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IN THE COURT OF APPEAL OF NEW ZEALAND

CA210/2015
[2016] NZCA 198

BETWEEN	SARA-JANE SKEET Appellant
AND	THE QUEEN Respondent

Hearing: 11 February 2016

Court: French, Simon France and Ellis JJ

Counsel: C J Tennet for Appellant
P D Marshall for Respondent

Judgment: 13 May 2016 at 11.00 am

JUDGMENT OF THE COURT

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

B The appeal against conviction is allowed in relation to the conviction for aggravated robbery, but dismissed in respect of all other convictions.

C The conviction for aggravated robbery is quashed and no order made for a retrial.

REASONS

FRENCH AND SIMON FRANCE JJ

(Given by French J)

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Introduction

[1] Ms Skeet was convicted after trial in the Napier District Court before Judge Down and a jury of two counts of blackmail, one of kidnapping and one of aggravated robbery.

[2] The Crown case was that over a period of months in 2013 Ms Skeet blackmailed the complainant and then, when she discovered he was leaving town, she kidnapped him, and with an accomplice forced him to withdraw money from three ATM machines and took his motor vehicle.

[3] Ms Skeet now appeals her convictions on various grounds.

[4] Ms Skeet's notice of appeal was filed out of time. We grant an extension of time to bring the appeal.

The verdicts were inconsistent and unreasonable

[5] Ms Skeet was originally charged with four counts of blackmail. The jury acquitted her of two. On appeal, her counsel, Mr Tennet, submitted the verdicts were inconsistent because the four counts were so inextricably linked there could be no logical rationale for the different outcomes.

[6] We disagree. A guilty verdict on one charge is unsafe if it is impermissibly inconsistent with an acquittal on another charge.[1] In this case, each charge was based on discrete evidence, and the evidence of the complainant was far clearer in relation to the counts on which Ms Skeet was convicted than it was in relation to the two counts on which she was acquitted. In our assessment, the different verdicts simply reflect that the jury must have followed the Judge's direction to consider each charge separately.

Blackmail was not the correct charge

[7] The offence of blackmail is defined in s 237 of the Crimes Act 1961. In order to be guilty of blackmail, the defendant must make one of four specified types of threat with the intent to cause the person against whom the threat is made to act in accordance with the defendant's will and with the intent to obtain a benefit for the defendant or cause loss to another.

[8] At issue in this appeal is the scope of the operative threats. The four threats specified in s 237 are:

(a) a threat to make any accusation against any person;

(b) a threat to disclose something about any person;

(c) a threat to cause serious property damage; and

(d) a threat to endanger the safety of any person.

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[1] *Dempsey v R* [2013] NZCA 297 at [17]–[18]; *R v Shipton* [2007] 2 NZLR 218 (CA) at [75]; *B (CA862/11) v R* [2012] NZCA 602 at [10]; *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [24].

[9] Ms Skeet was convicted of two representative counts of blackmail. Included among the alleged threats on the first of these charges were threats to "get to" the complainant's disabled daughter and to slit the daughter's throat. The alleged threats in the second charge included a comment that the daughter would get hurt if the complainant did not comply.

[10] Mr Tennet contended, in reliance on the High Court decision of *R v Winn,*[2] that a threat of actual violence could not, as a matter of law, amount to "a threat to endanger the safety of any person" for the purposes of s 237. In Mr Tennet's submission, the only available charge was that of demanding with intent to steal,[3] which would have required the Crown to prove Ms Skeet had no claim of right.

[11] The Court has been unable to agree on whether to accept this submission. The majority (French and Simon France JJ) consider the interpretation of s 237 in *Winn* should not be followed. Justice Ellis, who wrote the *Winn* decision, disagrees. In a separate judgment, Ellis J elaborates on her reasoning in *Winn* and explains why she considers it is correct. As Ellis J also explains, the divergence of views on the scope of s 237 does not impact on the disposition of the appeal.

[12] What follows under this section of the judgment is the view of the majority.

[13] Prior to 2003 the offence of blackmail was defined in such a way as to apply only to threats to disclose something about another person or to make an accusation.[4] The definition was widened in 2003 by the addition of "threats to cause serious damage to property or to endanger the safety of any person".

