ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF APPELLANT/ACCUSED/VICTIM/CONNECTED PERSONS PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CRI-2019-441-14
[2019] NZHC 2177

BETWEEN	D Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	28 June 2019 10 July 2019 – Further submissions received from Appellant 7 August 2019 – Reply submissions received from Respondent 21 August 2019 – Reply submissions received from Appellant
Appearances:	Appellant in Person S B Manning for the Respondent
Judgment:	2 September 2019

JUDGMENT OF CULL J

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[1] D appeals against his conviction[1] and sentence[2] for 11 offences: threatening grievous bodily harm (three charges),[3] threatening to kill (five charges)[4] and possession of an offensive weapon (three charges).[5] The threat charges relate to various threats communicated via text message, Facebook and email, spanning a

[1] *Police v* [*D*] [2018] NZDC 1777 [*Conviction Decision*].
[2] *Police v* [*D*] [2019] NZDC 6520 [*Sentencing Decision*].
[3] Crimes Act 1961, s 306, maximum penalty seven years' imprisonment.
[4] Section 306, maximum penalty seven years' imprisonment.
[5] Section 202A, maximum penalty three years' imprisonment.

period of about 10 months, directed primarily to D's former partner and her parents. The weapons charges relate to weapons in D's possession when he was stopped by Police, in a campervan he had hired, while travelling to Napier, where his partner lived.

[2] In April 2019, D was sentenced to a total of six years' imprisonment,[6] with a minimum period of three years, eight months.

[3] D appeals both his convictions and sentence on the grounds that the integrity of the trial and its process were compromised, and the Judge erred in fact and law.

[4] The Crown opposes the appeals against both conviction and sentence on the following grounds:

(a) The evidence against D was overwhelming.

(b) The District Court Judge applied the correct legal principles.

(c) The sentence imposed was commensurate with the very serious nature of the offending.

(d) The sentence was justified to deter D, and to protect the public and in particular his former partner from him.

Background and the District Court decisions

[5] The relevant facts are set out in detail in the District Court's reserved judgment.[7] In summary, D and his partner, CM, were in a relationship for some 12 years, up until November 2016. There is one child of the relationship, R, who is eleven years old. D and his partner initially lived in Hawke's Bay, then moved to Australia in 2011 and ended up living in Brisbane. They enjoyed a comfortable lifestyle in Brisbane with good jobs and good income.

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[6] *Sentencing Decision*, above n 2, at [73]. This was made up of five years and six months' imprisonment for the eight charges of threatening to kill or cause grievous bodily harm, and six months' imprisonment for the unlawful possession of offensive weapons. The sentences were imposed cumulatively.

[7] *Conviction Decision*, above n 1.

[6] However, in early 2016 D was remanded in custody pending the hearing of a charge or charges against him. It was not clear what these charges were. During that period in custody, CM elected to send R back to Hawke's Bay to live with her grandmother. On D's release from custody, in about July 2016, an agreement was reached between D and CM that they separate, but she agreed to provide emotional and financial support to D to help him "get back on his feet". D says this agreement was reached because when he was in prison, CM had sold most of his property. CM then left Australia in November 2016 and returned to live in the Hawke's Bay with R.

[7] From there, the relationship deteriorated significantly. This was due to a number of disputed issues resulting in D ultimately sending a barrage of texts, emails and Facebook messages to CM of an increasingly violent nature. D threatened to cause grievous bodily harm to her stepfather, threatened to kill her mother, and repeatedly, over many months' duration, threatened to kill her and to cause her grievous bodily harm.

[8] The threatening messages were detailed and violent as to the nature of the injuries and threats that D intended to cause his partner. The District Court Judge described them as "unrelenting, in that on many occasions [the threats] were sent repeatedly on the same day or over a series of days in what I am satisfied was a prolonged and premeditated series of attempts to intimidate and significantly frighten [CM]".[8] The Judge continued:

> [17] In those threatening messages, common violent acts and themes of violent retribution are present, including hunting [CM] down, cutting her open, slicing her face, melting her face by burning her face, shooting her with arrows, and a common threat, that you would broadcast the results of your actions to friends and acquaintances on social media showing, effectively, your revenge upon her and your "destruction of her prettiness," as you described it.

