

**IN THE DISTRICT COURT  
AT ROTORUA**

**CRI-2017-063-003066  
[2017] NZDC 28630**

**NEW ZEALAND POLICE**  
Prosecutor

v

**[HENARE PAPANI]**  
Defendant

Hearing: 14 December 2017

Appearances: Sergeant R Schreuder for the Prosecutor  
R Cavanagh for the Defendant

Judgment: 14 December 2017

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**NOTES OF JUDGE M A MacKENZIE ON SENTENCING**

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[1] Mr [Henare Papani], you appear for sentence today in relation to a total of 11 charges. In time order they are as follows. On 24 June, unlawful taking of [victim 1's] motor vehicle. On 25 June, there are three charges; intentional damage of a motor vehicle, assault on [victim 2], and resisting [a Constable]. That is what I call the first group of offences.

[2] The next group of offences are the offences which took place on 12 and 13 August. They relate to [victim 1] again. Those charges are breach of a protection order, assaulting [victim 1], and threatening behaviour.

[3] The third group of offences occurred on 21 August. Again, those offences involved [victim 1]. Those charges are threatening to kill, a Summary Offences Act

threatening language charge, breach of the protection order, and possession of cannabis.

[4] What can be said is that the thread of all the offending is your obsessive jealousy directed towards [victim 1]. There is a clear overtone of sexual jealousy and the offending all appears to be motivated for that reason. You, at various times, accused her of flirting and this appears to have manifested in this sustained campaign of intimidation towards [victim 1] over a two month period in June to August of this year. It has to be said that this is a completely over the top and unjustified response by you.

[5] Given the nature of the charges, in some respects it was difficult to pick a lead offence, because on a standalone basis, in my view, all three groups of offending could be viewed as serious. I have determined that the latter August offending, that offending which occurred on 21 August, the threat to kill and the breach of the protection order, is the lead offending because of the very serious nature of the threat and that this was offending whilst on bail and you had already earlier breached the protection order less than two weeks prior.

[6] There is no tariff case for threatening to kill. That is undoubtedly because of the wide variety of circumstances. As was noted by Justice Joe Williams in *Taylor v Police*<sup>1</sup>, there are few cases where threatening to kill is the lead offence. There are many cases however, where threatening to kill as part of a combination of offences centred around domestic conflict and there was never a truer word in terms of this case.

[7] Therefore, I am going to take, as I have said, the 21 August offending as the lead offending, but before I set starting points for that group of offending and uplifts for the totality of the offending, I will address the facts and then the aggravating factors.

[8] [Victim 1] is or has been your partner. On 24 June, you and she were involved in a dispute at an address in [location deleted]. You took the keys to her car and drove

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<sup>1</sup> *Taylor v Police* [2014] NZHC 1139.

off leaving her stranded on the side of the road. You had no permission to use it. She contacted another person to come and get her. He did so. When they were travelling on [name deleted] Road, they encountered you on [name deleted] Road near [location deleted]. You were on foot at the time. In an unprovoked manner, you lashed out at the second victim, [victim 2]. You punched the window of his vehicle causing it to smash and you reached in and punched [victim 2] twice in the face with a closed fist. You then left the area. When you were arrested, you pulled away and fought to prevent handcuffs being applied in a deliberate act to resist arrest. [Victim 2] received a black eye and a small cut and swelling to his right eye. Police seek reparation for the smashed window as well.

[9] The second group of offending is the offending on 12 and 13 August. Again, [victim 1] is the victim of this. You became angry with her and accused her of flirting with a male. You slapped [victim 1] using an open palm once to her face, and followed this up by grabbing her in a bear hug and squeezing tight. She broke free from your grasp and walked along the hallway. You followed her, grabbed her by the hair and pulled her back towards the floor. She sustained tenderness to her face and a swollen lip. The next day, you came back. That was 13 August. You were outside her address. This was uninvited and you stood outside the property near the fence. You started to shout and yell obscenities towards [victim 1]. You were so enraged about seeing another male present at the address that you started making threats to him. You were told to leave but you refused. The police arrived because they received a number of calls from concerned neighbours. You were making threatening gestures to the victim and the male.

[10] Matters reached their zenith on or about 21 August. You called [victim 1] multiple occasions. Again, this is a further and third occasion where the offending involved [victim 1]. She received 84 missed calls from you over a two day period. You called her three times. On one occasion, she answered her phone and during this conversation, you threatened to physically harm her. You said to her, "You little bitch, I am going to knock you out. I will run you over in your car." She told you to leave her alone and hung up. You continued to call her after being told not to do so. You called her again two days later using a private number. She answered her phone the first time. No-one responded and so she hung up. She answered her phone a second

time and you said, “You better fucking sleep with your eyes open, I’m gonna fucking kill you.” You told her to stay away from another person, apparently called [name deleted].

