IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2015-092-11253
[2016] NZHC 512

THE QUEEN

v

JEREMY HAMISH KERR

Hearing:	23 March 2016
Appearances:	C Gordon QC for Crown J Billington QC and H M Ford for Defendant
Sentenced:	23 March 2016

SENTENCING NOTES OF VENNING J

Solicitors:	Kayes Fletcher Walker, Auckland Anthony Harper, Auckland
Copy to:	J Billington QC, Auckland

[1] Jeremy Hamish Kerr you are for sentence in this Court having pleaded guilty to two counts of blackmail. The maximum penalty in each case is 14 years' imprisonment.

[2] On or about 26 November 2014 you sent two blackmail letters, one to the Chief Executive Officer of Fonterra and one to the Chief Executive Officer of Federated Farmers. The letters referenced sodium fluoroacetate (1080) and stated:

> Enclosed is a sample of 1080 blended with New Zealand dairy infant formula currently in China
>
> If after the 27th March 2015 this VTA is still in use in New Zealand
>
> Several New Zealand infant and other formula will be released into the retail chain in the Chinese market and one other market with traces of 1080.
>
> The release will coincide with a media package supplied to the Chinese authorities and competitors highlighting the risk to [New Zealand] their environment and others consuming our export products from exposure to 1080, and current NZ Government agency policy and practice with 1080
>
> A concurrent media release in NZ and China will expose the past 30 years of flawed self serving science and bureaucracy that has allowed the Government sanctioned approvals to continue.
>
> Our group has no confidence in the political or democratic process concerning 1080.
>
> It is for you to manage the outcome.
>
> This notice is private and confidential to you and will [remain] as such. If there is no compliance it will form part of the media release.
>
> The magnitude of this issue is now beyond the temporay [sic] financial and personal sacrifice that will be made by the agricultural and tourism sectors of the New Zealand economy.

[3] Enclosed with the letters in each case was a small, self sealing plastic bag containing a sample of infant formula contaminated with 1080. The collective volume of the 1080 if ingested was sufficient to prove fatal to between 13 and 33 infants.

[4] The blackmail threats were reported to the police. Following a preliminary assessment a serious crime investigation was commenced.

[5] The investigation represented a major undertaking for police over a period of 10 months and involved at times 35 investigators and analysts. In addition, additional resources were seconded from other departments from time to time, particularly the Ministry of Primary Industries. Police were involved in assessing approximately 2,600 individuals who had in some way voiced opposition to or expressed strong views concerning the use of 1080 as a pest control agent. The police also investigated persons who had had access to 1080.

[6] The investigation involved in excess of 30,000 investigator and analytical man hours at a cost of more than $4 million.

[7] The trigger date of 27 March 2015 passed without event. The threat was not actioned. The police investigation continued.

[8] In the course of the investigation you were spoken to by Detective de Villiers on 27 June 2015. You provided DNA and fingerprint samples and allowed the police to conduct a cursory examination of your laptop.

[9] You had had access to 1080 for research purposes, which is why you were spoken to. In 1995, through Feral IP Limited you had developed and registered a cyanide based product, Feratox, a VTA normally used in conjunction with ground based trapping. From 1981 on entities that you have been involved with had developed further ranges of pest control products specifically to reduce the population of possums, rats, stoats and other rodents.

[10] You received royalty fees from sales of Feratox. Over the 13 year period to March 2015 you had earned an average of $135,000 approximately from the royalty fees. Over the last five years prior to and including March 2015, however, the average royalties had reduced to just over $101,000 per annum.

[11] The Crown argue your offending was financially motivated. You denied that. A disputed fact hearing was held. Evidence was called by the Crown from a number of witnesses who had business dealings with you. Detective Beswick gave evidence of the financial pressure you were under in late 2014. You called evidence from Mr

Hussey who analysed your financial position at the time. Your son Mike also gave evidence. At the conclusion of the evidence this Court found as proved beyond reasonable doubt that at the time you wrote the blackmail letters in November 2014:

(a) you were under considerable financial pressure;

(b) you knew there would be some financial benefit to you if 1080 was banned on the basis that there would be a modest uplift in sales of Feratox;

(c) when you wrote the blackmail letters you were motivated in doing so by the fact you would benefit financially if 1080 was banned although you did not know how much exactly the financial benefit would be; and

(d) while there may have been other reasons behind your writing the letters in writing them you intended to obtain some financial benefit for yourself.

