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

IN THE DISTRICT COURT
AT TAUPOTAUPO

CRI-2017-069-000981
[2018] NZDC 3287

NEW ZEALAND POLICE
Prosecutor

v

[BLAIR NGAIO]
Defendant

Hearing:	21 February 2018
Appearances:	Sergeant M McGahey for the Prosecutor D Johnston for the Defendant
Judgment:	21 February 2018

NOTES OF JUDGE M A MacKENZIE ON SENTENCING

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[1] [Blair Ngaio], you appear for sentence today in relation to three charges of contravening a protection order and a charge of escaping from custody. One charge of protection order relates to events on 21 August 2017. The two other charges of contravening the protection order and the escaping custody relate to the events of 9 September 2017. The victim in respect of the August matter is [victim 1 name deleted]. The victim of the September matter is your children.

[2] On 21 August, you were at an address with [victim 1] and your [number deleted] children. Ms Johnston tells me that you were there with the consent of [victim 1]. It is not uncommon for that to happen, but that in my view does not mitigate what followed. The two of you have been in a long-term relationship, described by Ms Johnston as "on and off." As well as your [number deleted] children, [victim 1] is pregnant with your [number deleted] child. At times you have shared the care of the

children and you have also been the sole caregiver of the children as well. You were arguing about past issues. [Victim 1] told you she was recording the conversation on her phone. Your response was to demand that she hand over the phone so that you could delete the recording.

[3] The summary of facts say that you followed her around the house demanding the phone. She said she had not made a recording and asked you to leave. As I have said, you might have been there by consent, but that consent had been revoked at that particular point in time. Instead of leaving, you grabbed [victim 1] and you began groping her body in a frenzied attempt to locate her phone. Police were called. You had left before they arrived and you sent her a number of text messages following that.

[4] Then a short period of time later on [date deleted], police made enquiries at an address. You were present along with [victim 1] and the children. Apparently, the police had come to the address as they were looking to arrest both you and [victim 1]; [victim 1] for an unspecified, unrelated matter that I know nothing about. The summary of facts says that you were told that you were under arrest. You disputed your arrest, stating, "Yeah, nah, fuck off, fuck nah." You backed away from police, positioned yourself behind [victim 1] and the two children. You turned to her and said, "I thought you fucking sorted this shit, I ain't going down, fuck." You walked into the kitchen, kicked a cupboard, breaking one of the side panels. Your [number deleted] children were regrettably directly exposed to your violent outburst and they were both left crying hysterically. You then ran out of the back door of the property evading police. You were located on [date over a fortnight later] after a warrant in lieu of summons had been issued.

[5] You have four previous convictions for contravening the protection order. That protection order relates to [victim 1]. You have, according to my calculations, having reviewed your history, seven violence related convictions. These are two convictions for behaving threateningly, a conviction for possession of an offensive weapon, three convictions for male assaults female, one in 2008 and two in 2011, and a conviction for common assault, that conviction being in 2010. The other matter of relevance from your history is the conviction for escaping a penal institution in 2002, but given that it

was 16 years ago, I do not find it to be particularly relevant for the sentencing exercise today.

[6] As well as your history and the summary of facts, I have various other documents, including the pre-sentence report, a victim impact statement written by [victim 1] dated 21 August, and a letter that you had written, telling me that your family life does not consist of violence around your children and partner, that you are a young father who prides yourself in providing a safe and stable home environment for your small family.

[7] The pre-sentence report is not as positive as your own self-assessment of your safety around your family. Apparently, you take issue with some of the matters set out in the pre-sentence report, including the fact that [victim 1] was coerced into making a statement that was factually incorrect and that you have taken the rap to get these matters resolved. You then expressed remorse for the effect of these incidents on [victim 1] and the children and recognise that you need to find different ways to deal with stressors in your relationship and that you are willing to address these matters through attendance at anger management and relationship counselling. The report writer is perhaps a little cynical about that, noting that you previously received sentences for this type of offending and been offered interventions which have had little deterrent effect on your behaviour and offending.

[8] Breaches of protection orders are always considered seriously because deterrence is an important and a significant consideration for sentencing of this type. This is particularly the case in terms of sentencing you today in view of your four previous convictions of breaching the protection order which is in place. Deterrence is an important sentencing purpose because of the need to comply with these orders and clearly you have some issues or difficulties with that.