[11] The aggravating factors of the offending in the round include:

- (a) That this was a sustained campaign of intimidation towards [victim 1] over a two month period because you were obsessed and jealous about your thinking that she was interested in other men.
- (b) It involved a breach of trust, not only because there was a protection order in place which means that there must have been some physically or psychologically abusive behaviour in the first place for that order to be made, but secondly, [victim 1] is or was your intimate partner.
- (c) The threat to kill in late August came at the end of this two month period and therefore needs to be seen in its context of you having been aggressive, intimidatory, and not prepared to leave her alone when told to desist from this sort of behaviour.
- (d) That there was actual violence involved in the initial protection order breach on 12 August.
- (e) There is victim impact. There are two victim impact statements on file. The latter statement I have, dated 24 August, says that [victim 1] has been on edge with the anger you have shown. She has contemplated at that point moving towns and she is afraid at times to stay in her own home because, “I know that his family will bring him over.” It does need to be said that [victim 1] has softened her attitude to you and there have been occasions when she has contacted you, but as I have said, that is no answer to your breaches of bail, given the dynamics of family violence as articulated for example in *Ginnen v Police*<sup>2</sup> which I referred to in the EM bail decision.

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<sup>2</sup> *Ginnen v Police* [2016] NZHC 2354.

- (f) The last factor relating to the offending itself is the deliberate nature in my view, of the threat to kill. That must have been premeditated. You decided to pick up the phone. You phoned [victim 1] on multiple occasions and on two occasions, you threatened her, including a serious and direct threat to kill her. There was clearly deliberateness about that.

[12] As I have said, there is no tariff case for threatening to kill. That means that Judges must consider not only the aggravating factors that I have referred to, but also to look for comparator cases. In other cases, several factors have been identified in assisting a determination of the overall seriousness of a threat to kill. These include things such as whether the target of the threat was vulnerable, whether the threat was made directly to the victim, whether it was premeditated or impulsive, whether the threat was precise and specific, whether it involved the use of a weapon, whether the victim took the threat seriously, whether it caused the victim considerable fear or distress. Those factors were referred to in a case I have reviewed, *Saunders v Police*.<sup>3</sup>

[13] There are a number of those matters which are engaged here:

- (a) [Victim 1] was vulnerable. The reasons I have are already set out and, as I have noted, this has come at the end of a two month period of poor behaviour by you towards her.
- (b) It was made directly to [victim 1].
- (c) It is my assessment that it was premeditated, there was no impulsivity about it. It was specific. You cannot get much more specific than, “You better fucking sleep with your eyes open, I’m gonna fucking kill you,” and having regard to the 24 August victim impact statement, it certainly caused her some concern.

[14] I considered in particular two cases, *Saunders v Police* and *Taylor v Police*. In *Saunders v Police*, the starting point for the threat to kill was 10 months imprisonment. It was an indirect threat made to a third party. The starting point in *Taylor v Police*

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<sup>3</sup> *Saunders v Police* [2015] NZHC 1964.

was 18 months imprisonment. That involved a face to face direct threat in the context of what was described as minor physical violence. Having regard to the features of this threat that I have referred to and those comparator cases, in my view the threat to kill and the breach of protection order, on a totality basis, warrant a starting point of 14 months imprisonment. That needs to be uplifted by totality to take into account the other two groups of offending. Ms Cavanagh is correct that one of the aggravating factors is offending whilst on bail but that is a personal aggravating factor, as is your prior history of violence, particularly the overseas history.

[15] If I approach this on a discrete sentencing basis by considering starting points for the other two groups of offending, the end point would be too high on a totality basis. I say that because the unlawful taking of the motor vehicle and the assault on [victim 2] on a standalone basis, in my view, would justify a starting point of 10 months imprisonment, nine months for the unlawful taking and a month for the assault. The unlawful taking was of relatively short duration and that is why in my view there would be a starting point of no higher than nine months imprisonment for that.

[16] The 12 and 13 August offending, which is the breach of protection order, the assault and the threatening language, could justify a starting point in the vicinity of six months imprisonment. If I added all of those figures together, it would be an adjusted starting point of 30 months imprisonment, two and a half years. In my view that is too high, so the starting point I adopt therefore is two years imprisonment. The issue then is what uplift there should be to reflect your history of violence, particularly the overseas history and offending whilst on bail. That does need to be proportionate, so I am going to uplift that by two months, so that will be a starting point of 26 months imprisonment. I am going to take off two months for the prospects of rehabilitation which are referred to in the pre-sentence report. It is perhaps a little too late down the track, Mr [Papani], but at least you accept that now. You have got an anger problem and you are willing to engage in recommended programmes. It must be the case that you have got an anger problem or at least an anger with jealousy in terms of women because not only of this behaviour towards [victim 1], but the pre-sentence report refers to the fact that you have three protection orders against you in relation to three separate women.

[17] So from that 24 months, I give you a 25 percent credit for your guilty plea, which is six months, so that is an end sentence of 18 months.

