

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

**NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR  
IDENTIFYING PARTICULARS, OF COMPLAINANT(S) PROHIBITED BY S  
203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR  
IDENTIFYING PARTICULARS, OF ANY COMPLAINANT(S)/ PERSON(S)  
UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS [OR  
NAMED WITNESS UNDER 18 YEARS OF AGE] PROHIBITED BY S 204  
OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE DISTRICT COURT  
AT DUNEDIN**

**CRI-2017-012-002269  
FINAL STRIKE WARNING  
[2018] NZDC 7536**

**THE QUEEN**

v

**BEN JAMES DEMPSEY**

Hearing: 18 April 2018  
Appearances: C Power for the Crown  
J Westgate for the Defendant  
Judgment: 18 April 2018

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**NOTES OF JUDGE K J PHILLIPS ON SENTENCING**

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[1] Ben James Dempsey, you are for sentencing this afternoon on a number of matters relating to incidents that occurred [in 2017]. The charges faced by you are at a level of where I must send you into a fulltime custodial sentence of a considerable period. But it also requires me to impose upon you a Second (or Final) strike warning in the terms of the relevant section of the Sentencing Act 2002. That is going to have also a major impact upon you, but overall here the impact upon your victims of your offending is also a lasting one and I have to bring that into account as well. This is not

something that we can say the impact is able to be seen today because the indecent act charge that you have pleaded guilty to and are convicted on, really is a charge which, because of the age of the children, will continue to impact upon them for many years.

[2] These four young children [in 2017], aged [under 12 years] were playing in [location deleted] where children play and where parents living in and around the area consider they are safe to be. You were riding on your bike and you saw them playing. You began to watch them. You then began to circle them as they played. You then went through to a nearby toilet block. The children were scared by your actions in relation to your riding around them. They went to go home. They had to walk past the toilet block where you were. They found that there you were in the doorway rubbing your exposed penis. This was not a great distance away from these very young children, 10 metres or so. You were waving your hand for them to come in and join you. They (being wise beyond their age or years probably) ran away. You went home.

[3] You back at home, you had just completed parole in relation to sentences of imprisonment imposed upon you. I think that the people at your home were concerned about you to the extent of where a person in your home asked hesitatingly, whether you had been at [location deleted]. You denied that you had been. Why they were concerned was because of the convictions that had been entered in September 2014 on four charges of indecent act. However, you denied having gone to [location deleted]. That person went back to work.

[4] You went to the garage at your parent's house. You used a knife to force open a door of a locked gun safe. You took out a .22 Ruger rifle. You went to a second shed and took a 10-round magazine for the rifle. You also took three boxes of .22 calibre ammunition 133 rounds. You took two 20-litre fuel containers and put them all in your car and drove off. About five to six that evening, you were at Palmerston having driven from Waimate. You went to the [Service Station]. You filled your car and the two 20 litre containers with fuel worth \$237.91. You had changed the registration plates on your car. So it was a premeditated theft. When you drove off so they could not identify your car. The police were notified. They were searching for you.

[5] At 7.22 pm you were seen driving through Milton. The police officer followed you in his patrol car talking to Comms. You reacted to seeing a patrol car following you. You had the .22 rifle on the seat beside you. You loaded and actioned the breech upon seeing the officer. A police roadblock at Essex Street, Balclutha was set up. You entered the 50 kilometre area at the north end of Balclutha. The police patrol car following you put on its lights. The police at the roadblock were unsuccessful in deploying road spikes. You accelerated heavily onto the wrong side of the road, overtaking other cars. A police pursuit followed. Lights and sirens were used. You got up to speeds of 140 kilometres plus. You made a right turn into a street where on the loose gravel you lost control, slid, and you overcorrected, crossed back onto the left-hand side of the road, and crashed into a ditch. You at that stage (apparently on your own admission) took the loaded rifle and pointed the barrel to your head and pulled the trigger. It failed to fire on two occasions. The police patrol following you pulled up some 50 metres away.

[6] The Facts Summary I have is somewhat contrary I think to what Mr Westgate was emphasising. It says to me that you then got out of the vehicle and climbed up on the road. That you then pointed the rifle at the officer. Mr Westgate's submissions to me were that "he was still in his vehicle." It would appear from the Facts Summary that might or might not be correct. It says that you got out of your vehicle, climbed up onto the road facing the officer. You pointed the rifle at him and pulled the trigger. It again failed to fire. The Facts Summary then goes on to say, "the officer reversed away at speed." What we have is you deliberately getting out of the motor vehicle. Deliberately taking the rifle with you. Deliberately pointing it at the officer. Putting the best interpretation that I can on it, "as he sat in his patrol vehicle. It was pointed at him not the car. He pulled the trigger and that the gun did not fire".

