IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI 2016-485-15
CRI 2016-485-16
[2016] NZHC 1775

BETWEEN	PHILLIP DEAN TAUEKI Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 21 June 2016

Counsel: Appellant in Person
E FitzHerbert for Respondent

Judgment: 2 August 2016

JUDGMENT OF SIMON FRANCE J

Introduction

[1] Mr Taueki was convicted in the District Court of assault using a weapon (his motor vehicle) and assault. He was sentenced to six months' home detention. He appeals both conviction and sentence.[1]

[2] The victim was a member of the Horowhenua Rowing Club who had arrived at the club rooms on his bike. Mr Taueki has long been in dispute with the rowing club over its occupancy of the buildings and the manner in which they use the lake. CCTV evidence shows the victim, on his bike, approached by Mr Taueki in his car. There is a brief discussion before Mr Taueki reverses forcefully and drives forward straight at the victim who leaps out of the way. A clearly agitated Mr Taueki then leaves his vehicle and approaches the direction where the victim has leapt to. CCTV

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1 *New Zealand Police v Taueki* [2016] NZDC 1059 (conviction) and [2016] NZDC 7245 (sentence).

footage ends. The allegation is that Mr Taueki then grabbed the victim around the throat.

[3] In order to understand the complaints about the trial, it is necessary to understand that Mr Taueki's connection to Lake Horowhenua, and what status and powers he enjoys in relation to it, have been the subject of much dispute and litigation. Some of that history is reviewed in a Supreme Court decision considering another incident between Mr Taueki and rowers. In that proceeding two convictions for assault were confirmed.[2] Mr Taueki was denied a defence of defence of property (Crimes Act 1961, s 56) because, amongst other reasons, he was held not to be in peaceable possession of the area in front of the clubhouse where the assaults occurred.

[4] Mr Taueki, who acted for himself in the present proceeding, made it clear he wished to introduce much of this history into the present trial by way of cross-examination, and perhaps his own evidence. The District Court confined the matter to the events of the day. There is no ruling on this, but it seems clear that is what occurred. The record indicates that the Judge was unaware of the Supreme Court decision when so limiting the case. However, the Judge had read it prior to delivering verdicts, and considered it was supportive of the limits he had imposed.

[5] Mr Taueki submits these limits were wrong, and hindered him in his defence. He makes similar complaints about a second thread of his defence, namely what he says was an inadequate police investigation. Mr Taueki wished to explore the history between him and investigating officers with a view to showing bias. Part of that bias is said to flow from the refusal of the police to accept decisions that show Mr Taueki has the rights which he asserts over the land and lake.

[6] The relevance of the land dispute would be to possible defences such as s 56 of the Crimes Act 1961. A difficulty for Mr Taueki is that when he gave evidence he did not provide a factual narrative that could support such a defence. Rather, he said he did not aim his vehicle at the victim, did not intend to make contact with him and

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2 *Taueki v R* [2013] NZSC 146. One conviction was confirmed in the Supreme Court. Another was confirmed in the Court of Appeal – [2012] NZCA 428 – and leave to appeal was declined.

did not in fact make contact with him. In relation to the second charge he said he was acting in self-defence because the victim "shaped up" to him when Mr Taueki approached.

[7] The land dispute and prior events between Mr Taueki and the rowers are irrelevant to his explanation of his conduct. For neither charge is Mr Taueki giving an explanation that is sourced in his alleged control or guardianship role. That may be why he approached the victim, but thereafter liability turns on the specifics of the incident. Did he drive his vehicle at the victim, and was he acting in defence of himself when he put his hands around the victim's throat?

[8] It is therefore unnecessary to consider the correctness of the limits imposed by the Judge on the land issue evidence. Without a formal ruling it is difficult to comment, but at the time it was made the Judge did not know what Mr Taueki would say in evidence. It is likely therefore that the ruling was at least premature, and probably wrong at the time it was made. Mr Taueki also says that as a lay litigant he was thrown off his stride because he was prepared to run the case a particular way. He became flustered when he was prevented from doing that, and so did not do his case justice. On appeal it is difficult to assess that claim other than to observe the record on its face does not disclose these problems. More important, however, is that the prohibited evidence was irrelevant and inadmissible given Mr Taueki's evidence. Its exclusion cannot be a source of an unfair trial.

[9] Likewise, Mr Taueki cannot contend his own evidence reflects the defence he was allowed to run. If he was driving at the victim deliberately, but in defence of his property, Mr Taueki needed to say that when he testified on oath. If he put his hands around the victim's neck in order to evict, that is what needed to be said. However, it was not his evidence, and the convictions must be assessed against the testimony he gave.

