IN THE DISTRICT COURT
AT WHANGAREI

CRI-2017-088-003604
[2018] NZDC 14972

THE QUEEN

v

ISAIAH NOEL ALLEN

Hearing: 12 July 2018

Appearances: R Annandale for the Crown
J Day for the Defendant

Judgment: 27 July 2018

RESERVED JUDGMENT OF JUDGE D G HARVEY

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[1] On 12 July 2018 the defendant appeared for sentence on two charges; namely injuring with intent to injure and commission of a crime with a firearm. These are serious offences made the more so by the Crown's submission to me that this is a second strike offence.

[2] There is no doubt that on 23 October 2015 the defendant was sentenced on one charge of aggravated robbery. As that is a strike offence His Honour Judge de Ridder gave the defendant a first strike warning. That warning was in standard form and included was the advice to the defendant that he would be given a copy of the warning. The Judge did not say that the copy would also include a list of the serious violent offences, but that is not mandatory. Whenever a person is given the written notice setting out the consequences if the offender is convicted of any serious violent offence committed after the warning under subs (1)(a), a list of the serious violent offences is included.

[3] It is accepted that no such written warning was given to the defendant.

[4] Mr Day appeared for the defendant. He accepted that an oral first strike warning was given and whilst accepting that a record of that warning was created by the sentencing notes, argues that by itself that does not complete the three-step process that is contemplated by s 86B. Mr Day submits to me that the Court must give the offender a written notice setting out the consequences upon conviction of a further serious violent offence.

[5] In effect, it is submitted that for the Court to find that a written notice is not required to perfect the first strike warning would mean that the provisions of subs (4) are otiose and can safely be ignored.

[6] The Crown submit that the requirements of s 86B(1)-(3) have been met and accordingly the first warning has been validly given.

[7] The Crown submits that the meaning given to a "record" of a first warning is not contingent on the delivery of a written notice under subs (4) notwithstanding the mandatory language of subs (4) – "must". The Crown submits that this stands to one side of the definitional requirements of "record of (a first warning)".

Discussion

[8] Neither counsel are able to point me to any previous decision on point.

[9] The starting point must be that as this is a criminal statute the consequences to the defendant are significant, and therefore the statutory interpretation rules demand that the statute is construed strictly.

[10] Section 5 of the Interpretation Act 1999 provides:

> **5 Ascertaining meaning of legislation**
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[11] It is clear from this section that ascertaining the meaning of an enactment requires consideration of both text and purpose.

[12] The Sentencing and Parole Reform Act 2010 inserted ss 86A to 86I and the heading "Additional consequences for repeated serious violent offending" after s 86 of the Sentencing Act 2002.

[13] The purpose of the Sentencing and Parole Reform Act 2010 is as follows:

> **3 Purpose**
>
> The purpose of this Act is to—
>
> (a) deny parole to certain repeat offenders and to offenders guilty of the worst murders:
>
> (b) impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences.

[14] To establish the meaning of this section its text must be examined and its purpose kept firmly in mind.

[15] For the sake of completeness I set out both s 86A and 86B:

> **86A Interpretation**
>
> In this section and in sections 86B to 86I, unless the context otherwise requires,—
>
> **record of final warning**, in relation to an offender, means a record of a warning that the offender has under section 86C(3) or 86E(8)
>
> **record of first warning**, in relation to an offender, means a record of a warning that the offender has under section 86B(3)
>
> **serious violent offence** means an offence against any of the following provisions of the Crimes Act 1961:
>
> (1) section 128B (sexual violation):
>
> (2) section 129 (attempted sexual violation and assault with intent to commit sexual violation):

(3) section 129A(1) (sexual connection with consent induced by threat):

(4) section 131(1) (sexual connection with dependent family member under 18 years):

(5) section 131(2) (attempted sexual connection with dependent family member under 18 years):

(6) section 132(1) (sexual connection with child):

(7) section 132(2) (attempted sexual connection with child):

(8) section 132(3) (indecent act on child):

(9) section 134(1) (sexual connection with young person):

(10) section 134(2) (attempted sexual connection with young person):

(11) section 134(3) (indecent act on young person):

(12) section 135 (indecent assault):

(13) section 138(1) (exploitative sexual connection with person with significant impairment):

(14) section 138(2) (attempted exploitative sexual connection with person with significant impairment):