[9] D's defence was that he was not the author of those messages, that his former partner had infiltrated his social media and other electronic communication devices and had sent the violent and abusive threats to herself. The defence theory was that she had participated in an elaborate, vile dialogue with herself in order to bring a false

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8 *Sentencing Decision*, above n 2, at [16].

criminal complaint against D concerning these threats to kill or to cause grievous bodily harm, which would then result in D's arrest, should he return to New Zealand.

[10] This interpretation of the evidence was rejected by the Judge as incapable of serious belief on the evidence presented.[9]

[11] D then arrived in New Zealand on 10 October 2017. Prior to coming to New Zealand, he advised CM that he had obtained a new passport and had tickets to New Zealand. The Judge found these communications were malicious in that they were intended to increase CM's fear that D would find her and carry out the violent acts he had threatened to commit.

[12] On arrival to Auckland Airport on 10 October 2017, D texted and then called his former partner to let her know he was in New Zealand. She notified the Napier Family Harm Policing team. She had first made contact with this team two or three weeks after her first arrival back in Hawke's Bay in November 2016. Such was her level of concern for her and her family's safety as a result of D's constant threatening emails and other communications.

[13] D was intercepted on 12 October 2017 at gunpoint by the Armed Offenders Squad on the outskirts of Napier. He was found in a campervan which contained, amongst other things, camping equipment, food and supplies, a knife, a crossbow with arrows and a machete. When asked what weapons he had on him, D immediately named these three offensive weapons. The Judge rejected D's contention that these items were to be used for hunting small game in New Zealand and as presents for D's brother-in-law. He found that, not only was D the author and originator of the threats to kill or cause grievous bodily harm to his former partner or her parents, but he had also deliberately bought weapons in Auckland, after his arrival in New Zealand, to enable him to carry out those threats when he got to the Hawke's Bay. The Judge concluded:

> [214] I am satisfied D specifically travelled to New Zealand for the probable, frequently declared purpose of killing [her], or of eventually killing her after abducting her, then cutting and mutilating her (in addition to slashing

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9 *Conviction Decision*, above n 1, at [196].

> and slicing her face, D refers in one of his email to cutting off her "tattoeed 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.

[14] Not only did the Judge find that D made very specific and detailed threats but he had the intention, and the means, to carry them out.

[15] The Judge then convicted D of all charges in a reserved judgment issued on 22 November 2018, after a five-day hearing in which D represented himself, with the support of Mr Philip as standby counsel.[10] Following the conviction the Judge called for D to undergo psychiatric assessments.

[16] As D would not participate in the psychiatric assessment process, the Judge ordered a two-week secure care remand, as recommended by Dr Parsonson, to enable D to be observed by way of a formal psychiatric assessment. This was unsuccessful. D refused to participate in any formal assessment process because of his concern that his words would be used against him to paint an incorrect picture of his mental health. However, the psychiatrist, Dr Greg Young, was able to make the following observations:

> In my opinion, [D] does not suffer from a major psychiatric disorder such as schizophrenia or a related psychosis or major mood disorder. In my opinion, his behaviour as reflected in the messages provided by police and his present ideas about corruption are not the result of fixed delusions.
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> In my opinion, the clinical observations do not support a defence of insanity in relation to any of the charges. In my opinion, [D] has serious psychological problems especially in the area of anger management, violence risk and coping with rejection. These problems are all amenable to psychological treatment…
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> There is a greater than usual degree of uncertainty in this case because [D] was unwilling to co-operate with the assessment. The effect of this is that [D] may remain fixed in his beliefs about injustice even if an appeal against his convictions were to be heard and declined. In that case, the possibility that his beliefs are part of a delusional system may need to be reassessed.
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> Considering the seriousness of the threats and risks to [his former partner], her mother and stepfather, I recommend that a further assessment be done at the time of parole is considered.

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10 For the difference between an amicus and standby counsel, see *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392 at [81]–[84].