[9] I accept that in terms of the sentencing approach, that it is appropriate to take into account your four previous convictions for breaching the protection order. It is artificial to articulate a starting point, ignoring the fact of the previous breaches, and your previous breaches, one of the aggravating factors. There is ample authority for the proposition that prior convictions for breaching a protection order should be taken

into account in adopting the starting point, including the Court of Appeal's decision of *Mitchell v R*[1] and various other authorities such as *Palmer v Police*[2], and *Crean v Police.*[3]

[10] There are a number of aggravating factors of this offending in the round, other than the prior breaches. The aggravating factors which in my view exist are the following. Firstly, the four previous breaches of contravening the protection order in favour of [victim 1]. The second aggravating factor, and a factor which I regard to be seriously aggravating is the presence of your children on both occasions. Allied to that, not a separate aggravating factor, is that they are young and it involves a breach of trust on your part for them to see you behaving in the manner that you did; firstly, on the 21 August, groping their mother in an attempt to get the phone off her and, secondly, your behaviour in front of the children which clearly traumatised them, having read the summary of facts and read that out in Court today. They saw you swearing at the police. They have seen you kick a cupboard, breaking one of the panels and you used them in a very inappropriate way by using them and [victim 1] as a shield when the police were trying to arrest you. The presence of the children therefore is a seriously aggravating feature of this.

[11] It might be at the lower end of the scale, but there was actual violence involved on 21 August, given what the summary notes, that you were groping [victim 1]'s body in a frenzied attempt to locate her phone. Ms Johnston is correct that you were not charged with male assaults female, but the use of a degree of violence is an aggravating factor of that particular incident. A further aggravating factor is also that on 21 August, I regard [victim 1] to have a degree of vulnerability, given that she was pregnant at the time when you were groping her body in that fashion. The last aggravating factor is the property damage on 9 September when you kicked the cupboard and that is a well recognised aspect of psychological harm.

[12] In an overall sense, the two incidents represent serious psychological harm, particularly to your children who do not need to see someone who has been a sole

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[1] *Mitchell v R* [2013] NZCA 583.
[2] *Palmer v Police* [2015] NZHC 143.
[3] *Crean v Police* [2015] NZHC 3203.

caregiver for them and no doubt whom they love dearly, behaving in that sort of fashion.

[13] The approach to sentencing in light of those aggravating factors and particularly having regard to the authorities which note that:

(a) There is no tariff case;

(b) That prior breaches of a protection order can be factored into the starting point; and

(c) As was noted by Justice Brewer in *Crean v Police,* Judges must go back to first principles when articulating starting points because of the variety of circumstances involved.

[14] I adopt a starting point for the breach on 21 August, the first breach, of 10 months imprisonment which is in line with *Palmer v Police* where Justice Katz was sentencing Mr Palmer for three breaches of a protection order, and I am going to uplift that by four months to reflect the two breaches of 9 September. So there is a total starting point of 14 months imprisonment in relation to the three breaches of protection order.

[15] In relation to the escaping custody, I am going to deal with you on a concurrent basis in terms of that for two reasons:

(a) I need to deal with you on a totality basis, so that the overall sentence is appropriate to reflect the totality of the offending; and

(b) It was part and parcel of the events of 9 September. The real aggravating factor of that is that you evaded detection by police for a number of days.

[16] There will be a concurrent term of imprisonment of three months in relation to the escaping custody.

[17] Should there be an uplift to reflect your other history of violence? I think so. I am clear that any uplift relates to your criminal history other than the contravening protection order. In *Palmer v Police,* it was three months. In light of your history, I am going to uplift that by two months, so that will be a starting point of 16 months imprisonment. I will give you a credit for your guilty plea of four months which is an end sentence in relation to the four charges of 12 months imprisonment.

[18] I am not going to give you any separate credit for remorse of prospects of rehabilitation. Remorse is inherent in the guilty plea. I cannot unravel the issue of whether you are genuinely remorseful. You have written a letter indicating so. You have told the probation officer that you are, but in another part of the interview, you made some statements which contradict that. You clearly need rehabilitation because I cannot say, having regard to the events of 21 August and 9 September, and your history, that in fact you do provide your family with a safe and stable home environment, because your history in reality speaks against that when you have four breaches of protection order and the seven violence related convictions that I have already referred to. I do not regard there being any other credits available to you other than for your guilty plea and in my view, any remorse is reflected in that plea.

[19] So therefore there is to be an end sentence of 12 months imprisonment and I will impose release conditions. The 12 months imprisonment will be recorded on CRN ending 1144 as I am adopting a concurrent sentencing approach and so that will be 12 months imprisonment. In relation to CRNs ending 1148 and 1149, there will be four months imprisonment and three months imprisonment in relation to CRN ending 1150.

[20] You are to be subject to the release conditions set out in the pre-sentence report which is:

(a) To undertake an assessment for a department programme as directed by a probation officer and to attend any counselling treatment programme as directed; and

(b) To attend and complete any other treatment, programme or counselling to the satisfaction of a probation officer.

M A MacKenzie
District Court Judge