NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS REMAINS IN FORCE: [2019] NZHC 2177.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA480/2019
[2021] NZCA 658

BETWEEN	PN Appellant
AND	NEW ZEALAND POLICE Respondent

Court:	Collins, Duffy and Dunningham JJ
Counsel:	Appellant in person J A Eng for Respondent M J Phelps as Counsel assisting the Court
Judgment: (On the papers)	6 December 2021 at 9.30 am

JUDGMENT OF THE COURT

The application for leave to bring a second appeal is declined.

REASONS OF THE COURT

(Given by Dunningham J)

[1] On 23 November 2018, following a five-day Judge-alone trial where PN was self-represented, he was found guilty of five charges of threatening to kill, three charges of threatening to do grievous bodily harm and three charges of possession of

an offensive weapon.[1] PN was subsequently sentenced to six years' imprisonment with a minimum period of imprisonment of three years and eight months.[2]

[2] PN appealed both his conviction and sentence on multiple grounds. His appeal was heard in the High Court on 28 June 2019 with further submissions received following the hearing. On 2 September 2019, Cull J dismissed the appeals against conviction and sentence.[3]

[3] PN now applies to this Court for leave to bring a further appeal against both conviction and sentence.

[4] The Crown opposes the application for leave to bring a second appeal.

The offending

[5] PN and his partner, CM, were in a relationship for some 12 years and have one child. Although they came from Hawke's Bay, in 2011 they moved to Australia and ended up living in Brisbane. In early 2016 PN was remanded in custody while facing charges. During that period CM decided to send their child back to Hawke's Bay to live with her grandmother. When PN was released from custody, the couple agreed to separate and CM left Australia in November 2016, going back to Hawke's Bay to be with family.

[6] The relationship then deteriorated. In part this seems to be because of CM's decision to return to New Zealand, but also because PN felt she had not honoured her agreement to support him emotionally and financially on his release from custody. In addition, there was a dispute over accrued child support arrears. PN began to send a barrage of texts, emails and Facebook messages to CM of an increasingly violent and threatening nature. In these communications, PN threatened to cause bodily harm to her stepfather, threatened to kill her mother and repeatedly threatened to kill her and to cause her grievous bodily harm. The messages were of such unrelenting and violent nature that CM made contact with the Napier Family Harm Policing Team.

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1 *Police v [N]* [2018] NZDC 17777 [Conviction Decision].
2 *Police v [N]* [2019] NZDC 6520 [Sentencing Decision] at [73] and [81].
3 *[N] v Police* [2019] NZHC 2177 [High Court Decision].

[7] The threats took a more significant turn when in late 2017 PN advised CM that he had obtained a new passport and was travelling to New Zealand. He arrived in New Zealand on 10 October 2017 and promptly texted and called her to let her know he was in the country. CM was sufficiently concerned for her and her family's safety to contact the police again. PN was then intercepted on 12 October 2017 at gunpoint by the Armed Offenders Squad on the outskirts of Napier. In his campervan, police found a knife, a crossbow with arrows and a machete. When he was asked what weapons he had on him he immediately named these three offensive weapons.

The trial

[8] At trial PN submitted he was not the author of the threatening messages but that they were created by CM herself as a way of entrapping him on his return to New Zealand. The Judge, relying on the evidence of a forensic analyst which he found "compelling", rejected PN's denial of authorship of the threatening emails and other digital messages.[4] Although PN provided explanations for carrying the weapons he was found in possession of, including that they were to be used for hunting small game in New Zealand or were to be presents for PN's brother-in-law, those explanations were rejected by the trial Judge.[5] He concluded:

> [214] I am satisfied [PN] specifically travelled to New Zealand for the probable, frequently declared purpose of killing CM, or of eventually killing her after abducting her, then cutting and mutilating her (in addition to slashing and slicing her face, [PN] refers in one of his emails to cutting off her "tattooed foot, the one with the silver fern on it"), to probably burning her flesh off her face, a very often repeated threat messaged by him, I am satisfied, in various media.

The appeal

[9] PN then appealed his conviction and sentence on nine separate grounds, which included:

(a) errors by the Judge, and misrepresentations by the Department of Corrections, Probation Services, the Independent Police Conduct

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4 Conviction Decision, above n 1, at [194]–[196].
5 At [213].

Authority and the Judicial Conduct Authority in the decision to decline him bail;

(b) errors in the bail opposition form, which he claimed wrongly said that his mother was frightened of him;

(c) the fact he was self-represented, which affected his ability to have a fair trial;

(d) concerns about pre-trial issues, including in relation to name suppression and alleged pre-trial ambush;

(e) whether the Judge was right to conclude some of the emails threatened use of the type of weapons he was found in possession of when he was intercepted by the Armed Offenders Squad; and

(f) whether the Judge was right to conclude he was the author of various threatening documents.

