IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2008-044-009465
[2016] NZHC 1041

THE QUEEN

v

MARTIN VICTOR LYTTELTON

Hearing:	18 May 2016
Appearances:	S McColgan for the Crown Defendant in person M Gibson as amicus curiae
Judgment:	18 May 2016

SENTENCING NOTES OF ASHER J

Solicitors:
Crown Solicitor, Auckland.
M Gibson, Auckland.

Copy to: Defendant

[1] Mr Lyttelton, you appear for sentence today having been convicted of three counts; first of attempted murder, second, of causing grievous bodily harm with intent to injure; and third, aggravated burglary. The maximum sentences for attempted murder and aggravated burglary are 14 years' imprisonment, and for causing grievous bodily harm with intent to injure, seven years' imprisonment.

[2] This is the second time you have been sentenced for this offending. You originally pleaded guilty to these charges and were sentenced by Wylie J on 31 March 2010 to a term of imprisonment of five years and 11 months.[1] The breakdown was a sentence of five years and 11 months for the attempted murder, four years and six months for causing grievous bodily harm, and three years for the aggravated burglary. You served that sentence entirely, being given parole after three years and two months, which was just over half the sentence. You were then released on parole and you completed the parole period.

[3] Some years after you were convicted and sentenced, you appealed the convictions. Your appeal was allowed by the Court of Appeal.[2] It was allowed on the basis that there was one possible defence available to you. The Court said of you that at the time of the offending you were "so affected by a combination of mental illness and drugs that [you] may have lacked the specific intent that the charges required".[3] The Court of Appeal did not find the defence strong,[4] but could not exclude it and ordered a retrial. I presided over that retrial which took place before a jury, and the convictions were the result.

[4] I approach the exercise of sentencing you afresh. It is a principle of sentencing that it is desirable that there should be a general consistency of sentencing so I have and will on occasion refer to Wylie J's decision. However, I take the view that it is my obligation to reach my own conclusions about the facts, your culpability and mitigating factors.

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1 *R v Lyttelton* HC Auckland CRI-2008-044-9465, 31 March 2010.
2 *Lyttelton v R* [2014] NZCA 638.
3 At [82].
4 At [87].

[5] Before I turn to the facts I record that I have had very extensive submissions from you, Mr Lyttelton, on matters of fact. As I have recorded in my ruling earlier today, you have in the end sought a disputed facts hearing and made a very considerable number of detailed submissions about the facts broadly, and about specific matters.

[6] I have read all your submissions and I have considered them. I will not, however, be in this sentencing going through your detailed submissions, or indeed the Crown's responses such as they are. This is because I have heard all the evidence. In particular, I have heard from Mr Ord and Ms Fenton and you, who were the three persons present during the offending, and the available health professionals, and feel able to make findings of fact about which I am sure. It is not the normal practice in sentencing to examine facts too minutely, and I do not propose departing from that usual practice. In the end a Judge must understand and take into account all the detail of the facts of the offending, but in reaching a conclusion on culpability must not lose their broad perspective. All the various matters are assessed and weighed.

The facts

[7] So turning to the facts. I record, as I have in my earlier ruling, that I have accepted aspects of your evidence at the trial, Mr Lyttelton, as you will see as I go through the facts, and it can be observed that on the broad sequence of events as they unfolded at the Ord home on the day of the crimes, there are not major differences between you and Mr Ord. However, there are some differences in matters of detail, and certainly a great difference between how each of you appear to interpret the events.

[8] Insofar as there are differences between what Mr Ord says happened and what you say happened, I prefer the evidence of Mr Ord. It is my assessment, consistent with the jury verdicts, that the jury found Mr Ord a credible and reliable witness and accepted his version of events. I am bound to do the same given their finding, but I would also record that it is my own assessment that he was an entirely truthful and accurate witness. There may have been some small differences between

what he originally recounted and what he ultimately said in his evidence, but that is understandable in the circumstances. I consider his account of what happened when he gave evidence in the witness box at the trial to be truthful and correct.

[9] So going back to the start of all this. It began when you entered into a business relationship with Mr Ord in the early 1990s. That relationship, which involved amongst other things the construction of some significant health facilities, seems to have been successful. You had a good working relationship. However, in about 2000 it started to sour badly. You fell out and extensive litigation followed. There were arbitrations. There were court hearings. There were at least two Court of Appeal hearings. By early 2008 you had become depressed and preoccupied with your dispute. You were taking the view that Mr Ord had ruined your life. Indeed, as I will explain later, by the time of these events you were suffering from a serious mental illness.

