard from is the sister-in-law of [the victim],

[name deleted]. [The second witness] was the recipient of one of the phone calls from [the victim] on the journey back to [details deleted] and from [details deleted] to Whangarei.

[19] She may have received other calls along the way but it is those calls that are significant. She describes [the victim] as being terrified.

[20] The next witness that I heard from was [the Sergeant]. She was on duty at the Whangarei Police Station, she heard about an incident that she thought was a road rage incident, she eventually attended that incident and after some searches of the area came across [the victim]. She described her as being physically shaken and terrified. She eventually assisted in the process of statements being taken.

[21] Mr [Burke's] evidence, as I have said, was that these incidents did not occur. He acknowledges that there was an argument at the house but he did not touch [the victim], he did not threaten [the victim]. He got up, the children woke up, he fed them, he went to put them in the car to go and visit a park nearby for the day.

[22] He says that [the victim] had been drinking, he was of the view that as much as six Cody's may have been drunk by [the victim], he himself was not drinking. He did not want her to get in the car, she did so. He described her as being suicidal and while he tried to prevent her getting into the car, she did so. He acknowledges that they drove off to the [details deleted] area and continued on to the isolated area out at the Whangarei Heads road that I have made reference to. He said there were arguments that [the victim] tried to get the keys out of the ignition but she was not successful, that any grazes that were caused to her body and arms area that I have made reference to arose out of the general scuffle, if one describes it, over the keys, he did not bite her and he certainly says he did not punch her.

[23] There is one further incident that I need to make reference to. It is alleged that on the journey to [details deleted] Mr [Burke] has punched [the victim] in the back kidney area on more than one occasion. [The victim] has a limited function of her right kidney arising out of complications with [details deleted] and [the victim's]

kidneys are vulnerable and that is a further allegation, in fairness to Mr [Burke] that he denies occurring.

[24] This is a case that is much like any other case, it falls to be determined by the stories, the evidence if you like, that the witnesses tell. Credibility is very much at issue. Credibility can be determined on two separate fronts. The first issues the Court often takes into account such as demeanour, such as whether or not concessions are made by one or other of the parties knowing full well that those concessions may be adverse to the position that they adopt. Credibility of the story itself is an entirely different matter. That is a question as to whether the story that a witness tells has the ring of truth to it. Does the story hang together in light of the evidence that the Court has heard and does it hang together within itself.

[25] Turning to the ingredients of the charges and given that there are three separate charges there are not surprisingly three separate ingredients that the Court has to consider. The first that I intend to look at is the male assaults female charge, I have to satisfy myself in respect of that charge that [the victim] was a female, that Mr [Burke] was a male and that Mr [Burke] assaulted [the victim]. Assault by definition means the unwanted application of force by Mr [Burke] to the person or the body of [the victim]. Secondly, that [the victim] did not consent to the application of force and thirdly, Mr [Burke] could not have believed that [the victim] did consent to that force.

[26] The second set of ingredients that I wish to consider is the injuring with intent to injure charge. There is a charge brought under s 189(2) Crimes Act 1961. I must be satisfied that the police have proved to a standard beyond a reasonable doubt that Mr [Burke] injured [the victim] and that he did so with the intention to injure her. Helpfully, the defence acknowledge that in the event that I am satisfied that the narrative presented by [the victim] that findings of fact that kicking and punching and biting did occur would be sufficient to establish the intention to injure. The nature and extent of the injuries is a matter that I will return to shortly.

[27] Finally, there is the threatening to kill charge. I must be satisfied that a threat was made and that the threat was taken seriously by [the victim]. Having seen and heard the evidence and in particular having viewed the photo booklet bearing the

heading, “Constable [name deleted],” I am satisfied that a number of injuries occurred. Firstly, to the right shoulder area of [the victim] are some grazes on the front and top part of her shoulder area. Those, she says, were bites.

[28] Secondly, [the victim] has a [details of tattoo deleted] tattoo on her [shoulder], there was a graze going across the middle area of that [tattoo] which [the victim] arose from her being manhandled, pushed and kicked down the hill area. There is a bump on her [eye] area which she says came from a punch. There is this allegation of punches to her kidney area. [The victim] refused to allow that to be photographed or in the event she did not refuse it was not photographed in any event so there is no corroborating evidence one way or the other.

[29] I am of the view that the bite was inflicted by Mr [Burke]. The marks around the front shoulder area of [the victim] have all the hallmarks of looking like a bite. She has said as much. Mr [Burke] has said it did not happen or these have been self-inflicted. The chances of a bite to the shoulder area being inflicted by [the victim] are, in my view, fanciful. It simply does not have the ring of truth to it.

[30] Mr [Burke] has said that he was going to take the children to the park, that he has gone past the park and driven to an isolated area all the while these assaults are alleged to have continued. They are consistent with the bumps, the bruises and the scrapes that are evident in the photos that have been put before the Court. I do not accept those are self-inflicted either.

[31] The story about the threat to kill which I find was made by Mr [Burke] is corroborated from the evidence of [the second witness] and from [the Sergeant], they both describe meeting [the victim] contemporaneously with this incident occurring and her being described as terrified.

[32] The injuring with intent charge, the Crown rely on that as arising from the punches to the head, the pushing to the ground and the bite to the shoulder area in the Whangarei Heads area, the male assaults female being the jab to the head area and the threat is both the singular threat, it appears in the ongoing repetition of those threats along the road.

[33] I am satisfied, as I have said, that each of those charges have been proven to a standard beyond a reasonable doubt. I am not convinced in any way, shape or form that these injuries have been caused by [the victim] inflicting them herself.

[34] Accordingly, in respect of each of the charges convictions will be entered today.

G L Davis
District Court Judge