[10] Cull J considered every ground of appeal against conviction, along with the appeal against sentence, and dismissed the appeals on all grounds.[6]

The application for leave to appeal

[11] PN now applies for leave to bring a second appeal against conviction and sentence. The proposed grounds for the appeal are set out in an extensive 24-page document.

[12] The sole issue for us is whether the application meets the test for a second appeal contained in ss 237 and 253 of the Criminal Procedure Act 2011. That section requires us to be satisfied that:[7]

(a) the appeal involves a matter of general or public importance; or

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6 High Court Decision, above n 3.
7 Criminal Procedure Act 2011, ss 237(2) and 253(3).

(b) a miscarriage of justice may have occurred, or may occur, unless the appeal is heard.

We now consider whether PN's proposed appeal meets either test under s 237.

PN's proposed appeal against conviction

[13] PN's grounds of appeal against conviction do not expressly address the criteria in s 237. However, we ascertain that he considers that a miscarriage of justice has, or may have occurred, in his case because of the errors which he alleges were made in the course of his Judge-alone trial, and not rectified on appeal.

[14] While PN has set the alleged errors out extensively, we accept, as the Crown says, they raise the following three issues:

(a) whether the weapons found in PN's vehicle are consistent with the threats made in the threatening messages;[8]

(b) whether an "Australian production order" has been concealed from PN by the prosecution;[9] and

(c) whether members of the police perjured themselves in making various statements relating to bail pre-trial.[10]

By implication, PN says the High Court's findings on these issues were wrong and a finding in his favour could have affected the outcome of the trial.

First ground of appeal — the weapons found on PN were not consistent with the threatening emails

[15] In finding PN did not have a lawful reason for possessing the offensive weapons, Judge Rollo said the crossbow was "clearly capable of fulfilling a threat to shoot CM with arrows", and the hunting knife, machete and sharpening stone were

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8 Described as PN's first and second "causes of action/grounds for appeal" as set out at pages 1–6.
9 Described as PN's third "cause of action/grounds for appeal" as set out at pages 7–16.
10 Described as PN's "fourth cause of action/grounds for appeal" as set out at pages 17–24.

"clearly capable of cutting, mutilating and amputating body parts, and of stabbing CM, as so many email threats refer to".[11] PN appears to suggest he was taken by surprise by this finding by the District Court Judge. When he contested this on appeal, the Crown relied on an email claiming he would shoot CM with a shotgun, not an arrow, and Cull J avoided the discrepancy by simply saying there was a clear reference to "shooting".[12]

[16] In our view, this ground of appeal does not meet the threshold in s 237. It is clearly not a matter of general or public importance. It is a minor factual finding in the course of an extensive trial.

[17] More importantly, having viewed all the emails which were the subject of the District Court proceedings, we do not consider this ground of appeal suggests there may have been a miscarriage of justice. Even though the emails did not refer to shooting CM with arrows, PN does not contest the finding that the knife and machete were capable of cutting, mutilating and amputating body parts, as some of the emails threatened. Furthermore, this was just one of many factors which led the Judge to reject PN's evidence that he was in possession of the offensive weapons for lawful purposes and that instead, he possessed them with the intention of using them to cause bodily injury, if not death, to CM and related family members.[13] Even though there was no reference in the emails to threatening to shoot CM with arrows, we consider there was ample evidence on which the Judge could reach the conclusion that PN was unlawfully in possession of the offensive weapons for the purposes described by the Judge. As a result, there was no risk of a miscarriage of justice.

Second ground of appeal — withholding the "Australia production order"

[18] The second issue relates to an allegation that the evidence obtained through an "Australian production order" has been concealed by the prosecution and thus hampered PN in running his defence. As the Crown explains, this arises from the appellant's assertion that photographs of three text messages, apparently sent by him from Australia, were in fact messages created on the "Viber" application by CM. PN

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11 Conviction Decision, above n 1, at [217].
12 High Court Decision, above n 3, at [63].
13 At [213]–[224].

alleged that the prosecutor had concealed evidence from Vodafone Australia which would have demonstrated that he had not sent the relevant messages.

[19] This argument was traversed in the High Court, with PN alleging that the Crown never disclosed his "Vodafone records" and these would prove that the three text messages he referred to were not sent from him or his cell-phone. However, as the Judge found, the police never obtained a production order for PN's Vodafone number in Australia. They did seek a production order for the pre-paid Vodafone New Zealand number that PN purchased when he arrived in New Zealand. PN's Australian cell-phone was taken pursuant to a search warrant and analysed by the police forensic unit but, because the SIM card was never found, the police have not gained access to the SIM card that related to PN's Australian cell-phone number. The Judge explained that the police did not have jurisdiction to issue a production order to have effect in Australia, and such a request could only be made by the Attorney-General under the Mutual Assistance in Criminal Matters Act 1992.[14]

[20] We are satisfied that this issue was thoroughly traversed in the High Court hearing and there is no evidence that an Australian production order has been concealed by the prosecution.

