IN THE HIGH COURT OF NEW ZEALAND
WHANGANUI REGISTRY

CRI-2015-483-19
[2015] NZHC 2691

BETWEEN	RONALD HOUGH Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 14 October 2015

Appearances: D M Goodlet for Appellant
N A Refoy-Butler for Respondent

Judgment: 30 October 2015

JUDGMENT OF CLARK J

I direct that the delivery time of this judgment is 4.20 pm on the 30th day of October 2015

Introduction

[1] Following a Judge-alone trial in the District Court in Whanganui Mr Ronald Hough was convicted of the theft of 10 heads of cattle.[1] On each of the 10 charges the District Court Judge sentenced Mr Hough to one month imprisonment, the terms being cumulative. In addition to the sentence of 10 months imprisonment on the theft charges Mr Hough was sentenced to one month imprisonment for threatening behaviour, a charge to which he had pleaded guilty. That term of imprisonment was to be served concurrently with the 10 month term of imprisonment for theft.

[2] Mr Hough appeals his convictions for theft and the sentence of 10 months imprisonment.

Factual background

[3] Since 1947 John Churton has leased two small farm blocks of Māori owned land near the Whanganui River in the Jerusalem area. Mr Churton does not live on the blocks.

[4] Mr Churton's leased land is next to a family farm operated by the Aorangi Whānau Trust (the Trust). The Trust was established by Mr Hough's family. There are three trustees: Mr Hough's wife, his oldest son and oldest daughter. Mr Hough described his role in the Trust as being to "coordinate mostly all the sale of the stock" but he did not have a "hands on" role in the farm itself. Mr Hough lived on the farm.

[5] On 18 December 2012, Mr Churton received a phone call from a neighbour and friend of some 30 years. The neighbour had been moving his sheep on the road when a transport truck stopped. Because he was inquisitive, the neighbour checked the load and saw approximately 10 cattle. He spoke to the truck driver and established the cattle were being driven to the sale yards. The neighbour, being aware that Mr Churton had been losing cattle, contacted Mr Churton to suggest he might like to visit the sale yards to check the cattle were not his.

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1 *New Zealand Police v Hough* [2015] NZDC 7699 (the judgment).

[6] The next morning, Mr Churton went to the Stratford sale yards with his farm worker Brendon White. He located the 10 cattle in pens awaiting sale which he recognised as his. In fact three of the cows were not strictly Mr Churton's. He had given two cows to his farm worker, Mr White, but they continued to graze on Mr Churton's land. The third cow was a pet cow called Chocolate. The cow had been given to a friend some eight years earlier but also was being grazed on Mr Churton's block. The cow had distinctive markings, was particularly friendly and came to Mr Churton when he called her by name.

[7] With the assistance of the police the cattle were seized, withdrawn from sale and returned to Mr Churton.

[8] The 10 cattle bore National Animal Identification and Tracing (NAIT) tags identifying them as belonging to the Aorangi Whanau Trust.

[9] Mr Hough was charged under s 219(1)(b) of the Crimes Act 1961:

> (1) Theft or stealing is the act of, –
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> …
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> (b) dishonestly and without claim of right, using or dealing with any property with intent to deprive any owner permanently of that property or of any interest in that property after obtaining possession of, or control over, the property in whatever manner.
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> …

[10] Mr Hough accepted that he arranged for the transportation of the cattle from the farm on which he lived to the sale yards. He maintained that he did not know the cattle belonged to Mr Churton when he arranged for them to be transported for sale. His position was that he believed the cattle were owned by the Trust.

The District Court

[11] In the District Court there were essentially two issues. The Crown needed to prove ownership of the cattle and it needed to prove that Mr Hough knew the cattle did not belong to him or the Trust.

[12] It was accepted by the defence that the pet cow was owned by Mr Churton's friend and that Mr Churton was grazing it on his block along with the other cows that were transported to the sale yards.

[13] As to the remaining cows, the evidence records Mr Hough's concession under cross-examination that "maybe they weren't" his or the Trust's cows.

[14] The Judge accepted Mr Churton's evidence that, prior to their theft, the cattle all had NAIT tags identifying them as belonging to Mr Churton.