[7] You, after the officer had reversed away at speed, removed the magazine from your rifle. You actioned the bolt several times clearing the blockage. You reloaded it and you then tested it. You fired a single shot into the roadside where you were standing. By this time the police had deployed. You walked towards where they were. You walked from the crash scene towards the armed police. You walked several hundred metres along Barnego Road carrying that loaded rifle. Finally, you put the gun down on the ground and you surrendered as you were told to do. You were taken

into custody. You told the police as per these facts. You said that you knew you were in trouble for exposing yourself to the children and you wanted to get away from everyone. What does worry me as it is most concerning, is you said you had considered committing “suicide by cop” as you were walking towards the armed police with your firearm.

[8] Those are the matters that you are for sentence on in relation to charges that you face: of discharging the firearm in a public place; unlawfully carrying a firearm; dangerous driving; failing to stop; theft of rifle; theft of petrol; and then the two principle matters for sentencing, doing an indecent act in a public place; and finally the head or lead charge, using a firearm against the police.

[9] I am required in the terms of the law in relation to that head or lead charge to tell you that I note that when you were convicted on 23 November 2011 for sexual connection with a young person aged between 12 and 16 and sentenced to two years and two months’ imprisonment, you received a Stage 1 warning in terms of s 86(1)(b) Sentencing Act 2002. I am required to give you a second warning following your conviction on that head or lead charge using a firearm against an enforcement person, against s 198A(1) Crimes Act 1961. This is a serious violent offence and you are subject to that three strikes law.

[10] This is your final warning which will explain the consequences of any further serious violent convictions. Prior to your return to prison this afternoon you will be given a written notice containing a list of the serious violent offences.

- (a) If you are convicted of any serious violent offence other than murder or manslaughter, you will be sentenced to the maximum term of imprisonment for each event. That sentence will be served without parole or early release unless it would be manifestly unjust to do so.
- (b) If you are convicted of manslaughter after this warning then you will be sentenced to imprisonment for life and you must be ordered to serve at least 20 years’ imprisonment unless a Judge considers it would be

manifestly unjust to do so in which case a Judge must order you to serve a minimum of at least 10 years' imprisonment.

- (c) If you are convicted of murder after this warning then you must be sentenced to imprisonment for life. A Judge must order you to serve that sentence without parole unless it would be manifestly unjust to do so and if a Judge found it was manifestly unjust to do so then a Judge must impose a period of imprisonment no less than 20 years unless that would be manifestly unjust. A Judge in that case must sentence you to a different minimum period of imprisonment. If you are sentenced to preventative detention you must serve the maximum term of imprisonment for the most serious offence you are convicted of unless a Judge considers it would manifestly unjust to do so.

[11] I think contrary to the discussions that we have had with counsel this afternoon, your getting a second warning does not mean that when you are serving this sentence, you must serve a maximum term. As I understand it, it is if you are convicted after the warning you must be sentenced to the maximum term but I will hear from counsel on that matter shortly.

[12] So having put all those matters to you, having regard to your prior history of offending, I must then note the provisions of s 7 and 8 Sentencing Act 2002 and the other matters relevant to the length of the term of imprisonment that I have to impose.

[13] Restorative Justice here would have been a non-issue. It has not happened. I do not know really whether it was ever appropriate to refer it to Restorative Justice because that would be with your father. Quite rightly he said it would not be helpful. Secondly, any issue of Reparation in a financial way has been paid by your father.

[14] The Pre-Sentence report that I have notes that the offending occurred days from completing your parole after an earlier sentence. You say your intentions were to commit suicide. I note the amount of ammunition you took with you; the nature of the magazine and the way in which the rifle was loaded, I have doubts as to the truth about that comment. I note what you have told the probation officer that you consider

that you should be sentenced to a “therapeutic mental health” type of result today rather than prison because any intervention from prison has not met your needs. I note the strengths that you have in relation to pro-social family members. I note that you are an intelligent man with academic ability and that you have access to practical support. I have to balance all that Mr Dempsey, against the risk of your reoffending and causing harm to others because that risk is an extremely high one.

[15] You have a belief that your behaviour in relation to the indecent act is not sexually motivated and that there are other issues that need to be explored. In the end, the nature of your actions here are establish to my satisfaction that it was sexually motivated. I see at the start that your actions have had an impact upon victims. The children’s parents have each completed a Victim Impact Statement for three of the children, one being the mother of two of them. All note the effect on their children. Nightmares, bedwetting, anxiety, talking about what happened. It is clearly playing on their minds. Being scared, hesitant, unsure, clingy and behavioural issues. That is occurring to, in and around, the people that they know and love and who care for them. They have difficulties being outside of the family home, walking to school and similar such matters, that this before this had happened, was a natural thing for them. You have severely and, I think, irreparably adjusted their youth and their lives irreparably.