[21] In addition, it appears PN now has the telecommunication data from Vodafone Australia he alleges would prove he had not sent the relevant messages. As part of this application for leave to appeal, PN applied for an "Australian Vodafone production order". The Crown advised while PN could not apply for a production order, he could apply for a non-party disclosure order under the Criminal Disclosure Act 2008. Subsequently, the Court appointed Mr Phelps to assist the Court to investigate whether it was possible to pursue third-party disclosure issues with Vodafone New Zealand, and Vodafone Australia.

[22] On 5 March 2021 Mr Phelps advised the Court that only Vodafone Australia retained the requisite information.[15] In a minute on 18 June 2021 Collins J recorded:

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[14] At [33]–[38].

[15] Vodafone Australia retain call information for seven years, including details as to the time and date that a message was sent and details of the originating and receiving number, although not the content of the message.

> Mr Phelps has made progress in obtaining from Vodafone Australia, records of outgoing calls for the relevant period. He handed those records to [PN] on 11 June 2021.

[23] PN has not provided this information to the Court. Instead, he now claims the information provided by Mr Phelps is incorrect and from a different phone company as the name "TPG telecommunications" appears on the documentation. There is nothing in this submission. TPG Telecom Ltd operates a number of mobile and internet brands including Vodafone Australia. The logical inference is that the information PN has received does not assist him. Again, this is neither a matter of general or public importance, nor do we consider it points to a possible miscarriage of justice.

Third ground of appeal — allegations of perjury by police in opposing bail pre-trial

[24] The third basis of the appeal relates to a number of allegations that members of the police perjured themselves in making statements in opposition to PN's pre-trial bail application. These include:

(a) saying that he had criminal convictions in Australia, including for domestic violence and assaulting and obstructing police; and

(b) saying that members of the family have contacted police due to fears for their own safety.

[25] PN says his criminal record from Australia (which he attaches to his grounds of appeal) shows "no conviction recorded" against each offence, albeit there was a minor penalty imposed in some cases. He also says Detective Bailey "fabricated" the claim the defendant's brother, sister and mother called police for fears for their safety. PN says that these are both proof of perjury and should point to there having been a miscarriage of justice at his trial.

[26] We do not consider these matters can have any bearing on the outcome of the trial. Judge Rollo dealt with PN's police record from Australia and PN's assertion of "maliciously false assertions of convictions". He concluded that "none of those early

alleged missteps, again viewed from [PN's] perspective, has in reality adversely influenced the conduct of this trial".[16] The Judge went on to say:[17]

> … I have found no valid evidential basis for the suggestion that there has been malfeasance or wrongful actions by any member of the police in the conduct of this investigation and prosecution (other than the technical error relating to the use of the word "convictions" in the police bail opposition form …

[27] Cull J also dealt with this issue, saying:[18]

> Although it was unfortunate that the police misinterpreted the Australian previous criminal history for [PN] at his bail hearing, this issue and mistake have no bearing on [PN's] guilt or innocence for the offence for which he has been convicted.

[28] Similarly, whether or not there was a divergence of evidence as between PN's mother and Detective Bailey as to whether she was frightened of PN, we accept, as did Cull J,[19] that this is not relevant to whether he was properly convicted on the charges he faced.

[29] In conclusion, the reserved judgment of Judge Rollo was extensive and thorough, and he set out, in compelling detail, the reasons for finding PN guilty on all charges. After a further hearing, Cull J came to the same conclusions. Nothing in PN's grounds of appeal satisfies us that they contain an issue of general or public importance, or that a miscarriage of justice may have occurred when he was convicted on these charges.

PN's proposed appeal against sentence

[30] PN also applies for leave to appeal his sentence although he does not set out the grounds for this proposed appeal. We are not satisfied that a second appeal against sentence is justified. The District Court categorised the offending as "near to the most serious of cases"[20] and the minimum period of imprisonment was justified in light of the considerations listed at s 86 of the Sentencing Act 2002. Cull J considered both

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16 Conviction Decision, above n 1, at [172].
17 At [180].
18 High Court Decision, above n 3, at [52].
19 At [56].
20 Sentencing Decision, above n 2, at [60].

the length of the sentence and the minimum period of imprisonment imposed were justified.[21] We see no reason to revisit those findings.

Result

[31] The application for leave to bring a second appeal against conviction and sentence is declined.

Solicitors:
Crown Law Office, Wellington for Respondent

[21] High Court Decision, above n 3, at [75]–[76].