[17] Dr Young concluded that there was "no psychiatric impediment to justice taking its course."

[18] With this information, the Judge then sentenced D to a total of six years' imprisonment.[11] He identified the following aggravating factors in relation to the offending:

(a) The vulnerability of CM, having been in an intimate relationship with D for 12 years, since she was 15 years old.

(b) The premeditation and escalation of the threats: the threats from Australia, the threats to come to New Zealand, then telling her he was in Auckland, then on his way to the Hawke's Bay. This was calculated and designed by D to cause maximum fear to CM and her immediate family.

(c) D's clear anger, jealousy and desire for revenge against CM.

(d) D is yet to accept any responsibility, let alone accountability, for his actions.

(e) D intended to give effect to the threats and that he intended CM to take the threats against her and her family seriously.

(f) The significant impact the offending has had on CM's life.

[19] The Judge found that taken in its totality, the sheer scale, duration, calculation and violence within the threats elevated the case to "near to the most serious of cases" for these offences.[12] As a result, the Judge took a relatively high starting point of five years and six months' imprisonment for the threatening to kill or to cause grievous bodily harm charges.[13] He then applied an uplift of six months cumulatively for the

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11 *Sentencing Decision*, above n 2, at [73].
12 At [60]–[61].
13 At [64].

three charges of unlawful possession of offensive weapons.[14] He found there were no relevant mitigating factors personal to D that would justify a reduction and therefore the total sentence awarded was six years' imprisonment.[15]

[20] Lastly, the Judge considered the issue of a minimum period of imprisonment which the Crown had sought under s 86 of the Sentencing Act 2002. The Judge imposed a minimum term of imprisonment of three years eight months, that is, two-thirds of the five years six months' imprisonment.[16]

Approach to conviction appeal

[21] An appeal against conviction in a Judge-alone trial is a general appeal, governed by s 232 of the Criminal Procedure Act 2011 (the Act). The appellant must satisfy the Court that a miscarriage of justice has occurred, either because the Judge erred in his or her assessment of the evidence, or for any other reason.[17] A miscarriage of justice is "any error, irregularity, or occurrence" that "has created a real risk that the outcome of the trial was affected" or "has resulted in an unfair trial or a trial that was a nullity".[18] As s 232 makes clear, not every error or irregularity causes a miscarriage of justice.[19]

[22] The Supreme Court has recently re-examined the role of s 232(2)(b) and the general function of an appellate court.[20] In *Sena v Police*, the Supreme Court held that the function of the appellate court is to re-evaluate the evidence, and an appellant is entitled to the appeal court's determination of whether the first instance Judge was right or wrong substantively on the outcome. On this approach, if the appellate court comes to a different view on the evidence, the trial Judge necessarily will have erred in their assessment.[21]

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14 *Sentencing Decision*, above n 2, at [65].
15 At [67].
16 At [80]-[81].
17 Criminal Procedure Act 2011, s 232(2).
18 Section 232(4).
19 "A miscarriage is more than an inconsequential or immaterial mistake or irregularity": *Matenga v R* [2009] NZSC 18 at [30].
20 *Sena v New Zealand Police* [2019] NZSC 55.
21 At [38].

[23] The Court cautioned, however, that this change of approach does not mean the role of the appellate court is to consider the issues de novo as if there had been no hearing at first instance. Since it is an appeal, it is for the appellant to show than an error has been made. In assessing whether there has been an error, an appellate court must take into account any advantages a trial judge may have had. Where the challenge is to credibility findings based on contested oral evidence, an appellate court will exercise "customary caution".[22]

[24] If the appeal is successful, the Court must set aside the conviction and either direct that a judgment of acquittal be entered or that a new trial be held, or make any other order it considers justice requires.[23]

Grounds of appeal

[25] D set out his grounds of appeal in nine parts, both challenging the Judge's findings and making allegations of impropriety against various participants within the criminal justice system. Following the hearing of the appeal before me, D filed further submissions, largely addressing his concerns about the "Vodafone forensic reports" and applying for disclosure of Vodafone records and forensic reports in the control of the prosecution. D also applied for a hearing to determine whether Vodafone is in possession of "specific evidence in the form of text-related messages".