[14] During the second reading of the amendment Bill in Parliament, the then Minister of Justice stated that the purpose of widening the scope of the threat was "to capture certain types of industrial blackmail, such as where the threat may be to contaminate a product unless the company does not do what the blackmailer wants". The Minister went on to say "[t]his is to ensure that we have sufficient force to

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2 *R v Winn* HC Auckland CRI-2009-090-12003, 13 September 2010.
3 Crimes Act 1961, s 239.
4 Section 238 of the Crimes Act ("Extortion by certain threats") was repealed on 30 September 2003 by s 15 of the Crimes Amendment Act 2003.

penalise people who may want to commit blackmail by way of tampering with supermarket products".[5]

[15] It was this statement by the Minister and the use of the phrase "endanger the safety of any person" in other provisions that persuaded Ellis J in *Winn* to hold the threat must be a threat of indirect harm, rather than a threat of direct harm directed to a specific person.[6] The Court held only the former type of threat is a threat to endanger safety; a threat of violence is not.

[16] If that were correct, it would mean the threats at issue in this case, being threats to directly inflict harm, would be outside the scope of the offence of blackmail and the wrong charge has been laid.

[17] In our view, however, the phrase "a threat to endanger the safety of any person" should be given its ordinary and natural meaning so as to encompass both threats of direct and indirect harm. In everyday parlance, a threat to kill the complainant's child would be considered a threat to endanger the child's safety and to hold otherwise is, with respect, to give the phrase a strained meaning.

[18] We also consider that distinguishing between different types of harm would create obvious anomalies and uncertainty for which there is no policy justification. As the Crown submitted, why should a person who demands money with threats to disclose a person's adultery or commit industrial sabotage or blow up their factory be guilty of blackmail, but a person who demands money with threats to harm the person's child is not? Questions also arise as to how uncertain and indeterminate the threatened harm must be in order to become a threat to endanger safety rather than a threat of violence. The offensiveness of the behaviour in blackmail is the use of threats. Threats of indirect harm are not necessarily always more pernicious than a threat of actual violence.

[19] The facts of the present case illustrate the distinctions that can arise. In ordinary language, a general threat expressed in terms of "hurting" someone is surely

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5 (5 October 1999) 580 NZPD 19733.

6 *R v Winn*, above n 2, at [23]–[28].

a threat to endanger their safety. So too is a threat to "get to" someone. If that is correct, it is difficult to see that a distinction should be drawn if the threat is more specific, such as to slit their throat. A further reality is that most specific threats carry risks of indirect consequences that would come within the statutory phrase. To threaten to stab someone is a threat of specific harm but obviously it also has potentially wider consequences that do endanger someone's safety. A threat to stab someone is also a threat to endanger their life.

[20] We acknowledge the legislative history detailed by Ellis J in her separate judgment but do not attach the weight to it that she does. Ultimately, what the history shows is that the amendment widened the scope of the section, something that is not in dispute. For us, the key point is that to exclude direct threats from the offence of blackmail is to give the words "endanger the safety" a meaning much narrower than it ordinarily carries, in circumstances where a narrow meaning is not required either linguistically or for policy reasons. Nor are we persuaded that the use of the phrase in different sections in different contexts requires it to have the same meaning in this section, especially when it was introduced in tandem with the phrase "to cause serious property damage".

[21] Similarly, we would not attribute the same weight as Ellis J to the statements made by the Minister when addressing Parliament. His focus may have been on industrial blackmail but the task of the Court is to interpret the words as enacted. Further, in any event, the Minister's statements do not go so far as to say the amendment was confined to cases of industrial blackmail as opposed to "capturing" that sort of case. In our assessment, much more specific words would be required before the Court would be justified in ascribing that intention to Parliament.

[22] In her separate judgment, Ellis J also considers the fact of the increased penalty for blackmail and the unavailability of a defence of claim of right in blackmail should inform the interpretation of the phrase. Overlaps between criminal offences with differing maximum penalties are, however, relatively commonplace. There are many areas where the same conduct constitutes more than one crime and, of course, within the one offence there are different levels of seriousness. The fact the prosecution had a choice whether to charge Ms Skeet with blackmail or

demanding with intent to steal is not of itself objectionable. Concerns about over-charging can always be managed at sentencing. The particular section charged is not determinative of sentencing outcome.

[23] The fact demanding with menaces has a defence (claim of right) that is not available in blackmail is, we consider, a stronger point. However, in our view, it cannot displace the clear wording of the section.