[10] In relation to the charge of driving at the victim, I am satisfied the history of the land dispute between Mr Taueki and the rowing club was not relevant. Mr Taueki denied he drove at the man, and that was the factual issue. Further, it is

conduct that could not possibly have been protected by the defence of property in the present circumstances, such was its disproportionate dangerousness.

[11] The assault incident is conceptually different. It is possible that Mr Taueki's perception of what might occur when he approached the victim and saw the victim square up to him could be coloured by Mr Taueki's past experiences with the victim. It would be wrong to exclude evidence relevant to that. However, Mr Taueki did not give any evidence to that effect – he referenced his alleged self-defence only to the victim's posture at that specific time. I am not aware of other history between them that might have coloured Mr Taueki's perception.

[12] In making these assessments, I have taken account of the fact that there is a vagueness to the limits imposed on Mr Taueki by the Judge. Mr Taueki is a lay litigant and so could genuinely be uncertain or confused about what evidence he might lead. However, I have not been pointed to any evidence of past conduct directly between him and the victim that might have been led but for this confusion. Accordingly, I conclude that the uncertainty of the limits on the evidence that might be led of the past history between Mr Taueki and the rowing club has not occasioned a miscarriage.

[13] The second related issue concerns the investigation of the offence and the allegation of bias. Mr Taueki draws support for this ground of appeal from an earlier successful appeal in relation to other charges arising from a previous incident. There Mackenzie J had identified unsatisfactory features of the investigation, including the fact that a police officer complainant in one of the two incidents had also conducted the investigation.[3]

[14] Mr Taueki has laid complaints about the conduct of local police in relation to him. He is dissatisfied with the response he has received to these complaints, and believes the relevant police officers should have been stood down pending resolution of his complaints. The two police officers who gave evidence in the present trial are officers who have had previous involvement with Mr Taueki and concerning whom he has made complaints.

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3 *Taueki v New Zealand Police* [2012] NZHC 3598.

[15] The trial Judge limited Mr Taueki when he attempted in cross-examination of the first officer to explore the past history. Mr Taueki was, however, able to question this officer, and the next one, about the adequacy of their investigation. He was concerned about their lack of effort including failing to take photos and measurements. Mr Taueki believes that these measurements would show his vehicle did not come as close to the victim as claimed.

[16] My assessment is that the restriction on Mr Taueki went too far, and Mr Taueki should have been able to further explore the contention of actual bias. However, the context was that the evidence of the police officers was of peripheral relevance. The key evidence was from the participants, and other observers. Mr Taueki's core proposition that there may have been evidence favourable to him that was not discovered because of a poor investigation did emerge through his questioning. It was only the alleged motives for this inadequacy that were cut off, and they are of little relevance to his liability.

[17] I am not satisfied the poor investigation, as Mr Taueki would have it, caused a miscarriage. Photos of the victim would not advance things as it is not alleged he was injured. The measurements have still not been obtained so there is no basis to say they show anything. Mr Taueki says the conditions of his bail prevented him from taking the measurements himself. That may have been so initially, but there has been ample time for them to be obtained. I appreciate Mr Taueki is a lay litigant who may not have understood how to make arrangements to obtain access. However, the reality is there are no measurements and the Court cannot speculate on what they might show. Further, as it happens there is CCTV footage which overcomes any deficit (and no doubt is the reason for a lack of other investigative action).

[18] The next challenge is to the credibility of certain witnesses, and of their evidence. There were two separate sources of "independent" observers. (I put independent in inverted commas to recognise Mr Taueki's submission that many are far from that.)

[19] The two groups of observers were first a woman already on site, and second a group of people in a van approaching the site. The bulk of Mr Taueki's challenge is to the van witnesses who all have connections to the rowing club. The challenge involves two aspects – their recollection of the sequence of events, and in particular when their vehicle arrived relative to the incident; and the ability of these witnesses to see what they say they saw from where they would have been positioned.

[20] As regards the first point, it is clear some of the witnesses were in error as to the timing of events. CCTV footage establishes the correct sequence of the arrival of vehicles. (The other independent witness also got this wrong.) Mr Taueki contends the common error about sequence is explicable only by a conspiracy to lie.

[21] The Judge recognised the error but did not draw this conclusion of a conspiracy to lie, seeing it instead as a mistake. I do not see any reason to differ. It is an error on an issue concerning which errors are not uncommon – the sequence of events can often be hard to recall. Further, it is irrelevant when exactly the van arrived. The sequence as disclosed by the CCTV makes it plain what happened in regard to the movement of Mr Taueki's vehicle.