[18] The issue fairly and squarely is then whether there is a full-time custodial sentence or whether I convert that to home detention, as urged upon me by Ms Cavanagh, and as is cautiously recommended in the pre-sentence report. That caution is well placed because the probation officer notes that it is with caution that a home detention sentence is recommended because of the concern expressed about the recent offences and contact with the victim. The driving factor in terms of the recommendation in the pre-sentence report is that you have not had the benefit of rehabilitative interventions in either New Zealand or Australia and clearly you have a significant need for rehabilitative interventions. The probation officer is realistic that a home detention sentence has its difficulties even at the address in [location deleted]. Your [sibling] has some concern as well, that you would attempt to contact the victim, should you have access to a mobile phone, and therefore conditions are recommended to address that concern, including the possibility of a whereabouts condition and not to enter [location deleted], such as your risk is considered to be. It is not surprising that you are said to be high risk of the prospect of reoffending against [victim 1]. That is evident from the nature of this offending.

[19] Ms Cavanagh submits that home detention is appropriate, given that you have got good family support. You have got a number of family members here today. The address in [location deleted] is with family; that rehabilitation is more likely to be supported by the family than if you are in prison; that this is the first time in custody whilst you have been in New Zealand and that has been a huge wakeup call for you; that the home detention address is at a distance; that the pre-sentence report proposes the appropriate limits to a home detention sentence directed towards addressing the identified risks; that you are willing to engage in programmes.

[20] The principles and purposes of sentencing here are, firstly, to hold you accountable because in any way, shape or form, whatever you thought about [victim 1's] behaviour, your actions were completely unjustified. There is a significant need for personal and general deterrence, given this degree of obsessive behaviour by you towards [victim 1]. There is a need for denunciation of this sort of domestic violence.

There is a need to promote in you a sense of responsibility because you were very much lacking any sort of sense of responsibility, given the ongoing offending towards [victim 1] and your willingness to breach your bail conditions in that regard. There is a need to protect the interests of [victim 1], whether or not she wants that degree of protection, but the Court needs to view that through an objective lens. On any objective lens, I agree with the probation officer that there is a high risk of reoffending. There is clearly a need for rehabilitation as well.

[21] Can a sentence of home detention meet those sentencing needs? This is a serious example of family violence offending. The appellate authorities do say that a home detention sentence is in and of itself a serious sentence. The line in this case falls away from a home detention sentence and towards a full-time custodial sentence. That is for the following reasons:

- (a) As I have said, this is a serious example of family violence offending towards a vulnerable victim. A serious response is required and, in my view, home detention will not adequately meet the sentencing needs I have identified.
- (b) I have carefully considered the thrust of the pre-sentence report and the need for rehabilitation. I completely agree that there is a compelling need for rehabilitation, but in my view, that can be addressed by release conditions at this particular point in time.
- (c) I am mindful that the victim is in fact at high risk of reoffending and a significant factor in terms of my view that home detention, wherever it might be, is troublesome and an inappropriate response, is that the geographical distance is not going to address one of the risks which is the fact that you can perpetrate family violence towards [victim 1] in ways other than face to face, and the threat to kill, and breach of protection order is a clear example of that when you were obsessive and stalking, phoning her approximately 84 times, intimidating her by saying you were going to knock her out and that you would run her over



in your car, and then after that, saying you were going to “fucking kill” her.

[22] I could impose a condition that you are not to have any phone, but it is naïve to think that that is easy to enforce and your breaches of bail are relevant to the assessment of whether you would be able to comply with that. Mobile phones are easy to obtain. Other electronic devices such as computers, tablets and iPads, are similarly easy to obtain and it is not simply telephonic communications that are indirect means of perpetrating further family violence. It is not rocket science to know that other forms of communication can be possible, including via social media sites. Therefore, I decline to substitute a sentence of home detention for the various reasons I have given.

[23] There is to be a full-time custodial sentence of 18 months imprisonment with release conditions and I will record that in relation to the threat to kill with separate other concurrent sentences. I could have undertaken a mixture of concurrent and cumulative sentences, but I will record 18 months imprisonment in relation to CRN ending 4133, the threat to kill. In relation to CRN ending 4131, breach of protection order of 21 August, there will be four months imprisonment. On CRN ending 4134, 21 August, possession of cannabis, one month imprisonment. On CRN ending 4132, 21 August, the Summary Offences Act charge, one month imprisonment. On CRN ending 3036, unlawful taking of the motor vehicle, six months imprisonment. On CRN ending 3037, the intentional damage of the vehicle, one month imprisonment. On CRN ending 3038, the assault on [victim 2], one month imprisonment, and the resisting police, CRN ending 3039, one month imprisonment. The 12 August offending, male assaults female, CRN ending 3941, six months imprisonment. On CRN ending 3942, the breach of the protection order, six months imprisonment and CRN ending 3944, threatening behaviour, one month imprisonment.

[24] There are to be special release conditions as per the pre-sentence report which is:

- (a) To attend and complete a drug and alcohol programme;

- (b) To complete a suitable family violence programme;
- (c) To not to communicate with [victim 1] without the prior written approval of the probation officer;
- (d) To submit to electronic monitoring in the form of GPS technology as directed by probation;
- (e) To undertake any other assessment, treatment and counselling; and
- (f) Not to enter [location deleted] as defined by the boundaries of the [location deleted] District Council during the period of those release conditions.

[25] I will not make an order for reparation, given the term of imprisonment.

M A MacKenzie  
District Court Judge