[10] Two days before the events in question, which took place on 10 April 2008, you purchased a .410 single action shotgun, two boxes of ammunition and a skinning knife. The shotgun, which could take only a single shotgun cartridge, had to be broken open, then the cartridge had to be manually inserted, it then had to be shut, and finally manually cocked. Only then when these steps had been taken could it be fired.

[11] The knife had a blade of approximately 10 centimetres. It was a wide strong blade and came to a very sharp point at the end. Needless to say both the gun and the knife were well able to inflict a fatal wound.

[12] On the same day after you had purchased these items you met a friend for coffee. You told your friend that you were feeling suicidal. The friend took you to a doctor who prescribed an antidepressant, Paroxetine, and Zopiclone sleeping pills. The sleeping pills were not to be taken with alcohol. That night you went home. You wrote a suicide note. You then consumed 14 Zopiclone and six Paroxetine tablets. You also consumed a considerable quantity of wine. You went to bed expecting to die. This was a genuine suicide attempt.

[13] The following morning your wife tried to wake you. You were later visited by the same friend who had been with you the day before. Unsurprisingly given what you had consumed, you were groggy and unable to converse or function. You largely slept through that day and the next night. You finally came to when you were woken by your wife at about 7 am on Thursday, 10 April 2008.

[14] At about 9.15 am that morning you left home taking in your car the shotgun, the full box of cartridges and the skinning knife. You told your wife that you were going to clear the mail and do some errands. It was your evidence at the trial, which I accept, that you went to the Auckland Domain, apparently intending to commit suicide there. You went down to a private part of the domain, but once you were there you changed your mind. It was at this fateful point that the events immediately leading to the offending began. You decided to drive to Mr Ord's residence in Browns Bay on the North Shore. You drove to his home. You found the front door and garage to be open. Mr Ord and his partner Ms Fenton were upstairs at the time.

[15] You proceeded to take the shotgun, six cartridges and the knife you had just purchased. You entered the house. Having done so you proceeded to walk slowly up the stairs holding the shotgun. At this stage, given the events that followed, the shotgun was clearly loaded and able to be fired, although I am not certain whether it would have been cocked at that point. Ms Fenton became aware that someone had entered the house, and looking down into the stairwell. She could see you coming up. You did not see her. She quietly and immediately explained to Mr Ord that you were there and they both went into the office, which was above the stairs on that higher floor, and shut the door. The office contained a computer and was used by them for office work. Ms Fenton was positioned near the door handle holding the door to resist entry. Mr Ord was also near the door but further into the room, and rang 111.

[16] When you got to the top of the stairs it seems that you walked around through some rooms before deciding that Mr Ord must be inside the office. There is opaque glass for part of the wall and shadowy shapes can be seen on the inside of the room from the outside hallway. You proceeded to try and open the door by turning the door handle but found that there was resistance and you could not do so.

[17] At this point you took the shotgun and fired a shot from it through the door. The shotgun had either been cocked at an earlier time, or was cocked immediately before you fired that shot. The shot punched a considerable hole through the door in a position some inches below the door handle. It hit Ms Fenton, blowing a major hole in her thigh and significantly damaging her femoral artery. She fell to the floor, bleeding profusely. You then, standing by the door in the hallway, proceeded to reload the shotgun. It is clear from what followed that you successfully reloaded the shotgun and cocked it.

[18] In the meantime Mr Ord decided that he would not stand there and wait for you, and he opened the door and you fell together and a struggle commenced. You stumbled into the room. There was grappling to control the gun. A shot went off hitting the wall. You and Mr Ord proceeded to wrestle and came out of the room and into the area above the stairs, and then partly smashing through the balustrade, fell or tumbled down the stairs into the front entrance area. Mr Ord throughout managed to keep a grip on the gun. The position arose whereby you were being held by him against the doorframe and wall, and he was directly behind you pinning you there. You both had a grip on the gun. You were both at a physical impasse.

[19] At that point, you reached down into your right trouser pocket letting go of the gun. You pulled out the skinning knife. Using a stabbing movement going around your front, stabbing backwards, you directed three or four stab thrusts towards Mr Ord's stomach area. The thrusts missed Mr Ord but he described them going closely past his side. The struggle then turned into a struggle to control the knife. Mr Ord suffered a number of cuts to his hands. Eventually you stopped struggling as Mr Ord held you and you relinquished the knife. During the struggle and the following conversations you told Mr Ord that he had ruined your life. When the fight ended and you stopped struggling you said you had to leave now.