[22] Mr Taueki claims the CCTV footage is misleading as it compresses the distances and makes everything seem closer than it is. It is here that the claimed inadequate investigation bites because Mr Taueki submits proper measurements would show there was more distance than appears on the CCTV footage. I have commented on the measurements issue, but in reality there is no risk the CCTV footage is misleading. It is crystal clear and the message it conveys is beyond dispute. An agitated Mr Taueki drove directly at the victim in a very dangerous manner. The victim was fortunate to avoid serious injury.

[23] The lack of credibility of Mr Taueki's version of the driving incident is also relevant to resolution of what is a straight conflict in evidence as to what occurred with the assault. It was common ground Mr Taueki grabbed the man's throat. Why he did so was the issue. Although the victim admitted he shaped up, he made it clear that he did so only after Mr Taueki approached him. It was open to the Judge to find

this charge proved, and Mr Taueki has not satisfied me the Judge was in error to do so.

[24] In summary, the decision of the District Court at the outset to prevent Mr Taueki from exploring the past history was an error at the point in time at which it was made. It would also have been preferable for the Court to articulate more clearly what the scope of the ruling was, especially given Mr Taueki was acting for himself. However on appeal I now have the advantage of knowing the scope of Mr Taueki's evidence. His description of events made the historical issues irrelevant. Proper resolution of the charges lay in an analysis of the events on the day, and in that regard the Judge made no error and drew somewhat inevitable conclusions.

[25] The appeal against conviction is accordingly dismissed.

[26] I turn then to the sentence appeal. The Judge took a starting point of 12 months' imprisonment for the two assaults. There was no uplift for numerous previous convictions, nor discount for the context in which the offending occurred. However, the latter was seen to support the conversion of the sentence from imprisonment to home detention.

[27] Mr Taueki is 56 years of age. He has numerous previous convictions, including several recent assault convictions stemming from the same context. However, he has only ever been sentenced to fines or community work.

[28] The issue as I see it is whether the nature of the conduct necessitated an immediate transition to imprisonment as the base response, albeit one then adjusted to home detention. There is no doubt that assault with a weapon is a much more serious offence than those committed during Mr Taueki's previous confrontations. It had the potential to cause significant injury, but fortunately it did not in this case.

[29] I consider that a starting point of imprisonment was an available response. The offence carries a maximum penalty of five years' imprisonment, and accelerating in a car at a person is dangerous. The short distance involved here

meant Mr Taueki's speed was such that the victim was able to leap out of the way, but had he moved more slowly, the outcome may have been very different.

[30] However, the second assault seems very much at the lower end of the scale, and together, a term of 12 months' imprisonment, given the absence of actual harm, is excessive. I consider half of that to be the most available.

[31] The issues of aggravation and mitigation largely balance each other out. There is no doubt Mr Taueki feels committed to his cause and has a legitimate role in relation to the general precinct. However, the victim was only going to enter a building. There is a total disproportion between that, and a response of driving a car at him. The reality is that Mr Taueki has a level of anger about the whole matter that on this occasion led to an excessive and dangerous reaction. It was a significant step up from previous incidents, which had also led to recent convictions. Mr Taueki was fortunate to avoid an uplift that reflected this continuing pattern of offending.

[32] That said, I am satisfied the purposes of sentencing could have been met on this occasion by a sentence of community detention. A sentence involving a restriction on liberty was definitely required to bring home to Mr Taueki that he needed to modify his conduct, or more severe consequences were looming. However, community detention, the least restrictive of this type of sentence, suffices to deliver that message.

[33] On appeal Mr Taueki has stressed the impact on his work of home detention. He is heavily involved in court or tribunal hearings involving Lake Horowhenua, and his ability to prepare and attend is significantly impaired by a home detention sentence. Although there is a temptation to bridle at the proposition a sentence should be changed because an offender finds it inconvenient, I am satisfied there is a public interest in this work that should be accommodated to the extent circumstances allow. The key such circumstance here is that the victim was not hurt, and that allows an element of flexibility that would otherwise be absent. It is also relevant that community detention is itself a significant step up from previous sentences, and so carries with it a real deterrent aspect.

[34] The sentence appeal is allowed. The sentence of home detention is quashed. The full term available for community detention is appropriate. Mr Taueki served a short period on home detention prior to being granted bail pending appeal, and I will make a modest adjustment for that.

[35] In place of home detention I impose a sentence of five months and two weeks' community detention. The relevant address is that approved for home detention.

[36] The curfew period is 7 pm to 6 am, seven days a week.

[37] The sentence is to commence three working days after the release of this judgment. Mr Taueki is to report to Community Corrections in Levin within 24 hours of the release of this judgment.

Simon France J.

Simon France J