[15] The Judge concluded that the prosecution had proved beyond reasonable doubt that all the cattle taken to the sale yards were in the possession and control of Mr Churton; that he owned seven, his friend owned Chocolate and the remaining two were owned by Mr White.

[16] The Judge then turned to the next issue which he framed as follows:[2]

> Whether Ronald Hough knew that the cattle did not belong to the Aorangi Whanau Trust at the time he arranged the transportation.

[17] Notwithstanding the concession as to ownership of the pet cow, Mr Hough was unable to offer any explanation as to how it, or the other 10 cows, came to bear NAIT tags identifying them as belonging to the Trust. His evidence was that he did not see the cattle on the truck and he had no knowledge of the cattle beyond what he had been told by family members just before he arranged the sale of the cattle with the sale yards.

[18] Mr Hough's evidence contrasted markedly with the evidence of Mr Churton who was able to describe each cow in quite elaborate detail because of his close association with the cattle, many of which had been bred by him.

[19] In assessing Mr Hough's assertion that he had no previous knowledge of the cattle prior to their transportation to the Stratford sale yards the Judge considered Mr Hough's evidence that:

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2 At [4].

(a) he had no direct involvement in the day-to-day running of the farm;

(b) he worked in Whanganui during the week on various ventures sometimes staying overnight; and

(c) the information he passed to the stock agent when arranging the sale of stock would have been provided to him by his son or daughter.

[20] As to the third point none of Mr Hough's family gave evidence.

[21] The Judge also considered the following evidence and factors were relevant to his assessment of Mr Hough's assertion that he had no previous knowledge of the cattle prior to their transportation to the sale yards.

(a) Mr Sutton, a stock agent, gave evidence of dealings with Mr Hough over a 20 year period. Typically they would discuss the values of different age groups of various stock then Mr Hough would decide what would be sent up to the sale. Mr Hough would provide the stock agent with details of the breed, age and whether they were bulls, steers or heifers.

(b) A TB technician for Asure Quality tested the Trust's herd in February 2013. His evidence was that "Ronald Hough" was listed as the herd owner on Asure Quality's database and that he had tested Mr Hough's cattle for about 30 years. The Judge considered the evidence to be consistent with the stock agent's evidence that Mr Hough would provide him with details of the available stock such as their breed, their age and whether they were bulls, steers or heifers.

(c) That Mr Hough was listed as the herd owner in relation to TB testing carried out on 7 February 2012 was consistent with the stock agent's evidence.

(d) Mr Hough's video interview with police in March 2013 displayed his working knowledge of the Trust's stock breeds and their age ranges.

This contrasted with his evidence in court to the effect he had no real knowledge of the cattle on his farm.

(e) In the video interview Mr Hough claimed the 10 cattle concerned came from his stock and that they had been there all the time. The Judge referred to this particular evidence and Mr Hough's description of some of the cattle being calves they reared and some being old cows as being in marked contrast to his evidence in court that he had no direct knowledge of the cattle concerned.[3]

(f) As well, during the video interview Mr Hough claimed the block farmed by Mr Churton was some 10 kilometres from where Mr Hough lived. Under cross-examination Mr Hough was forced to concede the distance was about one kilometre. The Judge said of this evidence that Mr Hough had: [4]

> no convincing explanation for this glaring disparity, which suggests a clumsy attempt to exculpate himself.

(g) The farm operated by the Trust was "small by any standards". In February 2012 21 cattle were tested for TB. In February 2013 41 cattle were tested. The Judge noted:[5]

> The small size of the Trust's herd casts doubt on Mr Hough's claim that he was unfamiliar with the cattle.

(h) Finally, Mr Hough had been asked about the cow, Chocolate, on 20 December 2012 when questioned by Constable Erwood. The judgment records his evidence and the Judge's view of it:[6]

> When asked about the cow Chocolate he acknowledged that he had been aware of that cow as he answered "You couldn't get near the damn thing, man". He went on to describe it as being black with horns and skitterish. This contrasts with the evidence of Mr Churton, Dr Faumui and Constable Erwood

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3 At [18](d)(iii).
4 At [18](d)(ii).
5 At [18](d)(iv).
6 At [18](d)(v).