[20] Mr Ord received several cuts to his left hand and a deep laceration of 20 – 30 millimetres in length to his right forefinger. Ms Fenton received significant damage to her leg, which I will refer to shortly.

[21] Ms Fenton was in a critical condition and losing large amounts of blood. Fortunately a medical team arrived promptly. Her condition was too serious for her to be moved, so they stabilised her bleeding on the spot. Her injuries were life threatening. Both she and Mr Ord were taken to hospital by ambulance. Ms Fenton there underwent emergency surgery.

The victims

[22] I have victim impact reports from Mr Ord and Ms Fenton. They have been updated for the purpose of this hearing. Mr Ord, in addition to the cuts, suffered a damaged ulna nerve to his left elbow. He has suffered numbness in his left hand and a loss of strength. The other main physical injury that he sustained was that following the second shotgun blast where the gun was close to his head, his eardrums have suffered damaged, in that he is now subjected to a continuous ringing in his ears. It is intrusive and something that he is resigned to enduring for the rest of his life. It is a constant reminder of what happened.

[23] In his victim impact report he recounts the emotional harm he and Ms Fenton have suffered. Plainly their lives have been greatly changed. They are, because of Ms Fenton's injuries that I will discuss specifically in a moment, unable to lead the sort of life they led prior to your attack. They are worried about security and have taken extensive security measures in their home. They remain unsettled and anxious. They have found the ongoing litigation concerning you most difficult to deal with and a constant reminder of the events. A particular loss has been that they have both loved hiking around New Zealand and because of Ms Fenton's injuries they can no longer do that. Mr Ord makes the point that although you have expressed remorse during the retrial at no stage have you expressed remorse directly to him or Ms Fenton.

[24] Ms Fenton has of course suffered the same general consequences, but her terrible injuries do require specific mention. The effect of the shotgun blast was to put a very large hole in her left thigh. In addition to the immediate horror that she suffered, she is left with a number of ongoing problems. There are still shotgun pellets in her body that cannot be removed. There are clips that have been put in

place to clamp off veins from where the artery was shot away. She has had to have extensive plastic surgery and is still left with major scarring. The plastic surgery in itself has been extremely painful and traumatic. She is unable to walk as she used to. Her leg is permanently weakened. There is no improvement that can be seen in the foreseeable future.

[25] I note that you have repaid insurance company losses that resulted from the damage caused by the incident. Mr Ord and Ms Fenton have not sought any reparation, and indeed expressly do not wish it.

The starting point

[26] Mr Lyttelton, when I sentence you I apply a methodology that has been set out by our Court of Appeal in *R v Taueki*.[5] I first make an assessment of your culpability examining the offending carried out by you. I then turn to aggravating or mitigating factors that relate to you personally.

[27] So my first task is to assess the culpability of your offending in relation to the three charges.

[28] The most serious charge is the attempted murder charge in terms of the potential penalty and the gravity of the offence. There is no guideline judgment on how to sentence for attempted murder, as there is in relation to some other offending.

[29] Now I will be mentioning the effect of drugs and alcohol on you later when I deal with factors relating to you personally. I do, however, record that the events in question must be seen against the backdrop of your consumption of drugs and your depressive condition. This is relevant in particular in relation to assessing premeditation.

[30] In assessing your culpability, as I have already said, you genuinely had tried to commit suicide two days earlier and you still had suicide on your mind at least at

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5 *R v Taueki* [2005] 3 NZLR 372. This has been applied in setting the culpability for attempted murder charges in many cases: see for example, *R v Walker* [2015] NZHC 3214 at [40], *Marsters v R* [2011] NZCA 505 at [17], *R v Yu* [2015] NZHC 89.

the start of the day. After you left home something triggered in you a decision that you would go to Mr Ord's place to kill him, and I record, as is consistent with the jury verdict, that the explanation you gave at trial that you went to Mr Ord's house to commit suicide in front of him and not to kill him was rejected by the jury and is not accepted by me. That is not to say that after you had killed Mr Ord you did not possibly have in mind your own suicide. However, the conclusion consistent with the jury verdicts is that you went there to kill Mr Ord.

