NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT IN OFFENDING OF 27 AUGUST 2009 REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA198/2016
[2017] NZCA 404

BETWEEN	GEORGE CHARLIE BAKER Appellant
AND	THE QUEEN Respondent

Hearing:	31 July 2017
Court:	Cooper, Brewer and Peters JJ
Counsel:	W C Pyke for Appellant JEL Carruthers for Respondent
Judgment:	15 September 2017 at 10 am

JUDGMENT OF THE COURT

A The application for an extension of time to file the notice of appeal is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] On 5 November 2010, Courtney J sentenced Mr Baker to preventive detention with a minimum period of imprisonment of 16 years on a charge of kidnapping.[1] Mr Baker now seeks to appeal that sentence.[2]

[2] Mr Baker's appeal is more than five years out of time. However, we have had regard to the explanation provided in Mr Baker's affidavit affirmed on 15 December 2016. Briefly, Mr Baker represented himself at sentencing, was already serving a life sentence for murder and could not access legal advice, was unaware of his appeal rights, has significant mental health difficulties, and always wished to pursue an appeal. In these circumstances, and in the absence of opposition by the Crown, we grant the application for an extension of time for appealing.

Background

[3] On 15 December 2006, Mr Baker was sentenced to life imprisonment for murder. A minimum non-parole period of 18 years was imposed. Thus, he would have been eligible for consideration for parole in 2024.

[4] Mr Baker subsequently faced two trials in the District Court for offending while in prison. At his first trial he was convicted of attempted kidnapping arising from an incident on 5 July 2008. At his second trial he was convicted of kidnapping, threatening to kill and assault with a weapon arising from an incident on 27 August 2009. The District Court declined to sentence Mr Baker on these four offences because preventive detention was seen as an option and so sentencing fell to Courtney J.

[5] We adopt Courtney J's summary of the offending:[3]

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1 *R v Baker* HC Auckland CRI-2008-044-9492, 5 November 2010.

2 Mr Baker initially also sought to appeal against the conviction for kidnapping on which the sentence of preventive detention was imposed. However, that appeal was not pursued before us and, on 21 August 2017, Mr Baker formally abandoned his appeal against conviction.

3 *R v Baker*, above n 1.

5 July 2008

[4] The incident on 5 July 2008 occurred in a prison van that was returning you from Middlemore Hospital to Paremoremo Prison. You had previously been taken to hospital for a self-inflicted injury to your wrist. You were travelling in the van with four Corrections officers. During the journey you produced a make-shift knife constructed from a piece of sharpened aluminium and lunged at one of the Corrections officers. According to the summary of facts, which reflects the jury's verdict of attempted kidnapping, you shouted that you were taking the Corrections officer hostage. Fortunately he was able to hold the weapon against the side of the van and his fellow officers restrained you. One of the Corrections officers sustained a cut to the palm of his hand and a cut to a finger during the incident.

27 August 2009

[5] A little over a year later, on 27 August 2009, you committed the three other offences for which you have been found guilty, kidnapping, threatening to kill and assault with a weapon. These offences occurred in the recreational area of the special needs unit at Paremoremo Prison. The victim was an 82-year-old inmate. You had become agitated, barricaded yourself and the victim in the recreational room. You placed the complainant in a headlock and instructed prison staff to keep away from the gate or you would kill him. You were holding another homemade weapon comprising a sharpened screwdriver. You bound the complainant to a chair for two to three hours and when he began to sing hymns threatened to stab him if he did not cease doing so. You held the complainant for a period of ten hours during which time you armed yourself with various makeshift weapons, repeatedly saying that you had nothing to lose because you were probably not going to get out of jail anyway.

[6] I note that you say — and I think the Crown accepts — that you did do things for the complainant such as ensure that he had food and blankets. I note your assertion that you planned a lone protest rather than kidnapping, but even if that was your initial intention it was obviously overtaken by your decision to detain that victim for quite a lengthy period and, indeed, it was only police intervention that freed him.

Appeal

[6] The first ground of appeal in the written submissions of counsel for Mr Baker, Mr Pyke, was that the sentence of preventive detention was not appropriate in Mr Baker's case. A finite sentence would have satisfied all sentencing purposes, including the protection of the community. He argued the offending involved limited violence and, considered on its own, did not demonstrate a pattern of offending or a risk to the community following release.

[7] In his oral submissions, Mr Pyke acknowledged the difficulty in advancing this ground of appeal and did not seek to add to his written submissions. That was responsible. We have no doubt that the sentence of preventive detention was appropriate, notwithstanding that Mr Baker was already serving the indeterminate sentence of life imprisonment.

[8] It is well-established that a sentence of preventive detention can be imposed on an offender who is already serving an indeterminate sentence.[4] Whether such a sentence is appropriate is to be determined primarily in accordance with sentencing principle rather than whether it will have any practical utility.[5]

[9] The purpose of a sentence of preventive detention is to protect the community from those who pose a significant and ongoing risk to the safety of its members.[6] It is not a sentence of last resort and it is not intended as a different or greater form of punishment.