> that Chocolate has brown and white markings, no horns, and was extremely friendly.

The Judge regarded Mr Hough's evidence about Chocolate as "complete nonsense, and another example of his clumsy manoeuvring to avoid responsibility".[7]

[22] The Judge rejected Mr Hough's evidence that he had no knowledge that the cattle were not the Trust's at the time he arranged their transportation to the Stratford sales. The Judge found the prosecution had proved beyond reasonable doubt that the cattle belonged to, or were in the control of, Mr Churton and that Mr Hough knew the cattle belonged to Mr Churton at the time he arranged for their transportation to the sale yards and that by doing so he was taking possession and control over those cattle.

[23] The Judge further concluded the prosecution had established beyond reasonable doubt that Mr Hough intended to sell the cattle and apply the proceeds to the Trust and so permanently deprive the lawful owners of their cattle.

The appeal against conviction

[24] The thrust of the appeal against conviction is that there was inadequate evidence to establish the mental element of the offending: that Mr Hough knew the cattle did not belong to the Trust.

[25] Ms Goodlet, counsel for Mr Hough, also submitted that the Court did not adequately remind itself of the lies and tripartite directive. Ms Goodlet submitted that the Judge's rejection of the appellant's evidence merely left a gap or vacuum and rejection of Mr Hough's evidence does not establish his knowledge of the stolen cattle. If he was disbelieved the Judge should have appreciated that Mr Hough could have been lying for some reason other than that he was guilty, for example, to protect someone else. Because it can be dealt with shortly I deal with this submission before turning to the other grounds of appeal.

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7 At [18](d)(v).

The tripartite direction requirement

[26] What is known as the "tripartite direction" is sometimes given to a jury in respect of evidence which a defendant has given or called and when it is desirable that the jury be directed of the alternative conclusions available with respect to such evidence.

[27] There was no obligation to refer specifically in the judgment to the analysis that underlies the tripartite direction.

Lies warning

[28] Section 124 of the Evidence Act 2006 provides for judicial warnings about lies. Essentially, where a Judge considers a jury may place undue weight on evidence of a defendant's lie, thereby drawing inferences that are not warranted, the Judge is to warn the jury that people lie for reasons other than guilt and it should not be immediately concluded that a defendant's lie equates to guilt.

[29] In this case the Judge was not using lies as a plank in his reasoning. Rather, by finding that Mr Hough had no convincing explanation for some disparities in his evidence, and by doubting or rejecting other evidence, the Judge was making credibility findings.

[30] Accordingly s 124 of the Evidence Act is not engaged.

Did Mr Hough know the cattle did not belong to the Trust?

[31] Mr Goodlet submitted the Judge should have put to one side the appellant's evidence and then looked at the prosecution case in its entirety to see whether there was any other evidence which could establish the state of the appellant's knowledge.

[32] Ms Goodlet is correct to emphasise that the burden was on the prosecution to prove beyond reasonable doubt that the appellant knew the cattle he was arranging to sell did not belong to him. But it is incorrect to suggest that all of the appellant's evidence should have been put to one side. Even though some elements of

Mr Hough's evidence were not accepted because the Judge did not find him credible, other aspects can be relied upon, for example, admissions he arranged for the cattle to be taken to the sale yards and sold and that the pet cow was not his.

[33] In order to be satisfied that the prosecution had discharged that onus the Judge was entitled to assess all of the evidence bearing on the appellant's knowledge. That evidence included the appellant's own evidence of his state of knowledge. The Judge rejected this evidence for reasons which he set out in some detail. The appellant's denial of knowledge of his herd was, in the Judge's view, not credible in light of a body of other evidence which demonstrated the appellant did in fact have a good working knowledge of his herd.

[34] Ms Goodlet challenged as "incorrect" the Judge's conclusion that the stock agent's evidence contradicted Mr Hough's. The stock agent's evidence was that typically Mr Hough would provide him with information as to breeds, ages and whether the cattle were bulls, steers, or heifers. They would typically discuss the values of the different age groups of the various stock.

[35] Ms Goodlet submitted that this was not the case however with respect to the conversation in December 2012 concerning the sale of the 10 heads of cattle. She submitted that the notes of evidence show that in relation to that conversation "those specifics were not advanced".