[26] I directed that D's further submissions and material be served on the respondent to address the matters raised.[24] Mr Manning filed and served submissions in response and D has filed and served a further memorandum addressing "issues raised subsequent to appeal."

[27] I note that D's additional submissions and his reply relate to the charges of threatening to kill or cause grievous bodily harm, where the threat was communicated by text message.[25] I will deal with the additional submissions under the first ground

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22 *Sena*, above n 20, at [38]; and *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13] (footnote omitted).

23 Criminal Procedure Act 2011, s 233(3).

24 [*D*] *v New Zealand Police* HC Napier CRI-2019-441, 1 August 2019 (Minute of Cull J).

25 Those charges are CRN 5138, 5137, and 3138.

of appeal, with my reasons on each. Where the appeal grounds overlap, I have considered them together.

First ground: Threatening to kill or cause grievous bodily harm by the use of text/viber messages

[28] D submits that the "text messages" that led to three of the charges and ultimately conviction, are not in fact text messages and are instead messages on the Viber application. He says that his former partner was able to, and did, manufacture the messages, showing them as sent from D on her phone, but in fact she had sent them to herself. He says she then presented the messages to the police to look as though they were text messages sent from D, thus framing him which, he says, is consistent with her past behaviour.

[29] D was convicted of three charges relating to messages sent by text message: one charge of threatening to kill his former partner, one of threatening to kill her mother, and one of threatening grievous bodily harm to her stepfather.[26] The text messages, the subject of the three charges, were sent to the victim from D's Vodafone Australia mobile number.

[30] The messages are shown as being from [D's first name] and as having been sent from an Australian cellphone number. There was corroborative evidence at the trial confirming D used that number while resident in Australia at the relevant time and it was the same number in his application for a passport. The content of the messages is also consistent with the tone of the ongoing threatening messages that followed.

[31] The victim took her own cellphone into the Napier Police Station on 26 August 2017 and showed the text messages to a Constable, who took photographs of the messages and they were produced as exhibits at trial. It is those text messages that D is asserting the victim created herself by the use of Viber.

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[26] Those charges are CRN 5138, 5137, and 3138.

[32] His former partner was cross-examined extensively on this topic, both by D in person and counsel assisting. She emphatically denied the allegation that she had "manipulated" a Viber message to look like a text message, arranging for it to appear on her own phone as if it were a text message sent from D. D alleges that his former partner on an earlier occasion in Australia had falsified Viber messages, which were provided to Police. This too was put to his former partner in cross-examination, and she emphatically denied it.

[33] In this appeal hearing, D alleged that the Crown never disclosed his "Vodafone" records. D says that this was a deliberate concealment because disclosure of his Vodafone records would prove that the text messages were not sent from him or his cellphone.

[34] Mr Manning in reply to D's allegation of deliberate concealment explained that D arrived in New Zealand with a cellphone. Prior to that, he was using a phone number in Australia, which was on the Vodafone network. The SIM card for the appellant's Vodafone Australia phone number was not found on D at the time of his arrest. The police, therefore, cannot say which text messages were or were not saved or deleted from the SIM card that D used in Australia.

[35] During the police investigation into this matter, the police never obtained a production order for his Vodafone number in Australia. However, when he arrived in New Zealand, D purchased a Vodafone prepaid SIM card and the photographs of text messages from that Vodafone data are contained in exhibit 2, the volume entitled "Evidential messages". The police then sought a production order for the prepaid Vodafone New Zealand number on 9 October, when D arrived in New Zealand. He was apprehended on 12 October.

[36] Mr Manning explained that D's Australian cellphone was taken pursuant to a search warrant and analysed by the police forensic unit. Some text messages had been sent from the memory of the handset of the cellphone itself. Because the SIM card was never found, the police have not gained access to the SIM card that related to D's Australian cellphone number.