[31] I do not see premeditation as a significant aggravating factor in assessing your culpability. That is because I have accepted that the decision was made after you left your home that morning. To be sure, you did drive quite some distance to get to the Ord home, but I also accept that you were at the time in a confused state. So I do not find premeditation to be a specific aggravating factor. I do find, however, that when you got out of your car and proceeded up the stairs your intention was to find Mr Ord and to shoot him. When you fired the bullet into the door you intended to shoot someone.

[32] You were in effect attempting to murder Mr Ord from the time you entered that house. It is of course possible to break down particular instances of your conduct, for instance the shot in the door or the second shot that was fired, but it would be a mistake in my view to spend too much time on trying to assess whether any particular action was intended to fatally wound Mr Ord. The fact is that you were there to kill him and all your actions were in pursuit of that goal.

[33] So although the second shot might have been accidental, I find that you reloaded the shotgun and cocked it when you were outside the door, after having fired the first shot, with the intention of shooting Mr Ord with that cartridge. You were thwarted from doing so when Mr Ord came out to grapple with you. Mr Ord was trying to stop you shooting him, that was why he was grappling with you. You wanted control of the gun so you could shoot him.

[34] When you realised that you could not achieve that because of the way you were being held, you deliberately pulled out the knife. This was a knife, which although only about 10 centimetres long, had a very sharp point and was a strong

blade. When thrust into someone's torso it could easily inflict a fatal wound. Mr Ord was standing directly behind you as you stabbed at him, and I accept his evidence that the blade went close by his side.

[35] You have endeavoured to demonstrate to me that could not be so and it was physically impossible. It is my assessment that it was fully possible for you to stab him and that was what you had in mind. You could have easily through a turning motion of your body have achieved a trajectory whereby the knife had contact with him. Of course it did not do so, and that is why you are not facing a more serious charge, but the fact is you were attempting to kill him in any way you could through that struggle.

[36] I note your submission that your actions were reactive and automatic. Insofar as that submission is intended to persuade me that you were not acting with the overall intention of killing Mr Ord, I reject that submission. Indeed, to accept it would be inconsistent with the jury verdict.

[37] So what aggravating factors if any should be identified? First there was a significant degree of actual violence. Second, there was the use of two weapons, a shotgun and a knife. Third, and significantly, there was a home invasion – you entered Mr Ord's home without his permission with the intention of shooting him. Fourth, there is the persistency of the attack. It continued for quite some minutes. By the time you stopped struggling both you and Mr Ord must have been entirely exhausted.

[38] So what then is the appropriate starting point? The maximum sentence is 14 years' imprisonment. I consider briefly examples of a particularly serious and a particularly minor set of hypothetical attempted murder facts. A very serious attempted murder would be one that was premeditated over a long period, and one where there was very serious harm inflicted on the victim. Those are not features of what you did. A much less serious type of attempted murder at the bottom end of the scale would have been a spontaneous action, say a stabbing, where no harm at all was inflicted. Clearly you are not in that category either.

[39] Although it is in a way distasteful to try and categorise serious offending of this type, I would categorise your offending as being at a moderate level. I consider that the appropriate starting point is therefore eight years' imprisonment for the attempted murder.

[40] I turn to the causing grievous bodily harm with intent to injure charge. In my view, Mr Lyttelton, you were lucky not to be charged with a more serious violence offence in relation to what you did to Ms Fenton. The maximum sentence is seven years' imprisonment. In assessing your culpability on this, the dominating feature is the terrible injury that you inflicted on Ms Fenton and her severe and ongoing suffering as a consequence.

[41] In my view this is a very serious example of causing grievous bodily harm with intent to injure. Bearing in mind that the maximum term of imprisonment available is seven years' imprisonment I would, in the ordinary course of events, if this was a stand alone charge, have fixed a sentence of at least five years' imprisonment for that offending.

[42] I do not place any particular sentencing weight on the third charge of aggravated burglary, given that I have already taken the home invasion into account when assessing your culpability of the attempted murder and grievous bodily harm charges.

[43] If I just applied an arithmetical calculation the starting point that I would fix would be 13 years' imprisonment. However, the Sentencing Act requires Judges to take into account the totality principle.[6] Cumulative sentences should not be out of proportion to the gravity of the overall offending. Cumulative sentences should not be disproportionately long. Taking into account the totality principle it is my assessment that the correct starting point is in the area of 11 years' imprisonment.

