EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

IN THE DISTRICT COURT
AT TAURANGA

CRI-2015-070-004823
[2016] NZDC 9526

THE QUEEN

v

LEVI WIRIHANA

Hearing: 25 May 2016

Appearances: N Batts for the Crown
P Attwood for the Defendant

Judgment: 25 May 2016

NOTES OF JUDGE P G MABEY QC ON SENTENCING

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[1] Mr Wirihana, you are before the Court today for sentence.

[2] This afternoon you have pleaded guilty to charge 1 in a Crown charge notice dated 1 March 2016 which alleges that you assaulted a named complainant who was your partner at the time.

[3] You then pleaded guilty to a police charge document, which alleges that between 8 January 2016 and 12 January 2016 you attempted to pervert the course of justice by making nine phone calls to your then partner, in an attempt to coerce her into making a false affidavit that her statement to the police about you was untrue.

[4] I record that at Mr Attwood's request I put those charges to you. You are appearing today via AVL and you entered your pleas directly, as a result of me putting the charges to you. I have recorded them on the record. Having entered

those pleas Mr Batts, for the Crown, advised the Court that the Crown does not advance any evidence in support of charge 2.

[5] That charge is therefore discharged under s 147 Criminal Procedure Act 2011.

[6] You did face other charges which were intended by your previous counsel to go to trial but, given the nature of those charges and the potential maximum penalty they were not fit for the jury Court. The Crown noted in its Crown charge notice that of those four charges are withdrawn.

[7] The charges remaining and for which you are for sentence are male assaults female on 4 December 2015 and attempting to pervert the course of justice between 8 January 2016 and 12 January 2016.

[8] The facts relating to the charges can be relatively briefly stated. The allegation of assaulting a female is, as Mr Attwood has submitted, a technical offence. There was no actual striking. What you did was to threaten violence at a premise with your then partner. She had come back from town. There was an issue between the both of you. You threw some food to the floor and demanded that she clean it up. You broke some furniture in the premises. You demanded she fix it. You clenched your fist, saying that you would punch her. You did not punch her.

[9] That is, I accept a technical assault. It is rather more in the nature of bullying, controlling and threatening. I take that into account when assessing the seriousness of that charge, which is laid as male assaults female; one of the more serious allegations within the minor assault range.

[10] The other charge is an allegation that you attempted to pervert the course of justice. You were remanded in custody as a result of the domestic dispute. You were able to convince the prison authorities that you could call your then partner, the victim of the domestic offending, by saying that she was your sister. You then made a number of calls, some of which involved you asking your then partner to retract her allegations; to swear an affidavit to say that her statement to the police about the domestic incident was untrue.

[11] I understand from Mr Attwood that the relationship is now over and that certainly is his understanding from you. I also note that she has applied for a domestic violence protection order. Whether that has been granted by the Family Court I do not know.

[12] I need to sentence you by determining a number of factors. I need to consider and I do, the principles and purposes of sentencing as set out in the Sentencing Act 2002. I take into account what are the aggravating and mitigating factors that apply to the offending and to you.

[13] The lead charge is clearly the allegation of attempting to pervert the course of justice. What you did was to attempt to have a complainant change her statement and even go further and swear an affidavit that her statement to the police was untrue.

[14] Mr Wirihana, I am well aware of a perception within the prison that if someone goes along to the police station and says that their original statement was untrue, or as is commonly perceived within the prison, swears and affidavit to that effect, then police withdraw the charge and it all goes away. I have had that said too many times but it does not work that way. The most likely outcome of someone going to the police station, especially as a result of a domestic violence incident saying that the statement was untrue, is that they are told to go away and that they should tell that to the Court. The swearing of an affidavit is more serious, because it then places the person who swore the affidavit in the situation you are in as an attempt to pervert the course of justice.

[15] It did not happen in this case. I accept what Mr Attwood tells me, that you did not achieve your purpose. Mr Batts for the Crown accepts that to a certain extent lessens the seriousness of your offending. There is no doubt Mr Wirihana that the Courts regard any attempt to divert, pervert or interfere with the course of justice as very serious. It was said in *R v Churchward* CA439/05, 2 March 2006 that any attempt to disturb the process of administration of justice is to be deplored; in all but the most exceptional cases to be met with a moderately lengthy term of imprisonment.

[16] The Courts have applied that principle consistently. People go to jail for attempting to pervert the course of justice and you understand that I know. It is really a question of how long your sentence should be for this charge.

[17] Mr Batts has referred in his submission to a number of authorities including *R v Churchward*. He has referred to *R v Hillman* [2005] 2 NZLR 681 and *M v R* [2013] NZCA 385. All are consistent in their comments about the seriousness of this charge and the consequences of imprisonment.