(15) section 142A (compelling indecent act with animal):

(16) section 144A (sexual conduct with children and young people outside New Zealand):

(17) section 172 (murder):

(18) section 173 (attempted murder):

(19) section 174 (counselling or attempting to procure murder):

(20) section 175 (conspiracy to murder):

(21) section 177 (manslaughter):

(22) section 188(1) (wounding with intent to cause grievous bodily harm):

(23) section 188(2) (wounding with intent to injure):

(24) section 189(1) (injuring with intent to cause grievous bodily harm):

(25) section 191(1) (aggravated wounding):

(26) section 191(2) (aggravated injury):

(27) section 198(1) (discharging firearm or doing dangerous act with intent to do grievous bodily harm):

(28) section 198(2) (discharging firearm or doing dangerous act with intent to injure):

(29) section 198A(1) (using firearm against law enforcement officer, etc):

(30) section 198A(2) (using firearm with intent to resist arrest or detention):

(31) section 198B (commission of crime with firearm):

(32) section 200(1) (poisoning with intent to cause grievous bodily harm):

(33) section 201 (infecting with disease):

(34) section 208 (abduction for purposes of marriage or sexual connection):

(35) section 209 (kidnapping):

(36) section 232(1) (aggravated burglary):

(37) section 234 (robbery):

(38) section 235 (aggravated robbery):

(39) section 236(1) (causing grievous bodily harm with intent to rob or assault with intent to rob in specified circumstances):

(40) section 236(2) (assault with intent to rob)

stage-1 offence means an offence that—

(a) is a serious violent offence; and

(b) was committed by an offender at a time when the offender—

(i) did not have a record of first warning given under section 86B; and

(ii) was 18 years of age or over

stage-2 offence means an offence that—

(a) is a serious violent offence; and

(b) was committed by an offender at a time when the offender had a record of first warning (in relation to 1 or more offences) but did not have a record of final warning

stage-3 offence means an offence that—

(a) is a serious violent offence; and

(b) was committed by an offender at a time when the offender had a record of final warning (in relation to 1 or more offences).

86B Stage-1 offence: offender given first warning

(1) When a court, on any occasion, convicts an offender of 1 or more stage-1 offences, the court must at the same time—

(a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning (whether or not that further serious violent offence is different in kind from any stage-1 offence for which the offender is being convicted); and

(b) record, in relation to each stage-1 offence, that the offender has been warned in accordance with paragraph (a).

(2) It is not necessary for a Judge to use a particular form of words in giving the warning.

(3) On the entry of a record under subsection (1)(b), the offender has, in relation to each stage-1 offence (for which a record is entered), a record of first warning.

(4) The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (1)(a).

[16] There is no doubt that the Judge complied with the provisions of s 86B(1).

[17] No particular form of words are required when giving the warning and accordingly it was not necessary for the Judge to specify that the written notice would also contain a list of serious violent offences.

[18] However, I am of the view that to adopt the interpretation argued for by the Crown would be to totally ignore the mandatory provisions contained in 86B(4).

[19] In order to ascertain the intention of Parliament when enacting sections 86A to 86I it is instructive to look at first, the Law and Order Committee's report and secondly any relevant comments made in Parliament following the Law and Order Committee's report.

[20] When the Law and Order Committee reported back to Parliament on the Sentencing and Parole Reform Bill the report expressly acknowledged the requirement to give an offender a written notice. It stated:

> **Notice of warning to offender**
>
> A majority of us recommended amending cl 5(1) to require a Court to give an offender a written notice of warning setting out the substance of the warning that has been issued in the Court.[1]

[21] When the Bill was read in Parliament following the Law and Order Committee's report the Minister of Corrections, Judith Collins, stated:

> This Bill creates a three-stage regime that will improve public safety by imprisoning the worst repeat violent and sexual offenders for longer periods and under stricter regimes if they continue to offend. At stage one, offenders who are convicted of a serious violent offence will be sentenced as normal ***but will be warned, both verbally and in writing, that they are on the first rung of the regime and what will happen if they are convicted of another serious violent offence in the future.***
>
> At stage two, an offender who is convicted for a second time of a serious violent offence and has previously received a warning will be sentenced as normal but will be required to serve any sentence of imprisonment imposed by the Court, without parole. ***Such offenders will also be warned, both verbally and in writing, of the consequences of a further conviction for a serious violent offence series…***[2]

