IN THE COURT OF APPEAL OF NEW ZEALAND

CA80/03

THE QUEEN

v

WILLIAM DWANE BELL

Hearing: 24 July 2003

Coram: Keith J
Tipping J
Anderson J

Appearances: I D Tucker and M L Wotherspoon for Appellant
J C Pike and S A Mandeno for Crown

Judgment: 7 August 2003

JUDGMENT OF THE COURT DELIVERED BY TIPPING J

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[1] The appellant, William Dwane Bell, who is now aged 24 years, was found guilty by a jury in the High Court at Auckland on three counts of murder and one count of attempted murder. He pleaded guilty to one count of aggravated robbery. He was sentenced to life imprisonment on the murder charges. The Judge imposed a minimum non parole period of 33 years on him under s103 of the Sentencing Act 2002. He appeals against the length of that period. Concurrent sentences of 13 years and 12 years imprisonment were imposed for the attempted murder and the aggravated robbery respectively. They are not in issue.

[2] The first point which Mr Wotherspoon took on Bell's behalf was a jurisdictional one. Counsel contended that minimum non parole orders under s103 could not be for longer than 17 years, that being the minimum period which must be imposed if s104 applies. There are two problems with this argument. Bell's offending took place prior to 30 June 2002 when the Sentencing Act came into force. Section 154 of the Act provides that in these circumstances s103 applies but s104 does not. As s104 does not apply, it cannot logically provide any cap for s103 purposes. Equally, even if s104 had applied in the present case, there is no basis for holding that it limits the duration of s103 orders to 17 years or any other figure. We reject this first argument as untenable.

[3] That brings us to Bell's second point which is that, in any event, 33 years was a manifestly excessive minimum non parole period, despite the acknowledged gravity of his offending. The circumstances in which Bell's crimes were committed were truly appalling. He was a former worker at the Mt Wellington-Panmure RSA. Following his dismissal he planned to rob the Association's premises. On 8 December 2001 his plan was put into effect. With the help of an associate, Bell collected various items needed for the robbery including a shotgun, ammunition and a guitar case in which to hide the shotgun. The trial Judge was satisfied that Bell took the shotgun with him for the express purpose of killing anyone he found on the premises who might recognise him.

[4] Bell entered the premises with the shotgun at about 7.30am. Two people were already there and two more subsequently arrived. One of those originally present let him in as she recognised him and had no reason at that stage to know his purpose. Once inside Bell forced one of the victims to open the safe from which he took a sum of money. He then callously and systematically bludgeoned each of the four people in turn with the butt of the shotgun, after having shot one of them in the chest. Three of the victims died. One survived her ordeal; albeit grievously injured. She was the subject of the attempted murder conviction and is left with neurological damage of a substantial and permanent kind.

[5] We agree with the Crown's submission that these crimes were planned and executed with a degree of callousness which, fortunately, is very rarely encountered.

Furthermore, the crimes were accompanied by what Mr Pike described, with no exaggeration, as a fiendish sadism. The sole survivor testified at Bell's trial that he had laughed at one of the victims as she was crying in anticipation of her fate. She also recounted being forced to kneel with two of the victims while Bell stood behind them with the gun. The third victim could in the meantime be heard struggling for breath as he vainly fought to survive the fatal wounds he had already suffered.

[6] The callousness and brutality of these crimes is heightened when account is taken of the fact that Bell separated his victims and coldly beat them to death or near death, each in their turn. In one case Bell fired the shotgun into the chest of the only victim who could perhaps have physically threatened him. The bodies of the victims were found in separate locations. The horror and terror experienced by each of these four innocent people passes all imagining. The only conclusion which can be drawn is not that Bell lost control but rather that he performed his crimes in an individual, cold-blooded and methodical way. The calculated wickedness and evil inherent in these crimes cannot be over-stated. Their gravity is enhanced even further because they were committed while Bell was on parole from an earlier aggravated robbery sentence.

[7] The crimes fully deserve punishment and denunciation at the highest level. There can be and was no dispute that they require a minimum non parole period of sufficient length to achieve that level of punishment and denunciation together with the associated deterrence. We have discussed general issues pertaining to minimum non parole periods in our judgment in the case of *R v Howse* CA444/02 which is also being delivered today. We will not repeat that exercise. The difficulties identified in *Howse* are applicable here too. In particular, there is the difficulty that although Parliament has fixed the minimum non parole period when life imprisonment is imposed for murder at 10 years (s103), there is no express maximum. Implicitly the maximum can only be the term of the offender's natural life. As the Court has observed in *Howse*, the regime is one in which there is a statutory floor but no finite ceiling. There is therefore only one fixed reference point in the individual case rather than the two that usually apply when a maximum is fixed.

[8] The sentencing Judge in the present case rightly said that in establishing the length of a minimum non parole period, the Court is concerned with the gravity of the offending. She cited *R v Brown* [2002] 3 NZLR 670 (CA) and *R v Lundy* (2002) 19 CRNZ 574 (CA) to this effect. The Judge took careful note of the circumstances of the *Lundy* case, in which a minimum period of 17 years was increased to 20 years on a Solicitor-General's appeal. She also mentioned *R v Falealii*, High Court Auckland, 19 July 2002 in which the Crown's appeal has now been abandoned. The Judge referred as well to the 28 year sentence imposed in the High Court in *Howse*. Obviously the level of sentence in that case will have had a material influence on the level which the Judge considered appropriate in the present case. The Judge also appropriately noted this Court's observations in *Lundy* about the level of the non parole period imposed in *R v Bain*, Dunedin High Court, T.1/95, 21 June 1995. As we there observed events have moved on in the ten years since Williamson J imposed on Bain, who had killed five family members, a non parole period of 16 years.

[9] Had this Court upheld the 28 year sentence in *Howse*, we would almost certainly have upheld a non parole period only five years longer in the present case, which must be regarded as requiring even greater punishment and denunciation than the case of *Howse*. However, for the reasons given in our judgment in *Howse*, the period in his case is being reduced from 28 years to 25. As the Court has said in the *Howse* judgment, the primary comparison is between the individual case and the datum of ten years. Comparisons with other cases are secondary, albeit necessary and important as a check, and for parity reasons.

[10] We consider that Bell's case requires a materially longer non parole period than that being imposed in *Howse*. Bad as Howse's case was, Bell's is of materially greater gravity. We recognise the substantial degree of public concern that exists in relation to serious violent offending. The Courts must nevertheless keep a sense of proportion and endeavour to administer the non parole jurisdiction on a principled and balanced basis. It is also worth noting that offenders are not automatically released from indeterminate sentences after their minimum non parole period has been served. They remain subject to the indeterminate term and the Parole Board

may order their release only if they no longer constitute a significant risk to the safety of the community.

[11] We consider that had the sentencing Judge known, before she sentenced Bell, that Howse's non parole period would be reduced to 25 years, she would probably not have imposed on Bell a period as long as 33 years. Be that as it may, we consider that in order to keep a reasonable sense of proportion between this case and the datum of ten years, and between this case and the *Lundy* and *Howse* cases, Bell's non parole period should not exceed 30 years. Nor, however, should it be less. At 30 years it will still be the longest minimum non parole period which an offender has been required to serve in New Zealand. No-one can tell what risk Bell will pose to the safety of the community in 30 years time. The psychiatric reports before the Court suggest that he represents, in the words of one of them, a high and persistent risk of violent re-offending. Unless that risk can be convincingly dispelled, Bell ought to be kept in custody for the rest of his natural life.

[12] For the reasons given his appeal is allowed. The 33 year order is quashed. In its place we make an order of 30 years duration.

Solicitors:
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