[24] Finally, we note that both before and after *Winn* was decided, there have been a number of cases where charges of blackmail have proceeded on the basis of direct threats of physical violence apparently without any concerns or doubts being expressed by either the court hearing the case or the parties.[7]

[25] For all the above reasons, we reject this ground of appeal.

Failing to give a direction under s 122 of the Evidence Act 2006

[26] Section 122 of the Evidence Act 2006 provides that if a trial judge considers evidence given in the trial may be unreliable the judge may warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be placed on it.

[27] Mr Tennet contended the cross-examination of the complainant exposed so many deficiencies in his evidence that Judge Down should have given a s 122 warning. The failure to do so amounted to a miscarriage of justice.

[28] We do not accept that submission. Much of the focus of the cross-examination was on the complainant's generally dishonest character. It was a strong cross-examination and the complainant's potential unreliability was obvious for the jury to see. At the beginning of the summing-up the Judge described the cross-examination as a very thorough consideration of the complainant's "reprehensible conduct" and said the purpose of evidence about the complainant's character was to help the jury "make a judgment about the reliability and truthfulness

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[7] *Qiu v R* [2007] NZSC 51, [2008] 1 NZLR 1; *Tie v R* [2012] NZHC 916; *Clutterbuck v R* [2013] NZCA 373.

of what [the complainant] alleges so that you can decide whether you are sure on all of the evidence whether or not these allegations are true".

[29] It is correct the Judge diluted the force of those comments by going on to warn the jury against being swayed by prejudice. However, at the request of defence counsel, the Judge returned to the issue of the complainant's reliability at the end of the summing-up and made a point of re-emphasising that the jury could use what they had heard in cross-examination to decide the complainant's credibility and reliability.

[30] We agree with the Crown that a s 122 direction was not required. Indeed, had one been given in the circumstances of this case, it might have been interpreted as a direction to reject the complainant's evidence, which would have been unfair to the complainant and a usurpation of the jury's role. We reject this ground of appeal.

Failure to give a direction about reasoning by inferences

[31] Judge Down did not give a general direction about the drawing of inferences. Mr Tennet submitted one was required, particularly in relation to the aggravated robbery charge, because the jury could only find Ms Skeet had acted dishonestly and without claim of right by drawing inferences.

[32] Proof of the mental element of a crime is almost always dependent on the drawing of inferences, but of itself that does not mean the direction need always be given. In this case, the Crown case essentially rested on the complainant's evidence and, in our view, to have given an inferences direction would not have assisted the jury in deciding whether to accept or reject that evidence.

Failure to draw a distinction between reluctance and involuntariness

[33] Mr Tennet submitted the Judge erred in failing to direct the jury that, even if they were satisfied the complainant may have been unwilling to go to the ATM machines, they needed to consider whether it was reasonably possible he went voluntarily, in which case Ms Skeet would not be guilty of kidnapping. Similarly, in Mr Tennet's submission, the Judge should have told the jury that if the money and

the car were handed over reluctantly but voluntarily Ms Skeet would not be guilty of aggravated robbery.

[34] We disagree. The competing versions of events and the defence that the complainant acted of his own free will were squarely before the jury. The complainant's account involved the use of a knife, threats and intimidation, evidence that, by its very nature, did not realistically permit of any possibility of voluntariness. The issue for the jury was whether they accepted that account or not.

Errors in direction on aggravated robbery

[35] Of all the grounds of appeal raised by Mr Tennet, we consider this ground to have the most merit.

[36] In order to explain our concerns, it is necessary for us to set out the facts of the aggravated robbery in greater detail. What the complainant alleged was that Ms Skeet arrived at his house with her nephew, Mr Lange. Mr Lange was wearing a Mongrel Mob vest and carrying a butcher's knife. According to the complainant, Mr Lange threatened him with the knife and Ms Skeet also made threats. Ms Skeet told the complainant they would take him to an ATM to withdraw everything from his bank account. She and the complainant then drove to an ATM machine in a car belonging to the complainant, with Mr Lange following behind in another vehicle also belonging to the complainant (a Ford Falcon). Mr Lange did not get out at the ATM machine but was parked across the road.

[37] The complainant also stated that, while they were in the street where the ATM machines were located, Ms Skeet made him sign a change of ownership form relating to the Ford Falcon.