[36] I have examined the notes of evidence and in particular the passages on which Ms Goodlet relies for this submission. The stock agent was asked in cross-examination if he could recall the detail of the discussion with Mr Hough in December 2012 (almost three years earlier). He said that from memory it was that there would be a mix of cattle and there would be about 10 to 12. It was put to him that he and Mr Hough would discuss the values of stock and then Mr Hough would decide what he was going to send up to the sale. The stock agent agreed and added: "it was just a normal conversation".

[37] While, as Ms Goodlet observes, the stock agent did not expressly say that he and Mr Hough discussed specifics of breed, age and so on during the December 2012 conversation, he did say it was their normal conversation.

[38] The stock agent clearly impressed the Judge as a straightforward, matter of fact, and "thoroughly independent" witness. On the basis of the stock agent's evidence, and the evidence overall, the Judge was entitled to reach the view that his evidence of the typical conversations he had with Mr Hough when arranging the sale of stock contradicted Mr Hough's evidence that he did not have a detailed discussion in relation to the transaction in question beyond describing them as cows.

[39] More to the point, as the Judge noted, the stock agent's evidence was independent evidence of Mr Hough as the person who not only arranged the sale and purchase of stock but who had a working knowledge of the types of stock and was the decision-maker in relation to the types and numbers of stock being made available for sale.

[40] The Judge rejected Mr Hough's evidence that he had no knowledge the cattle were not the Trusts at the time he arranged their transportation to the Stratford sale yards.

Outcome of conviction appeal

[41] Mr Hough's asserted belief in the Trust's ownership of the stock he arranged to sell was advanced in reliance on two essential planks:

(a) that the information he passed onto the stock agent about the cattle he was arranging to sell came from his family; and

(b) his lack of involvement in the day-to-day running of the farm and lack of knowledge of the stock itself.

[42] As to the first plank, Mr Hough's evidence stood alone. The Judge rejected it in light of all other evidence he heard.

[43] As to the second plank, the Judge rejected Mr Hough's evidence that he had no knowledge of the stock he was selling beyond that they were cows. The factors relevant to the Judge's assessment of Mr Hough's asserted belief are set out in [21] above.

[44] In addition to those matters Mr Hough's concession under cross-examination that "maybe they weren't" his or the Trust's cows, while not referred to in the judgment, is relevant to Mr Hough's asserted belief that he had authority to sell the 10 cattle.

[45] Ultimately, the ownership of Chocolate was conceded. Yet Mr Hough could offer no explanation as to how Chocolate happened to be included in the 10 cattle transported for sale nor how it came to bear an NAIT tag identifying it as belonging to the Trust.

[46] The Judge expressed his finding that Mr Hough had guilty knowledge as the prosecution having proved beyond reasonable doubt that Mr Hough knew the cattle belonged to Mr Churton. In fact, the proper inquiry was the more limited inquiry as to whether Mr Hough knew the cattle were not the Trust's. Nothing turns on the point however.

[47] Once it was established the cows were not Mr Hough's but were tagged as if they were, in the absence of credible explanations as to how they were incorrectly tagged and as to Mr Hough's lack of knowledge about the stock he was sending to the yard, a finding of guilt was inevitable.

[48] The appeal against conviction is dismissed.

Sentence appeal

[49] The Judge imposed a sentence of 10 months imprisonment to be served concurrently with a sentence of one month for the threatening behaviour charge to which Mr Hough had pleaded guilty.[8]

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[8] *New Zealand Police v Hough* [2015] NZDC 15156.

[50] Mr Hough has historical criminal convictions from 1989 through to 2000. Eleven were for receiving stolen property. The two most recent were for offending in 2000 for which he received a sentence of non-residential periodic detention. In considering the pre-sentencing report and numerous character references the Judge noted the regard and respect in which Mr Hough is held in the community.

[51] Mr Hough was assessed as having a low risk of re-offending particularly given the length of time since his last conviction. The Police position was that a sentence of community detention and community work would be adequate.

[52] As against those factors the Judge noted Mr Hough's lack of remorse for the offending and that he continued to maintain some of the cattle were his to sell. The Judge considered that, and Mr Hough's obstinate and defiant attitude at trial, did him no credit at all.