[37] Importantly, as Mr Manning told the Court, the police did not request or receive any records from Vodafone Australia relating to D's Vodafone cellphone number, so the police are not withholding information from D. In his subsequent reply submissions, Mr Manning explains that the police do not have the authority, under the Search and Surveillance Act 2012, to request a New Zealand Court to issue a production order to have effect in Australia. Such a request for records from an overseas-based company needs to be made under the Mutual Assistance in Criminal Matters Act 1992. Such a request can be made only by the Attorney-General.[27]

[38] In his Memorandum, D challenges Mr Manning's explanation as to why the Police did not obtain a production order from Vodafone Australia and does not accept the jurisdictional difficulty in doing so. Although D reiterates his concern about the need for confirmation of the identity of the sender of the text messages, for reasons which I canvass below, I do not uphold D's submission.

Analysis

[39] After arriving in New Zealand on 9 October 2017, D purchased a Vodafone New Zealand SIM card, which was inserted into the mobile phone handset D had brought with him from Australia. When he was stopped by the Napier Police on 13 October 2017, D's mobile phone with the New Zealand SIM card was found in the campervan he was driving, together with packaging that had come with the New Zealand Vodafone SIM card he had purchased. The police applied for a production order and Vodafone New Zealand provided the police with cellphone data for D's New Zealand cellphone number. The data covered the period 12.00 am to 9 October 2017 to 5.30 pm 12 October 2017.

[40] From D's handset, the police accessed text messages which were saved to the handset of the cellphone. The handset was forensically examined by Ms Zigliani of New Zealand Police digital forensics unit. The text messages which were saved to the cellphone handset were extracted, including text messages, call logs, emails and photographs and saved to a CD disk that was provided by way of disclosure to counsel

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[27] Mutual Assistance in Criminal Matters Act 1992, ss 8, 10 and 11.

formally representing D on 9 May 2018. The CD was also made available to the forensic analyst engaged to assist D at trial.

[41] Mr Manning advises that some portions of the text messages that were saved to the memory of D's handset were produced in evidence, to show a connection between D and the handset.

[42] From the notes of evidence, D at trial confirmed that he was aware of the data found on his mobile handset and in re-examination he makes specific reference to the absence of the relevant text messages on his handset's memory.

[43] At the hearing, Mr Manning submitted that the text messages from D's handset should not be confused with Vodafone data. Mr Manning identified from the trial notes of evidence, where counsel assisting re-examined D and identified the document, known as "attributions". In the exhibit book, the police had included some of the text messages that were found on D's handset as evidence connecting D to the handset itself.

[44] Mr Manning during the hearing explained that the inclusion of the text messages in the exhibit booklet may have led D to assume that those text messages comprised all the text messages he ever sent and received, and thus queried the disclosure of the documents from Vodafone Australia. As Mr Manning has submitted, both in writing and orally, the police did not seek a production order from Vodafone Australia.

[45] Turning, then, to D's submission that the victim manipulated the text messages by the use of Viber, he pointed to the indication that a signal is present on her Samsung cellphone, which can be seen from the screenshot in the exhibit. I accept Mr Manning's response in respect to D's submission. On a perusal of the screenshots in the exhibit 2 booklet, a Viber icon on the icon bar does not mean that the content on the screenshot is not a text message. The Viber icon appears alongside a number of icons, such as the percentage of the battery, the date and time, WiFi connectivity, and the 4G icon. The presence of the icon does not equate to a signal being present on her Samsung cellphone demonstrating that the message was created on Viber, as D

submits. I accept that the Viber icon was present, but this does not mean that the message was sent by Viber. During the trial, the victim had her cellphone in Court and made it available when D put it to her that she had somehow manipulated her cellphone to create text messages to look as though they had come from D.

[46] There is further evidence which supports my rejection of D's arguments. The identical language used in the text messages is also found in the emails sent by D and his Facebook messages. The District Court Judge found the content of the text messages bore a striking similarity to the words in both the Facebook messages and the emails such as:

> You will deserve what's coming to you. Tell that weak bitch X he's a weak f .. cow

Numerous examples correlate the language in the Samsung text messages with the emails on Facebook messages sent by D to the victim, as exhibits 2 and 3 demonstrate.