[18] Now looking at your charge and the facts of your charge, Mr Wirihana, I make these observations. You, I know from your record, have been in prison many times. You know how things work and you must have known the calls would be recorded. To that extent Mr Attwood's submission that it was a clumsy attempt is true, but of course the fact that the calls would be recorded by the prison means that you are likely to get caught out if someone listens to them. It does not lessen the impact on the person that you are calling.

[19] There is no suggestion Mr Wirihana, that when you made the calls and made the request for your then partner to retract her statement, that she would be harmed. You did say some things to her which were suggestive of harm. You spoke of damage or injuries to a prisoner that had occurred in your yard. They could be taken as implied threats, but this is not a case where there were any direct threats to her. Your phones calls were in the nature of pressure. She resisted that pressure.

[20] This is not offending of the most serious type within the range of the offence. The maximum is seven years. Mr Batts in his submissions contends for a start point of two and a half years and I consider that to be appropriate. There are cases where start points have been considerably more. A start point of two and a half years for you on the facts of this offending acknowledges where it fits in the level of offending. That is the start point I adopt.

[21] What I then need to consider is the other charge which is male assaults female. It is by no means of the most serious type. It could be, as Mr Attwood has said, a simple charge of assault but it was charged as male assaults female. That

does not change the underlying facts or the reality that it was a technical assault. Mr Batts has considered that perhaps a six-month sentence would be appropriate for that charge by nominating six months as an uplift to the start point on the perverting charge.

[22] I am not inclined to agree with that. On a standalone basis a start point for that offending would, in my view, be closer to three or four months. I am prepared to consider three months. I increase the start point on the perverting charge from two and a half years, which is 30 months, to 33 months.

[23] I am obliged to consider totality and enquire whether the overall offending justifies a start point of that amount. I consider it does. There is no reduction for totality.

[24] I then need to consider your personal situation. You have an unenviable record in Court starting in the Youth Court and coming up to today. You have been to prison for injuring with intent to injure in 2010 and you have been involved in an aggravated robbery for which you were imprisoned.

[25] Considering the nature of the charge, that is, male assaults female and looking through your record for domestic related violence, there was an assault on a child for which you received a short concurrent term of imprisonment in June last year. There was common assault which received a concurrent term of imprisonment in June last year. There was a male assaults female charge in September 2012 and another common assault in November 2011. Then going back to 2010 there was a male assaults female charge and I do not need to go back any further than that.

[26] I am conscious that considering an uplift for previous convictions I must at all times avoid double punishment. You do not have a serious record of domestic violence, but you do have a record of previous convictions involving violence. I will uplift your sentence by three months, so that takes us to 36 months which is three years.

[27] You are entitled to credit for your guilty plea. It cannot be at the highest level. I know there has been a history here of counsel and a change of counsel. You now have Mr Attwood who has managed to address matters head-on and get it to the point it is today. It has been suggested by Mr Batts that you should receive a 20 percent discount for your guilty pleas. I accept that. That would reduce your sentence by eight months, to 28 months.

[28] Mr Wirihana, Mr Attwood has told me that you feel unsupported in the community when you are released from prison and that there are simply not enough programmes or constructive opportunities for you when you are released. He says that you are now occupied in the laundry in prison. That you are enjoying the benefits of being occupied. You are keeping out of the yard and you are determined, when you are released, to avoid going back to prison.

[29] You are currently in your forties and it is not uncommon for people who have spent a long time in prison such as you, Mr Wirihana, to come to the conclusion that enough is enough, you are too old for this, and you want to change your life when you get out. You are to be commended for that and I rather think you are quite sincere in those sentiments given to Mr Attwood.

[30] Mr Attwood advises me that you waive your right to a pre-sentence report and that is why you are being sentenced today.

[31] Your release will be entirely at the discretion of the Parole Board. I cannot impose conditions, but the Parole Board will. If I have any advice for you, Mr Wirihana, it is this stick to your efforts in the laundry, keep out of trouble in the yard, go on as many programmes as you can because when you get to the Parole Board they are going to be interested in what you have planned for the future. They will look at the charges, they will look at the sentence that I have imposed and they will note the comments given to me through your counsel that you are of an age now where you would rather spend more time in the community and no time in prison.

[32] You no doubt have family to go back to but, really, at the end of the day it is up to you. If come before the Parole Board showing a determination to re-enter the community and be an effective and useful member of the community then that would not be lost on the Parole Board. What I am really saying to you Mr Wirihana, is that it is up to you.

[33] The sentence I impose upon you, having regard to the relevant principles and purposes of sentencing, having regard to the aggravating and mitigating factors which apply to you and your offending and giving you due credit for your guilty pleas is 28 months imprisonment on the charge of attempting to pervert the course of justice; you are sentenced to three months concurrently on the charge of assaulting a female. Stand down.

P G Mabey QC
District Court Judge