[38] After money had been taken out of three ATM machines (located on the same street) Mr Lange drove off in the Ford Falcon. The complainant did not see him again. Ms Skeet and the complainant returned to the complainant's home where Ms Skeet had left her vehicle. She then drove off in her own vehicle.

[39] The particulars of the charge of aggravated robbery were that Ms Skeet "being together with Dion John Lange … did rob Brent Allan Willis of $2,000 cash and a ford falcon motor vehicle".

[40] Unfortunately, no thought appears to have been given to the issue of when the offence was complete and the related issue of whether the charge sheet involved two separate offences (one in respect of the car and the other in respect of the cash), rather than the one offence. There was some evidence to suggest that at the time Mr Lange drove off in the Ford Falcon to the ATM machine, he and Ms Skeet intended to permanently deprive the complainant of that vehicle, which would mean the offence of robbing the complainant of the car was complete at that point, that is, before the theft of the cash.

[41] In addition to this problem, two errors were made in the summing-up.

[42] The Judge gave the jury a parties direction, explaining the difference between secondary and principal offenders under s 66 of the Crimes Act. The direction did not distinguish between the kidnapping and aggravated robbery charges for this purpose, which led the Judge into error.

[43] Ms Skeet had been charged with the form of aggravated robbery under s 235(b) of the Crimes Act.

[44] As explained in previous decisions of this Court, what is required under s 235(b) is that the Crown must prove the defendant was part of a joint enterprise of robbery by two or more persons who are physically present at the robbery, who share an intention to steal using their collective force if required and each of whom must play some definite part to accomplish the design.[8] The inquiry under s 235(b) is a factual one and questions of primary and secondary participation do not arise within it. In other words, it is not relevant whether under s 66 one may be a principal and another a party. That distinction has no part in the analysis. Section 235(b) is sufficient unto itself. In the case of a group of offenders, there can of course be

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[8] *R v Feterika* [2007] NZCA 526 at [33]; *R v Galey* [1985] 1 NZLR 230 (CA) at 234; *R v Newson* [2012] NZCA 408, (2012) 26 CRNZ 321 at [19]–[20].

s 66(1) party liability for others within the group once the s 235(b) offence is sheeted home to at least two of them.[9] That is to say, it is possible to be a secondary party to an aggravated robbery.

[45] In this case, however, there were only two participants and therefore giving a parties' direction in relation to the aggravated robbery charge was unnecessary. More importantly, it was also potentially misleading because the Judge suggested to the jury they would be entitled to find Ms Skeet guilty of aggravated robbery if Mr Lange was aiding and abetting her as a secondary party to the robbery committed by her. But that was not the extent of the inquiry required.

[46] The key issue for the jury was to determine whether there was sufficient physical proximity between Ms Skeet and Mr Lange and whether they had acted together as part of a joint enterprise having the characteristics described above. We acknowledge that in a later passage in the summing-up the Judge did refer to a joint enterprise but he did so without correcting the misleading impression or confusion his earlier parties direction may have created.

[47] The second error arose in the course of the Judge's direction about claim of right. He told the jury "the critical issue in this charge is whether Ms Skeet had a *reasonably* held belief that she was entitled to the money and the car".[10] That was wrong in law. The belief need not be reasonable. What is required is that it be honestly held and, although the reasonableness of a belief logically bears on whether the belief exists, the test is a subjective one.[11]

[48] As the Crown emphasised, the Judge corrected this error when re-directing in response to a jury question. However, it is not necessary for us to decide whether the re-direction was sufficient because we are satisfied the problems with the charge sheet when combined with the error about parties mean this particular conviction is unsafe and should be quashed.

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9 *R v Newson*, above n 8, at [19]–[21].
10 Emphasis added.
11 Crimes Act, s 2(1); *Hayes v R* [2008] NZSC 3, [2008] 2 NZLR 321 at [57]–[58].

[49] Judge Down sentenced Ms Skeet to 10 months' home detention, later reduced to seven months on a re-sentencing.[12] She has served that sentence. Accordingly, no issue of a retrial arises as a result of our quashing the conviction and none is ordered.

[50] For completeness, we add that, even without the conviction for aggravated robbery, the sentence was within range and, indeed, could be viewed as lenient. We note too that our decision does not affect the first strike warning given to Ms Skeet because the kidnapping offence was a qualifying offence for that purpose.[13]

Result

[51] The application for an extension of time to bring the appeal is granted.