Disclosure

[47] The CD containing the data extracted from D's electronic devices, including his handset, was provided to his counsel and his retained expert, the independent analyst. The material contained on the CD was provided to D in hard copy, delivered to him at Hawke's Bay Regional Prison. Police records confirm that the hard copy disclosure of the file was made on 24 July 2018.

[48] In the additional material filed by D following the hearing, he has made several requests for disclosure under the Criminal Disclosure Act 2008. As stated earlier, these relate to the forensic report and data from Vodafone Australia. I decline D's requests, albeit that the applications were not made in the proper form, and set out the summary of reasons which I adopt from Mr Manning's submissions. They are:

(a) The police did not request or receive any forensic report from Vodafone Australia relating to D's Vodafone Australia cellphone number.

(b) D was not in possession of a Vodafone Australia SIM card at the time of his arrest.

(c) The only Vodafone data requested and received by the police related to D's Vodafone New Zealand cellphone number.

(d) D's handset had some text messages saved to it, but these were not the relevant text messages sent to the victim.

(e) All digital data and reports relating to the matters before the Court were disclosed to D prior to trial.

Conclusion

[49] For reasons which are set out extensively in the Judge's reserved decision, there were many reasons justifying the Judge making a finding in favour of the victim's credibility and against D:

(a) An acceptance of the unchallenged evidence of the digital forensics expert. Her evidence linked, in many respects, D to the various devices and to documents found on his laptop computer entitled "This bitch".

(b) A rejection of D's evidence and various explanations for how the threatening material came to be on his devices or sent from them.

(c) A rejection of the suggestion that his former partner would have created the messages and sent them to herself.

(d) That the content of the messages contained detail that could only have come from D. For example, references to his relationship with her, talk of their daughter, and financial circumstances.

(e) The content of the messages, in addition to containing the threatening material, also contained meaningful expressions of affection towards his former partner that was consistent with D having previously had a longstanding relationship with her and being jealous of her.

(f) The language used in the messages was distinctive and consistent with the language used by D when giving evidence in Court.

[50] As the Crown submits, this was a straight credibility determination by the Judge and one which he had ample evidence to make in favour of his former partner. On the evidence before this Court, and hearing from D, I cannot find error in the Judge's credibility findings, and so uphold them.

Second, sixth and eighth grounds: false convictions, Department of Corrections/Probation, and the IPCA and Judicial Conduct Authority

[51] D submits that in his bail hearing, the Judge relied on his "previous convictions" in Australia to deny his bail, when they were not convictions but "proven previous offending". He submits the Department of Corrections, Probation Services, the IPCA, and the Judicial Conduct Authority are conspiring against him in misrepresenting his criminal history in this matter.

[52] There was an acknowledgement by the Crown that the Police were technically wrong in referring to the Australian records as previous convictions. Although it was unfortunate that the police misinterpreted the Australian previous criminal history for D at his bail hearing, this issue and mistake have no bearing on D's guilt or innocence for the offence for which he has been convicted.

[53] The Judge addressed this issue specifically. He was satisfied that the description in the bail opposition form of Australian offending as "convictions" was a genuine error. He held:[28]

> [164] As Constable Abbott and also Constable Bailey each acknowledged in their respective evidence, the bail opposition prepared and presented to the court by police was technically wrong in referring erroneously to "relevant previous convictions". It should have referred to "relevant proven previous offending." However, in my judgment, as I have referred to, this was only a technical error of terminology and would not have been determinative.
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> …
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> [180] With respect, I have found no valid evidential basis for the suggestion that there has been malfeasance or wrongful actions by any member of the

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[28] *Conviction Decision*, above n 1.

> 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, as I have discussed).

[54] I cannot uphold D's allegations and these grounds of appeal fail.

Third and fourth grounds: evidence from members of D's family

[55] D submits that Detective Bailey falsely stated that D's mother told Detective Bailey that she was "extremely frightened" of D. D relies on his cross-examination of his mother who, in response to questions from D, confirmed she had never told Detective Bailey she was frightened of D.