[16] A police officer (taking your best position) sitting in his car, sees a man who has driven in a demented way, get out of his car and point a rifle at him. He is a police officer with 23 years’ experience and has no doubt has seen a lot of things. Married himself, with teenage children. He has no physical injuries or financial costs. He has done that 23 years and never before has had a rifle pointed at him. He describes it as a daunting moment which he will never forget. Then he found out that you had pulled the trigger of the rifle which was locked and “ready to go”. It misfired but shortly after it was fired into the ground. He is now considering a career change. He is anxious about attending incidents and feeling sick with anxiety. His wife and children worry about him every time he is out at night doing his job. That impact will last upon him forever.

[17] Mr Power’s filed submissions which I have read (prepared by Mr Smith). I give credit to Mr Power for arguing the Crown position this afternoon. Authorities

that were put to those submissions that I have read. I accept where he places the indecency starting point, 15 to 18 months' imprisonment with an uplift of three to six months. He also, looking at the head or lead charge, use of a firearm, discusses the cases of *R v Taylor*<sup>1</sup>, *R v Wells*<sup>2</sup>. What is very clear in those cases is that presenting a firearm, even an unloaded firearm that any such crimes must be dealt with severely. "Deterrence is the main purpose..." said Harrison J in *Wells*. There are other such authorities, *R v Hartley*<sup>3</sup>, *R v Harris*<sup>4</sup>, and Mr Smith in his written submissions considered those cases. He considers here a starting point of 4 to 4 and a half years is appropriate because as he sees it "...You pointed the rifle and you pulled the trigger. The pulling of the trigger could be seen as an indication of intention." In relation to the other matters he considers there should be an uplift of two to three months. For the theft and the dangerous driving, three to four months. A starting point of between six to seven years. He has no argument with a guilty plea credit of 25 percent but seeks a minimum period of imprisonment for 50 percent.

[18] Mr Westgate in his written submissions on your behalf stresses totality to me. He does not argue with the starting point reached by Mr Smith in his written submission, or the uplift. He considers that in relation to that offending, overall 18 to 24 months before personal factors are taken into account is appropriate. He brings to my attention the case of *R v Kahu*<sup>5</sup>. He has discussed that with me this afternoon. That is a decision of Mallon J where she adopted a starting point of three years in a case where a man pointed a sawn-off at two police officers who walked around the corner and were confronted by him. There was no evidence before the learned High Court Judge that the firearm was loaded. Nor was there any indication on the facts of *Kahu* that the trigger was pulled. Mr Westgate says that your case is worse than *Kahu*, but needs to be kept in line with it. He submits a starting point of four years, plus four months for the dangerous driving and thefts, on top of the 18 to 24 months on indecency. Six years, three months with 30 percent credit of the 25 percent for guilty plea, five percent for remorse, plus an allowance for totality; an end point of three

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<sup>1</sup> *R v Taylor* CA 470/88, 9 May 1989 (CA)

<sup>2</sup> *R v Wells* HC Auckland CRI-2003-092-026964, 30 April 2004

<sup>3</sup> *R v Hartley* [2012] NZHC 2124

<sup>4</sup> *R v Harris* [2008] NZCA 214

<sup>5</sup> *R v Kahu* [2017] NZHC 983

years, 11 months' imprisonment. 50 percent minimum period of imprisonment is not argued.

[19] I have read a number of authorities in relation to sentencing. I think *Kahu* is not in line with most of the authorities that I have read. It is an indication that the decision was made by Mallon J on the basis on the facts as she saw them. I take that into account.

[20] I must consider that we have the use of a weapon and I note that the Victim Impact Statements describe the harm that has resulted. I note that all of the victims were vulnerable. I consider your acts in the [location deleted] when you had your penis exposed, was a premeditated act. You would have known the children would have had to go out that way. Your acts in relation to the police officer were clearly premeditated. I take into account your history, particularly in relation to matters of committing the crime of indecent act, they are aggravating factors in terms of s 9.

[21] When I have regard to mitigating factors. I note your guilty plea. I accept what Mr Westgate says that there is some degree of remorse, but in my view, it is limited. I think it is appropriate that when I couple that with the mental health issues that are mentioned in the report, that a five percent credit would be allowed.