[53] The theft of stock was, the Judge said, "a very serious offence". The crime of theft of stock from a rural property was often easy to commit and equally often it was difficult to identify the offender.

[54] The Judge also placed weight on the victim impact statement of Mr Churton, now aged 83 years, and the enormous stress and anxiety caused to him and shared by his wife who had recently passed away. Mr Churton described the incident of threatening behaviour to which Mr Hough pleaded guilty as leaving him feeling unsafe on his own farm which is isolated and has no cell phone coverage.

[55] In considering the principles of sentencing and, in particular the statutory obligation to impose the least restrictive outcome appropriate in the circumstances, the Judge considered the option of home detention with community work.

[56] The Judge dealt with the evidence of Mr Hough's good character in this way:

> While he does carry out good work in the community, this has to be seen against his considerable previous history of dishonesty offending and accordingly there will be no discount for good character.

[57] In light of the absence of remorse, the seriousness of the offending in terms of its premeditation and the targeting of a neighbouring farmer, the negative impact on Mr Churton, the need to adequately denounce Mr Hough's conduct and the importance of a sufficient element of deterrence, the Judge ultimately considered only a sentence of imprisonment would adequately meet the sentencing principles he had identified.

[58] The Judge observed that, apart from the value of the cattle, the High Court decision in *Long v Police*, involving a rural neighbour who stole bulls with a combined value of $16,875, had a marked similarity to the present case.[9] The High Court in *Long* accepted a starting point of 18 months was stern but within the range available and dismissed the appeal against the sentence of 12 months which had been imposed.

[59] In this case the Judge considered a starting point of 10 months imprisonment to be appropriate, comprising one months imprisonment for each of the 10 cows stolen. Given that Mr Hough continued to minimise his responsibility for the offending and expressed no remorse, the Judge saw no justification for a reduction below that starting point.

[60] Ms Goodlet submitted on appeal that the Judge had not fully considered the purpose of the sentencing principles. She identified matters in the victim impact statement that should not have been attributed to Mr Hough, for example, Mrs Churton's illness and the number of cattle which Mr Churton had lost over the years. These matters, she submitted, should not have gone before the Judge.

[61] Ms Goodlet emphasised the distinguishing features of *Long* (beyond the value of the cattle).

[62] First, the maximum term of imprisonment available for Mr Long's offending was seven years. Secondly, Mr Long was clearly the principal offender and there had been evidence that it was he who had cut and removed the ear tags from the

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9 *Long v Police* HC New Plymouth CRI-2009-443-8, 6 March 2009.

cattle. Thirdly, nine years had elapsed since Mr Long last offended whereas in Mr Hough's case it has been some 15 years.

[63] Ms Goodlet also referred to the fact that Mr Churton had not even been aware the cattle were missing and that they were returned within 24 hours of locating them at Stratford. As well, characterising Mr Hough's offending as "very serious" was neither accurate nor fair.

[64] Furthermore, Ms Goodlet submitted, the description of Mr Hough "operating" and "being involved" in the community misrepresented his real role as a leader in the community. Mr Hough's references were "spectacular" and the Judge had given insufficient weight to these and other mitigating factors.

[65] Section 250 of the Criminal Procedure Act 2011 requires a first appeal court to allow a sentence appeal if satisfied that, for any reason, there is an error in the sentence and a different sentence should be imposed. It is not for the appeal court to embark upon a fresh sentencing exercise for the purpose of substituting its own opinion for that of the sentencing Judge. It is necessary to find some error which vitiates the exercise of the original sentencing discretion and the court on appeal should not interfere unless error is found.[10]

[66] There are two aspects of the Judge's approach that, together, give rise to error.

[67] First, the Judge placed undue weight on what he characterised as Mr Hough's "considerable previous history of dishonesty offending" while paying virtually no regard to the evidence of Mr Hough's good character and his active leadership role in the community.

[68] The proper approach to be taken to the time which has elapsed since offending is addressed by the authors of *Adams*:[11]

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10 *R v Shipton* [2007] 2 NZLR 218 (CA) at [138].