[12] After Detective de Villiers had visited you, you decided to write to him anonymously claiming that there never had been a threat made to New Zealanders and that the purpose of the blackmail letter was to show what damage would be caused to the New Zealand dairy product export market to China if products became contaminated with 1080.

[13] On 2 July 2015 you travelled to Marton and on 3 July 2015 drafted a retraction letter addressed to Detective de Villiers. You were unable to print it but you then later used your own laptop to recreate the letter and label which was successfully printed.

[14] You posted the retraction letter to Detective de Villiers at the Gore Police Station where he was based, on 3 July 2015 from the Wellington area. After the letter was received both it and the envelope were analysed.

[15] An analysis of the DNA profile on the envelope showed it was 260 times more likely to be your DNA rather than a random male sourced from the general New Zealand population (not excluding paternal male relatives). A number of search warrants were obtained and executed at premises associated with you. You were interviewed on 13 October 2015. Initially you denied any knowledge of the blackmail threat during the course of that interview and you denied also any knowledge of the anonymous retraction letter. As the interview progressed and the evidence was put to you, you first admitted you sent the retraction letter and then subsequently also admitted that you had written the blackmail letters. You denied there was any financial motivation in doing so and when arrested at the conclusion of the interview you said you were sorry and regretful.

[16] Mr Kerr you are 60 years old. Prior to this offending you were a successful businessman, although as I have found in the disputed fact hearing, you were under financial pressure, particularly because of your involvement and your commitment to another company, Natures Support and the venture associated with it.

[17] You lost your wife of 30 years in 2011 after being her primary caregiver for four years while she suffered from cancer. You have two adult sons who maintain their support for you. Counsel has presented other letters that have been written in your support. The pre-sentence report writer has said that when your offending was described to you, you said you felt sick. You accepted you had put many people through so much and you acknowledge people may have lost jobs because of you. You repeated, however, you said you felt frustrated by the situation in relation to the use of 1080. You said you had no ill intent when making the threats but acknowledged the impact of them. You said you did not consider your threats would be taken seriously and repeatedly said you had no intention to carry out them out. You were unable to say why you had referred to the Chinese market. You went on to tell the report writer that shortly after writing the letters you wished you could fix it but didn't know how to.

[18] The sentence I impose on you must:

(a) hold you accountable for the harm done to the victims, Fonterra and Federated Farmers in particular, but also other businesses and the wider community;

(b) promote a sense of responsibility in you for that harm; and

(c) importantly denounce your conduct and deter not only you but also others from committing similar serious offending.

[19] I am obliged to take into account the gravity of the offending, including your culpability. The seriousness of the offence is marked by the 14 year maximum penalty fixed by Parliament for the offence.

[20] I am also required to take into account the effect of the offending on the victims. In this case both Fonterra and Federated Farmers have provided victim impact statements setting out the financial effect on them. Fonterra says it has lost in excess of $20 million, in the case of Federated Farmers over a $100,000. Even though the charges are framed as a threat to endanger the safety of infants who might have digested the dairy infant formula, which is what you pleaded guilty to, by making that threat you also endangered the legitimate business interests of Fonterra and Federated Farmers and indeed other farmers. You knew that would be the effect. That was the reason you wrote to them to have them place pressure on the Government to change the policy. You were quite clear in your intentions, which as I have found were in least in part motivated by a desire to improve your financial position by increasing the royalties available to you. Apart from the financial impact there have also been significant impacts on people associated with your victims at a number of levels in the organisations.

[21] As I have said your offending has had a very serious impact not only on both Fonterra and the farmers of the country but also on other dairy companies and other business interests such as supermarkets. It has also posed a major threat to the trading relationship of New Zealand with other countries. The Ministry of Primary Industries, in particular, was forced in conjunction with a number of other representatives of other Ministries to take urgent steps to address the threat the letter

posed. In total parties that claim to have been affected have put their costs at losses in excess of $32 million.

[22] In this case the Crown submits a starting point for sentencing you of at or near the maximum of 14 years' imprisonment is appropriate. The Crown accepts that personal mitigating discounts may be available to you, particularly the discount for your guilty plea, although tempered by your unsuccessful challenge to the financial motivation issue. The Crown also argues for a minimum term of imprisonment.

[23] Mr Billington QC submits that a starting sentence in the range of eight to 10 years is the appropriate starting point and you should then be entitled to personal mitigating discounts for:

(a) your age;

(b) the fact you have pleaded guilty;

(c) remorse;

(d) you have no record of similar offending; and

(e) your extenuating personal circumstances.