[22] The Chair of the Law and Order Committee, Sandra Goudy (National), said:

> At stage one, offenders who are convicted of a serious violent offence will be sentenced as normal, but will be warned – as has been previously said – ***both verbally and in writing that they are on the first rung of the regime. They will also be warned about what will happen if they are convicted of another serious violent offence in the future***. At offence one – at the first strike – they are told about the likely consequences if they do not take control of themselves and take some responsibility for their behaviours…[3]

[23] Dr Cam Calder (National) said:

> This Bill is designed to protect the public from repeat serious violence offenders. These are offenders ***who have ignored verbal and written warnings*** of the consequences of their violence and shown a cavalier disregard for the rights of others.[4]

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[1] Sentencing and Parole Reform Bill (17-2) (Law and Order Committee report) 26 March 2010
[2] (4 May 2010) 662 NZPD 10673
[3] (4 May 2010) 662 NZPD 10673
[4] (25 May 2010) 663 NZPD 11226

[24] What I draw from this is that the only possible conclusion available is that Parliament clearly intended that the offender would be warned both verbally and in writing.

[25] When the wording of s 86B is looked at in that light, it is clear that s 86B(4) cannot be considered as otiose and may not be ignored. Parliament has clearly signalled by the wording in s 86B(4) that an offender must be given written notice of the warning. This is no doubt because of the potentially serious consequences if a second strike offence is committed.

[26] I am of the view that had Parliament viewed the written warning as simply being an adjunct to the oral warning it would have said so.

[27] An example of this may be found in the Child Protection (Child Sex Offender Government Agency Registration) Act 2016. That Act requires the Court to give an explanation to an offender that he or she is a registrable offender under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 in any case where that section applies. However s 12(3) of that Act reads:

> Failure to give the explanation required by subsection (2) does not affect the validity of the sentence or order or affect the offender's reporting obligations.

[28] No such provision is contained in the Sentencing and Parole Reform Act 2010.

[29] In saying this I do not lose sight of the fact that s 12 of the Child Protection (Child Sex Offender Government Agency Registration) Act does require the offender to be given a written notice explaining the offender's reporting obligations and the penalties for failing to comply with those obligations. However, the point is that when passing that Act, Parliament turned its mind to the consequences of the failure to give such a warning. No such saving provision is contained in s 86B.

[30] It is noted that the Westlaw commentary in Adams on Criminal Law states:

> Unlike the oral warning and the recording of that warning which occur contemporaneously with the entry of the conviction, the notice can be given to the offender at any time. A failure to provide the written notice referred to in subs (4) does not vitiate the record of first warning, as it is the record that

> the oral warning has been given that creates the record of first warning and qualifies the offender for the associated consequences.[5]

[31] No authority is quoted in the Westlaw commentary for that conclusion and it seemingly ignores the mandatory provision contained in subs (4).

[32] The Court of Appeal recently noted:

> In the three strikes regime Parliament recognised a need for warnings not because offenders must be given express notice of the law, but because the penalty that would follow for a second or third offence is very likely disproportionate but for the warming…[6]

[33] It is clear that the Court of Appeal recognises that the need for a warning is because of the dire consequences that follow for a second or third offence. This reinforces my view that given what may be described as the punitive nature of the three strikes legislation, Parliament intended that before such a strike becomes effective a set procedure is required to be followed.

[34] There is a further reason for ensuring the written warning is given. For some defendants the sentencing process is a frightening one which may well affect their concentration. Also, many defendants are interested solely in how long a sentence they are to receive and have little focus on anything else. Given the importance of the strike warning it is vital that in addition to the verbal warning the consequences of further like offending are reinforced with the written warning to ensure a defendant is fully and fairly informed of his or her position.

[35] It is clear that this was the intention of Parliament as earlier discussed. Accordingly it is not, in my view, appropriate to regard the failure to serve the written notice as simply being an administrative oversight. In order for a first strike warning to be valid, a written notice must be given in accordance with the section. To hold otherwise would be to totally ignore the mandatory language of the subsection.

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[5] SA86B.04
[6] *DO v R*, Court of Appeal 600/2015

[36] I am not prepared to do that. I decline to deal with the defendant on the basis that he is subject to the second strike provisions of the Act. The first strike warning was fatally flawed.

D G Harvey
District Court Judge