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6 Sentencing Act 2002, s 85.

Personal matters

[44] I turn to matters relating to you personally, this is the second stage of the sentencing process. As I have said there are no aggravating factors in the sense that you do not have a bad criminal record, or any history of violence. So I turn to the mitigating factors in your favour. There are two and they are both closely linked.

[45] At the time of your offending you were suffering from a major depressive illness. This has been attested to by numerous reports from a large number of psychiatrists.[7] It was not such a depressive illness so as to mean you were unable to plead, and it was not such a depressive illness so as to mean that you were able to invoke the defence of insanity, but it was severe and it is appropriately taken into account in the sentencing process. Indeed a Court is required to do so under s 9 of the Sentencing Act 2002.

[46] Coupled with this was your very considerable consumption of drugs on the night of your attempted suicide. I accept that the effects of those drugs were still with you. I have taken into account the very detailed submissions that you have made about the effect of drugs on you, and the shorter submissions by the Crown. I am not going to define the level of influence of drugs on you with any more precision than I have already done. Suffice to say that you were still affected by the drugs you had taken and it is a mitigating factor to be seen in combination with your depressive illness.

[47] In my view a deduction of 30 per cent for that illness and the effect of drugs on you is appropriate. I accept that when you committed the offences you were suffering from what has been referred to by the experts as suicidal ideation and a major depressive episode. You were still affected by the overdose.

[48] I also take into account your lack of previous convictions and the evidence of good character that has been referred to on earlier occasions, although not in a specific way by you in this sentencing. You had no relevant prior convictions, or any

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[7] Specifically, Dr Goodwin, Dr Dean and Dr Menkes gave evidence at trial. Other reports on Mr Lyttelton's mental state by Professor Mullen and Dr McCormick were made available to the jury on an admitted basis.

convictions for criminal misconduct. Plainly you are a man who has been successful in business. Plainly also you are greatly loved and valued by your family. I note they have loyally stood by you and that your wife and daughter gave evidence in your support at trial. I will allow a further five per cent discount to take into account your good record up to the offending.

Discount for guilty plea and remorse

[49] Plainly what I will not do is give you any discount for a guilty plea. Nor will I give you any discount for remorse. You have on occasions expressed regret at the physical and mental damage suffered by Mr Ord and Ms Fenton. But there has not been a fulsome and unconditional acceptance of fault by you, or expressions of sadness at the damage you have caused. No deduction is appropriate. Indeed, your defence at the trial and much of your submissions on sentencing have contained within them considerable elements of self-justification.[8] I do not penalise you for that, but I make the point to explain why there will be no discount for remorse.

[50] Indeed, I remain concerned given the strength of your opinions as expressed by you in this sentencing process, for instance, your allegation that Mr Ord committed perjury. There are indications that you have still not got over your feelings of anger and resentment which led to your original offending.

Conclusion

[51] So what is the end effect of this? The end effect is that I have fixed a starting point of 11 years' imprisonment as the overall sentence, discounted by a total of 35 per cent, and making some allowances in your favour, I have decided that the appropriate end sentence will be seven years' imprisonment. This is 13 months more than the sentence imposed upon you by Wylie J.

[52] While I have reached my sentencing decision independent of that Judge's decision, I have nevertheless noted it. My process of reasoning has been different from him, but I have had the benefit of actually hearing the evidence and seeing the

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[8] This is despite Mr Lyttelton saying at the conclusion of the trial, in response to a question about conditions of bail applying "They do, and I'm perfectly happy – I've had the proper fair trial that I wanted – I'm perfectly happy".

persons involved. Inevitably I will have developed slightly different perspectives than those developed by him. However, in the end there is little difference between us in our overall assessment of the right sentence. The difference is in the guilty plea discount.

[53] So Mr Lyttelton could you stand up please.

[54] Mr Lyttelton for your offending I impose the following terms of imprisonment: For the attempted murder you are sentenced to seven years' imprisonment. On the causing grievous bodily harm with intent to injure charge, you are sentenced to five years' imprisonment, that term of imprisonment be concurrent. On the aggravated burglary charge you are sentenced to a term of imprisonment of three years, that term also to be served concurrently.

[55] I anticipate that in due course the Parole Board will take into account the term of imprisonment you have already served.

[56] There are now no suppression orders in place in the High Court.

[57] Mr Lyttelton you may stand down.

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Asher J