[24] Mr Billington argues for a discount in the order of 25 per cent and submits there is no need for a minimum period of imprisonment.

[25] The Court is required to consider comparative cases. There is no tariff decision for blackmail. Counsel referred to cases both in New Zealand and overseas, particularly the United Kingdom. In *R v Duckworth* Mr Duckworth pleaded guilty to a charge of demanding with menaces.[1] He had sent to the bottler of Coca Cola a bottle of contaminated Coca Cola with a letter demanding 140 ounces of gold, about $100,000 in value at that time in the early nineties. He later placed another

[1] *R v Duckworth* [1992] 3 NZLR 322.

contaminated bottle in a retail store in a position where it was unlikely to be purchased before it was removed in accordance with information he supplied. He renewed the threats from time to time. When caught he was fully co-operative and pleaded guilty.

[26] He was sentenced to five years' imprisonment. The maximum sentence at that time was seven years in relation to that offence. The Court of Appeal dismissed Mr Duckworth's appeal. It considered that in the range of conduct of amounting to demanding with menaces the offending had to be placed in the most serious category and deterrence was a prime factor in sentencing. But for the plea of guilty and co-operation the maximum sentence of seven years would not have been inappropriate even though worse examples could have been imagined. The Court went on to note personal circumstances must carry less weight in situations such as was before the Court.

[27] In *R v Low-Wai, Lee & Dass* a Hong Kong businessman resident in Auckland was sent a bullet and a bottle of acid, being accompanied and followed by a series of threats. Initially a million dollars was demanded which was later reduced to $300,000.[2]

[28] The Court of Appeal rejected an appeal against sentence of six years.

[29] As I have said there are other cases from the United Kingdom that are of relevance. In *R v Telford* the appellant pleaded guilty to blackmail.[3] He had written three letters to a confectionery manufacturer threatening to contaminate products with paraquat, a highly poisonous weed killer, unless he was paid £1 million. He was arrested when his accomplice attempted to collect the money. He was sentenced to 10 years' imprisonment, reduced to eight years on appeal. The Court accepted that there was no evidence he intended to carry out the threat.

[30] In *R v Taylor and Norman* the appellant Norman pleaded guilty to three counts of blackmail.[4] He was involved with Taylor in an attempt to blackmail three

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2 *R v Low-Wai, Lee & Dass*, CA49/94, 53/94 & 68/94, 22 June 1994.
3 *R v Telford* (1992) 13 Cr App R (S) 676.
4 In *R v Taylor and Norman* [1996] 1 Cr App R (S) 192.

major supermarket chains by informing them that unless large sums of money were paid food products would be contaminated with chemicals, bacteria and the HIV virus. It was accepted Mr Norman had mental health issues. However his appeal against a sentence of eight years' imprisonment was dismissed.

[31] Similarly, in *R v Riolfo* the defendant pleaded guilty to two counts of blackmail and was sentenced to eight years' imprisonment.[5] He had threatened Tesco Supermarket over a period of months that food had been contaminated with various things, and that he would inform the media if he was not paid £250,000. He received £7,500. It was accepted that no food was ever actually contaminated and no actual damage done to the supermarket. It was accepted on appeal that this offending involved mental derangement and in the circumstances the Court allowed the appeal and substituted the sentence of eight years with one of six years' imprisonment.

[32] In addition to the cases I have referred to by way of example I have also considered the other authorities that counsel have referred to me.[6]

[33] The cases suggest that the following features are relevant to fixing a starting point:

(a) the seriousness of the threat and the number of threats – were they repeated?

(b) the use of contaminated products to back up the threat;

(c) the loss caused by the threats;

(d) the vulnerability of the victims;

(e) public impact;

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5 *R v Riolfo* 1997 1 Cr App R (S) 57.

6 *R v Witchelo* (1992) 13 Cr App R (S) 371; *R v Dyer* [2002] 2 Cr App R (S) 105, EWCA Crim 567; *R v Smith* (1994) 15 Cr App R (S) 106; *R v Pilkington* [1996] 1 Cr App R (S) 383; *R v Banot* [1997] 2 Cr App R (S) 50; *R v Morrison* [2008] EWCA Crim 22; *R v Chow* CA134/98, 11 August 1998; *R v Lee* HC Auckland T002769, 18 January 2002; *Field v Police* HC Wellington CRI-2009-483-40, 23 October 2009;

(f) sophistication of the threat; and

(g) whether there was financial motivation and if so, the related issue of the amount of money demanded or involved.