[10] Courtney J addressed the mandatory considerations set out in s 87(4) of the Sentencing Act 2002. They lead overwhelmingly to the conclusion that a sentence of preventive detention was the proper response to Mr Baker's further offending:

(a) He has a pattern of serious offending. He was, at sentencing, 29 years of age. From about the age of 18 years he had been offending violently. This offending culminated in 2006 with the conviction for murder.

(b) The seriousness of the harm caused to the community by Mr Baker's offending was high. A prison environment should be a secure environment. Violent offending against inmates undermines the prison system and places other inmates and Corrections staff at risk.

(c) Mr Baker's tendency to commit serious offences in the future was identified starkly in the reports of the health assessors which were

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4 See *T (CA43/2013) v R* [2013] NZCA 497.
5 At [26].
6 Sentencing Act 2002, s 87(1).

before Courtney J and accepted by her. We agree with Courtney J's assessment of the reports and we will not repeat what she said. It is sufficient to note that Dr Skipworth, a consultant psychiatrist, related Mr Baker's statements to him that if he were released he would be killing people and would probably reoffend.

(d) Mr Baker had quite extensive contact with psychological services including a five month period of admission at the Mason Clinic in 2004. Courtney J noted he was reported as not having really been engaged in the therapy that was offered at the time.[7] The Judge said there was no real indication of any genuine motivation or even ability to engage in treatment.

(e) Although a lengthy determinate sentence is preferable if it would provide adequate protection for society, against the reports of the health assessors there was no indication that such a sentence would provide adequate protection for society.

[11] Courtney J concluded:

> [24] A factor that weighs heavily with me, as I have already indicated, is Dr Skipworth's view that it is unlikely that the risk you pose would significantly reduce in the remaining 14 years of your current minimum period of imprisonment. All the information I have strongly suggests that you will continue to pose a risk even after that time. Your offending has been consistently violent for a long time and in the four years since you have been sentenced on the murder charge nothing has changed for the reasons that we have already discussed. I therefore conclude that a term of preventive detention is needed and will send a clear signal to the Parole Board that, at this stage at least, nothing has changed and you must be regarded as a serious risk to the community even as far out as 2024 if significant changes are not made.

[12] For those reasons, the sentence of preventive detention was appropriate.

[13] The second ground of appeal advanced by Mr Pyke was that Courtney J erred in imposing a minimum term of imprisonment of 16 years because that was longer

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7 *R v Baker*, above n 1, at [19].

than the maximum penalty of 14 years for the offence of kidnapping upon which it was imposed.

[14] However, Mr Pyke accepted in oral argument that the imposition of a minimum period of imprisonment consequent upon a sentence of preventive detention is not tied to the maximum sentence which could be imposed if a finite sentence of imprisonment was adopted. As this Court said in *Ellmers v R*:[8]

> [38] The general scheme of s 89 is that when the court imposes a sentence of preventive detention, it must also impose a minimum period of imprisonment of at least five years. A longer period may be required to reflect the gravity of the offending or to protect the community. Whichever is the longest of the three options — five years, the period required to reflect the gravity of the offending or the period required for community protection — is the term that must be imposed.

[15] And:

> [52] We also reject the argument that the minimum period of imprisonment under s 89 can never be longer than the appropriate finite sentence for the offending. To adopt such an approach would be to defeat Parliament's express intention. Section 89(2)(b) directs that if community safety requires a longer minimum period than would be appropriate for the purposes of denunciation, deterrence and punishment, the court must impose it. The case of *Reid* cited by Mr Tennet is not authority for his proposition.
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> (Footnote omitted.)

[16] Furthermore, in *R v Wellm*, this Court reduced a minimum period of imprisonment from 17 years to 15 years, which was still one year above the statutory maximum penalty for the offence in question.[9]

[17] Mr Pyke's third and main point on appeal was that the minimum period of imprisonment of 16 years was unnecessary to protect the public because Mr Baker still had 14 years to serve on his 18 years' minimum non-parole period. In Mr Pyke's submission, adding two years achieved nothing of significance and deprived the Parole Board of an earlier opportunity to assess Mr Baker's suitability for release.

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8 *Ellmers v R* [2013] NZCA 676.
9 *R v Wellm* [2009] NZCA 175.

[18] Section 89 of the Sentencing Act requires a judge to consider what minimum period of imprisonment would be required to reflect the gravity of the offence and what would be required to reflect the purpose of safety of the community. It is the longer of those periods which must be imposed. That is an independent inquiry which must be undertaken by the sentencing judge as at the date of sentencing.

[19] In this case, the fact that Mr Baker was already subject to a lengthy minimum non-parole period was irrelevant. Courtney J had the direct opinion of Dr Skipworth that it was unlikely that Mr Baker's risk would significantly reduce within the 14 remaining years of his minimum non-parole period.[10] Therefore, she considered that a minimum period of imprisonment going beyond 14 years was necessary. Her fixing on 16 years as a minimum period of imprisonment sends, as was intended, a clear message to the Parole Board that as at the date of sentencing the Court considered Mr Baker to be a risk to the community for a period going beyond the minimum non-parole period considered appropriate when he was sentenced for murder in 2006.

[20] In our view, the approach taken by Courtney J was entirely open to her and we agree with the sentence she imposed.

Result

[21] The application for an extension of time to file the notice of appeal is granted.

[22] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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[10] *R v Baker*, above n 1, at [18].