11 *Adams on Criminal Law – Sentencing* (online looseleaf ed, Brookers) at [SA9.15].

Time elapsed between present offending and previous convictions

> The length of time that has elapsed since the last conviction will affect the weight to be given to previous offending. Where the previous offending was many years earlier and has since been followed by a reasonably constructive lifestyle, previous convictions may be given little weight or even disregarded: *Henry v Police* HC Rotorua CRI-2010-463-58, 31 August 2010; *R v Wilson* HC Invercargill CRI-2008-017-483, 31 March 2009; *R v Williams* CA190/90, 16 October 1990. For example, in *Carruth v R* [2013] NZCA 296, a single relevant conviction that was relatively insignificant and aged did not provide a proper basis for an uplift. The lapse of time since the last offending will be of particular relevance where the previous offending occurred in the offender's youth, or in cases of driving with an excess breath or blood alcohol level: see *Clotworthy v Police* (2003) 20 CRNZ 439, at [20].

[69] Mr Hough's many referees spoke of him as a hard-working man who serves on local committees. They described him as a well-respected kaumātua of the school community and the "hub of Jerusalem".

[70] Although he did not expressly say so, the Judge would have been entitled to view the evidence of Mr Hough's "good character" as offset somewhat by his threatening behaviour towards Mr Churton for which he was convicted.

[71] Even so, the length of time that had elapsed since Mr Hough's last conviction for dishonesty offending was substantial. That offending was prominent in the Judge's reasoning and should not have weighed so unfavourably in the balancing exercise. To that extent the Judge's approach was erroneous.

[72] Secondly, the way in which the Judge arrived at the starting point was unusual. Although the theft of the 10 cattle was the result of a single act the starting point was fixed by reference to the way in which the charges had been laid. There were ten charges, one for each head of cattle. By contrast *Long* involved only one charge although 11 bulls had been stolen.[12] The manner in which charges are brought is, of course, a matter for the prosecution. But in this case the way the charges came before the District Count enabled the Judge essentially to view each charge as a separate offence and led, in my view to a starting point that was too high in all the circumstances.

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[12] *Long v Police*, above n 9, at [1].

[73] Those circumstances include the value of the stolen property. At the prosecution's request the Judge amended the charges so that Mr Hough became liable under s 223(d) of the Crimes Act 1961 rather than s 223(c). Section 223(d) attracts a maximum term of imprisonment of three months if the value of the property stolen does not exceed $500. The provision does not have the effect of determining the value of the stolen property. There was no evidence in this case at all as to the value of the cows. Their value may have approached $500 a cow, or the cows may have had little monetary value at all.

[74] By approaching the sentencing exercise on a "per cow" basis and by unduly emphasising convictions which were at least 15 years old the outcome was a starting point that was too high. The result was a sentence that is manifestly excessive.

[75] I consider six months imprisonment is a proper starting point.

[76] I also consider it is appropriate to recognise the contribution which Mr Hough has made, and continues to make, to his community over the many years since his last relevant conviction for dishonesty offending. The six month starting point should be discounted by one month to reflect this.

[77] The result is an overall sentence of five months imprisonment.

Result

[78] The appeal against conviction is dismissed.

[79] I allow Mr Hough's sentence appeal. The sentence of ten months imprisonment is quashed and an overall sentence of five months imprisonment is substituted. That sentence comprises the following:

(a) On the charges for theft of the five cows covered by:

(i) CRN 13083002111;

(ii) CRN 13083002112;

(iii) CRN 13083002113;

(iv) CRN 13083002114;

(v) CRN 13083002115 —

a sentence of one month for each charge, to be served cumulatively.

(b) On the charges for theft of the remaining five cows covered by:

(i) CRN 13083002116;

(ii) CRN 13083002117;

(iii) CRN 13083002122;

(iv) CRN 13083002123;

(v) CRN 13083002124 —

a sentence of one month imprisonment for each charge to be served concurrently with the above.

[80] The sentence of one month imposed for the threatening behaviour charge is to be served concurrently with the new sentence of five months imprisonment.

"Karen Clark J"

Solicitors:
Debbie Goodlet, Whanganui for appellant.
Crown Solicitor, Whanganui for respondent.