[34] Mr Kerr I regard the blackmail threats you made in this case as particularly serious. The nature of the threat itself to poison infant formula was given credibility by your enclosing fatal doses of 1080 poison with the letters. The impact on Fonterra, Federated Farmers and the potential impact on New Zealand's trade relationships with China and other countries was extremely serious. Your actions have cost a large number of businesses considerable sums of money. It was submitted on your behalf that you may not have been aware of or may not have foreseen those consequences. I am unable to accept that given the terms of your letter, which were clearly directed at forcing the companies Fonterra and Federated Farmers to place pressure on the Government. You must have known the significance of the threat and I also note your reference in the letters to the Chinese market which is well known as a very important market.

[35] Also, as I have found you made these threats in order to improve your own financial position. Your actions were premeditated. You went to some trouble to avoid detection by travelling from Auckland to the Wellington region to post the letters. While I accept that there may theoretically be worse cases (such as if you demanded a substantial sum of money, or persistently repeated the threats) this is nevertheless near the most serious case of blackmail. That would support a starting point in the region of 12½ to 13 years.

[36] However, I accept that to the extent you were financially motivated in making the threats, practically the financial return to you from your threats if they had led to a change in policy, would have been relatively modest, perhaps as low as counsel has submitted $10,000 to $30,000. You were not exactly aware of just how much you would benefit by. Also importantly, while you enclosed 1080 with the blackmail letters, there is no evidence that you intended to carry out the threats. Indeed the evidence and the material before the Court really suggests that you did not. You let the trigger date pass without taking any further action. That and the material before

the Court is consistent with your statements to the pre-sentence writer that you did not intend to carry out the threat.

[37] Nor did you seek to repeat your threats. Rather you sought to revoke the threat and to effectively withdraw it after you had been spoken to by Detective de Villiers. While Ms Gordon submits that you did so in order to avoid detection I am prepared to accept in your favour that you did want to bring the situation to an end. The steps that you took by travelling to the Wellington region again and then writing to Detective de Villiers anonymously may well have been an attempt to cover up your involvement in the retraction letter but it was nevertheless part, I accept, of your intention to try and stop what you had started.

[38] Taking account of those factors I take an adjusted starting point before considering your personal mitigating circumstances of 11½ years.

[39] There are no personal aggravating factors. You have previous limited offending but it is some years ago and unrelated to this offending. However, you are not however entitled to a credit for a clean record because of that offending.

[40] Nor do I consider your age to be a particularly relevant mitigating factor. At the relevant time you were as I have noted operating as a businessman and entrepreneur.

[41] I do however take into account your medical condition and circumstances at the time. You were suffering from stress. The report of Dr Nuth confirms you were dealing with a range of personal difficulties at the time you wrote the letters. You may have been suffering from anger and depression.

[42] I also accept that you are extremely remorseful for what you have done and that you regretted your actions from an early stage.

[43] I reduce the starting point by one year to take account of your personal mitigating factors.

[44] That then leaves the further reduction for your guilty plea. You are entitled to a credit for your guilty plea. I am not prepared to allow the full 25 per cent for the guilty plea for two reasons. First, this was an extremely strong Crown case given the forensic evidence and your admissions. Further you unsuccessfully put in issue your financial motivation at the disputed fact hearing. Nevertheless you did plead guilty at a very early stage. In the circumstances a further reduction of approaching 20 per cent is appropriate.

[45] That leads to an end sentence of eight years', six months' imprisonment.

[46] The Crown submit a minimum period of imprisonment of up to two-thirds should be imposed to hold you accountable for the harm you have done, for deterrence and to protect the community, although I understood Ms Gordon to concede during the course of submissions that perhaps the last consideration may not be applicable.

[47] On balance I am prepared to accept Mr Billington's submission that in this case, having regard to your guilty plea, your genuine remorse, the factors operating in your personal life at the time, and that you are assessed as not being at risk to the community, a minimum term of imprisonment is not required. Denunciation and deterrence of others are the only possible bases to support a minimum term in your case. But I am not satisfied it is necessary to impose a minimum term to address those considerations in this case. I am satisfied that the principles of denunciation and deterrence are achieved by the starting point adopted by the Court. I decline to impose a minimum term other than the statutory minimum.

[48] Mr Kerr please stand. On each charge of blackmail you are sentenced to eight years, six months' imprisonment. Stand down.

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Venning J