[22] In the end Mr Dempsey, I have regard to the indecency. The indecent acts in relation to the four children who should have been able to play in [location deleted] and should be able to continue to do so; the impact on the children; you were just off parole; premeditated and calculated acts; the starting point for all that I consider to be 18 months' imprisonment. I must bring into account your past convictions of a similar kind. I consider that it is appropriate in relation to those matters as you continue to offend in this way, and you dispute that they actually are matters that relate to sexual actions on your part. I consider a five-month uplift is appropriate. The starting point before credits for that charge is 23 months' imprisonment.

[23] In relation to Using a Firearm to Resist Arrest. The gun was loaded, cocked and ready to fire. You got out of your vehicle purposely with the firearm. You pointed the firearm, not waving the firearm in a general direction as suggested by Mr Westgate.



You pulled the trigger. As I have already said, intention can be inferred. The gun malfunctioned and did not fire. I have considered the authorities put to me by both sides. I consider when I have regard to all of that, that the starting point on that charge should be four years and three months' imprisonment.

[24] In relation to uplifts for the other offending, I consider that in relation to the Arms Act 2000 matters, there should be a further two months. In relation to the dangerous driving, a further two months. In relation to the theft, two months. I reach a total starting point of six years and eight months' imprisonment.

[25] As I have said, I have regard to your mental health issue (although there has been no request for any form of assessment) I give you what credit I can for that, and post-action remorse of five percent, or four months to 76 months. I allow a full credit for your guilty plea which would bring the overall point to 58 months, four years and 10 months. I consider that I should then look back at it overall and consider your offending "in the round" allowing for totality. I consider in all the circumstances that pertain here, that it is appropriate that you should go to prison for a total of four years and six months and I am sentencing you on the basis of on Charge 3 to a term of imprisonment, four years and six months. On the charge relating to discharging a firearm in a public place, Charge 2, you are sent to prison for two months. On Charge 3 you have the second-strike warning, a term of imprisonment of four years and six months. I make an order for the forfeiture and destruction of the seized firearm and ammunition. On the charge of unlawfully carrying a firearm you are sent to prison for three months. On the charge of dangerous driving, you are sent to prison for two months and disqualified from holding or obtaining a driver's licence for a period of one year. That is from today. On Charge 6, you are convicted and discharged. On Charge 7, the theft of a rifle, you are sent to prison for two months. On Charge 8, imprisonment for two months. On the charge of doing an indecent act which I understand is Charge 9, one year and two months. All those terms are concurrent, are counts in relation to the minimum period of imprisonment.

[26] Mr Dempsey, having heard what I have said thus far, I also have to consider in the terms of s 86 Sentencing Act 2002 as to whether I should impose a Minimum Period of Imprisonment. To do that I have to be satisfied that parole at one third of

your overall end sentence would be insufficient to hold you accountable to denounce the conduct; to deter you; and to protect the community from you. I have regard to all of this offending. Mr Smith would describe your indecency as recidivism. A fifth conviction of a like kind within a reasonably short period would give support to that submission. I also see here that you acted in a manner then following where you placed a number of people at high risk. You drove in a manner in Balclutha where other road users were placed in danger. After having had an accident you then got out of your motor vehicle. You deliberately pointed a firearm which you knew was loaded at a police officer in a patrol vehicle. You pulled the trigger. The harm that you have done is clearly detailed in the Victim Impact Statements. It is serious and to a large degree, irreparable. That type of conduct, you using a firearm in the way you were, was then exacerbated, in my view, by you proceeding to have a loaded firearm that you knew would then discharge because you had tested it previously, walking towards a police officer, thinking about "suicide by cop". In my view, there needs to be a very strong element of community protection. I remind myself what Harrison J, the Judge in *Wells* said, "Deterrence is the aim of the sentence." In my view, when I have regards to that and those factors, for you to be eligible for parole after serving one third of your sentence would be entirely inappropriate.

[27] The Crown seeks a 50 percent Minimum Period of Imprisonment. That overlooked the first warning that had already been given. In the terms of the law as it has been explained to me by very learned counsel that are in front of me, I must indicate why I was going to impose a minimum of imprisonment and what I consider that period would be. Mr Smith who wrote the submission for the grant is an experienced counsel. He suggested 50 percent and I did not really see that there was a major argument being taken with that. Mr Westgate indicating on your behalf as to a minimum period overall, albeit that he was saying there should not be any at all. Accordingly, I indicate that if I was going to impose a minimum period of imprisonment it would have been 50 percent. However, because of where you are at and the first warning that was given to you, you must serve the four years and six months without parole or early release.

K J Phillips  
District Court Judge