[56] I accept the Crown's submission that these issues have no bearing on this appeal. D's mother was called to give evidence on D's behalf at the trial. There was a divergence of evidence as between D's mother and Detective Bailey, but only on matters that were relevant to comments contained within a bail opposition form, which is not relevant to the issues on this conviction and sentence appeal.

Fifth ground: past legal representation

[57] D submits his previous legal representation has been inadequate and has affected his ability to have a fair trial.

[58] D chose to be self-represented at trial. However, he was assisted by an experienced criminal lawyer acting as standby counsel. Although D may have had difficulties in the past with assigned counsel, this had no bearing on whether he received a fair trial. I note the Judge exercised considerable patience and latitude towards D in recognition of the fact that he was self-represented, albeit with a standby counsel, who still played a significant role throughout.

[59] The Judge addressed these issues in the judgment:[29]

> [8] D is self-represented. Although he has had lawyers previously assigned to him by Legal Services, for particular reasons unknown to me D remains self-represented.

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[29] *Conviction Decision*, above n 1.

> [9] Mr Philip, however, has been appointed by the Court as an Amicus, to assist D in the conduct of his defence and specifically to cross-examine the complainant on behalf of D (as required by s 95 Evidence Act 2006).
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> [10] It is apparent to me from the way the defence case has been presented by both D, or Mr Philip, and on many occasions by them both, one after the other, that Mr Philip has liaised closely with D in advising him of the relevant legal and relevant factual issues and in supporting D in putting D's case clearly before the court.
>
> [11] Additionally, D has shown, in the way in which he has acquitted himself in the conduct of this case, including his own defence, a strong grasp of the relevant issues, both legal and evidential.

[60] D represented himself at this appeal hearing. I concur with the Judge's comments that D is articulate, writes submissions well, and has a strong grasp of the issues involved in this appeal. The Judge has carefully traversed the matters raised by D, who was assisted by an experienced criminal lawyer. I cannot find any basis for holding that his trial was unfair or his legal representation, previous or otherwise, was inadequate. I reject this ground of appeal.

Seventh, ninth, twelfth and thirteenth ground: psychology reports, possible reoffending, ambush pre-trial and name suppression

[61] These matters have no bearing on the determination of the conviction appeal. The "ambush pre-trial" relates to an earlier occasion when the trial was set to proceed but did not. The concerns expressed therefore have no bearing on the trial that resulted in D's convictions. The name suppression argument is that D was not granted name suppression until he sent documents to the media covering the "widespread corruption" of the police and Court system. This has no relevance to the determination of the conviction appeal, but I will come back to the relevance of the psychological reports and possible reoffending when I address the sentence appeal.

Tenth ground: weapons

[62] D submits that the Judge relied on Constable Abbott's statements that the weapons found were "consistent with the threatening messages"; that is, that the weapons had been referred to in the threatening emails. He submits the words "machete" and "crossbow and arrow" were not in any email sent.

[63] In response to D's submission that there is no evidence of D's use of a crossbow or shooting, Mr Manning referred to the various messages sent to CM, where D threatened to shoot her. Mr Manning referred specifically to Tuesday 10 October 2017 at 2.43 pm, where D contacted her after he arrived in New Zealand. He sent a message to her from his Hotmail account to her account. In that message there is a clear reference to "shooting". Although there is no mention of machete or crossbow and arrow, D was apprehended with a bow and arrow following the reference to shooting the victim in his email. The Judge's reference to the weapons being found as consistent with the threatening messages was appropriate, in light of the evidence before the Court. I do not consider that there is any error in the Judge's reliance on the Constable's statements.

[64] D also raised a concern about the Judge's to the fact that D has no previous experience in using a crossbow other than firing one or two arrows, it would seem, missing from those he obviously bought in Auckland. D pointed out that there were no missing arrows. The two arrows were depicted in the photograph exhibits and were not missing or available for the inference that the Judge drew.

[65] Mr Manning conceded that D's earlier use of the arrows was not part of the Crown case, but the Crown case was based on the inferences to be drawn from the circumstances of D's possession and the Judge's extrapolation of D's previous experience is not something that was pursued by the Crown.

[66] I find that on the evidence adduced at trial there was a basis for the Judge to find that the weapons were consistent with the threatening messages. The Judge's further comment about D's weapon experience was not part of the Crown case and was not relevant to the charges he faced. D was convicted on the charges on the basis of the evidence supporting the threatening charges (three plus five counts) and possession of an offensive weapon. I find the Judge's comments had no relevance to the actual charges D faced, and were therefore irrelevant and not fatal to his ultimate conviction of D on the 11 charges.

Eleventh ground: "This bitch" documentation

[67] D submits he did not write these documents, but they were manufactured by his CM's mother and stepfather.

[68] The Judge found that the evidence against D was compelling. This led the Judge to firmly reject D's claims that someone else was responsible for the creation of the documents on his computer. The reasons were:

(a) Google searches on D's laptop were consistent with items found to be in his possession and his previously-expressed intentions towards harming her. The time of these searches coincided with his travel to and presence in New Zealand.

(b) The presence and content of the three documents entitled "This bitch" – Parts 1, 2 and 3 on the appellant's laptop (found in his possession). These documents contain content that is remarkably similar to the threatening messages, and a level of anger and threat towards the victim that is matched by that in the threatening messages. The document was created nine months before D travelled to New Zealand.

[69] The Judge rejected D's evidence that someone else was responsible for creating the content in the "This bitch" documents.

[70] The similarity in language, as I have found in relation to the text messages, emails, and Facebook messages applies equally to the creation of "this bitch document". The Judge has traversed the evidence, where he had the opportunity to assess the oral evidence and the credibility of the witnesses, and provided reasons as to why he rejected D's submission that the documentation was manufactured by his partner's mother and stepfather. I can find no basis for interfering with this finding, and I reject this ground of appeal also.

Conclusion

[71] On the evidence at trial and in the hearing before me, there is no material or issue that demonstrates that a miscarriage of justice has occurred. On the contrary, the District Court Judge's careful and detailed judgment clearly sets out the evidential basis upon which D was convicted, and nothing in his submissions leads me to find that the Judge was in error or that evidence was interpreted incorrectly or overlooked.

[72] The appeal against conviction is dismissed.

Approach to sentence appeal

[73] This appeal is brought under s 250 of the Act. An appeal against sentence is an appeal against a discretion. An appeal against sentence must be allowed if the Court is satisfied that, for any reason, there is an error in the sentence imposed and a different sentence should be imposed.[30] The focus is on the final sentence and whether that was in the available range, rather than the exact process by which it was reached.[31]

Discussion

[74] Following the constant and detailed threatening communications to his former partner, D travelled to New Zealand to carry out those threats. In addition to the weapons found in his possession, themselves linked to the detail contained in the threats, D also had 10 litres of petrol. Many of the threats made prior to his arrival in New Zealand related to burning his former partner. I consider that the Judge was correct to categorise the offending as being close to the most serious of its kind.

[75] I acknowledge that the starting point of five years and six months' imprisonment is relatively high, given the maximum penalty for threatening to kill or cause grievous bodily harm is seven years. However, that is the maximum penalty for a single charge of threatening to kill or cause grievous bodily harm. Here, there are eight (representative) charges of this type. Bearing this in mind, I consider the Judge was justified in adopting a starting point near the top of the range for multiple

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[30] *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482.
[31] *Ripia v R* [2011] NZCA 101 at [15].

occurrences of threats to kill and cause grievous bodily harm, over a period of about 10 months, when there can be no doubt that those threats were intended to be taken seriously and were in the process of being acted upon. The six months uplift (cumulative) for the possession of offensive weapons was moderate and appropriate in the circumstances, given that each charge carries a maximum penalty of three years.

[76] Further, the contents of the various psychiatric and psychology reports make it clear that D is someone from whom the community, and particularly his former partner and her parents, need protection. Accordingly, I find the Judge was justified in imposing a minimum period of imprisonment of three years eight months.[32]

Result

[77] The appeal against conviction and sentence is dismissed.

Cull J

Solicitors:
Elvidge & Partners, Napier for the Respondent

[32] Sentencing Act 2002, s 86(2).