[52] The appeal against conviction is allowed in respect of the conviction for aggravated robbery, but dismissed in respect of all other convictions.

[53] The conviction for aggravated robbery is quashed and no order made for a retrial.

ELLIS J

[54] I am also of the view that Ms Skeet's appeal should be dismissed. But I am unable to agree with French and Simon France JJ about the meaning of the phrase "threatens … [to] endanger the safety of any person". While I accept there may be room for argument, my own view is that both a literal and a purposive interpretation of those words means that blackmail is not the appropriate charge in circumstances where a demand for money or property is accompanied by direct threats of violence or physical harm.

[55] I set out my reasons below.

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12 *R v Skeet* [2015] NZDC 4183.
13 Sentencing Act 2002, s 86A.

The position prior to 2003

[56] In the Crimes Act 1961 offences involving blackmail (or extortion as it was historically termed) have always been grouped with offences involving robbery in a sub-part of pt 10 ("Crimes against rights of property"). That sub-part provides the immediate legislative context for s 237 and a useful analytical starting point.

[57] Prior to 2003 the offence of blackmail was defined in s 238 ("Extortion by certain threats") to involve the making of threats to disclose things of a certain kind or to make accusations of a certain kind with intent to extort or gain anything from any person. The underlying policy has been expressed in the following way by Professor Glanville Williams:[14]

> Although D has a liberty to demand money and a liberty to speak the truth concerning others, he is not at liberty to demand money under threat of speaking the truth. The position would be the same even if £5 were in fact owing to D: the threat of publicity would not be a proper mode of collecting the debt.

[58] The s 238 offence was distinguishable from both robbery (s 234) and demanding with intent to steal (s 239) because the end sought to be achieved by the maker of the specified threats ("anything") was not limited to things capable of being stolen. As well, it is relevant to note that:

(a) blackmail carried a maximum penalty of 14 years' imprisonment (in the Crimes Act 1908 it had carried a maximum penalty of life imprisonment);[15] and

(b) a colour or claim of right defence was not available to a charge of blackmail.[16]

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14 Glanville Williams "Blackmail" (1954) Crim LR 162 at 163.

15 Crimes Act 1908, s 269. There was a secondary form of blackmail that is not relevant for present purposes but that carried a seven year maximum sentence: Crimes Act 1908, s 270.

16 *R v Cargill* [1995] 3 NZLR 263 (CA) at 268. The common law and legislative history of s 238 (including the longstanding separation of, and distinction between, the two extortion offences that ultimately found combined form in s 238 from the s 239 demanding with intent to steal offence) and some of the policy reasons supporting the absence of a defence were discussed by the Court of Appeal in its decision.

[59] Section 236 contained an offence of compelling the execution, alteration or destruction of documents by force or by threat with intent to defraud. The maximum penalty was 14 years' imprisonment.

[60] Aggravated robbery (s 235) involved (as it still does) robbery accompanied by one of three stipulated aggravating features (infliction of grievous bodily harm, the presence of more than one person or the presence of an offensive weapon). As well:

(a) the maximum penalty was 14 years' imprisonment; and

(b) a colour or claim of right defence was available (in relation to the theft aspect of the charge).[17]

[61] Robbery (s 234) involved (as it still does) threats of violence combined with actual theft, namely where the purpose of the threat is effected and the victim's property (something that is capable of being stolen) is taken. For robbery:

(a) the maximum penalty was 10 years' imprisonment; and

(b) a colour or claim of right defence was available (in relation to the theft aspect of the robbery charge).

[62] Assault with intent to rob (s 237) was punishable by seven years' imprisonment. A colour or claim of right defence was available (in relation to the theft aspect of the intention to rob).

[63] And demanding with intent to steal (s 239) involved a demand made with "menaces".[18] "Menaces" include threats of physical harm to the victim or to a third party and are not limited to threats of immediate harm.[19] Again, such a charge was limited to cases where the object of the threat was to compel the victim to part with "anything capable of being stolen". For that offence:

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17 *R v Skivington* [1968] 1 QB 166 at 170; *R v Bhaskaran* CA185/98, 19 August 1998; *R v Heard* (1985) 1 CRNZ 474 (HC) at 481.

18 The offence is still found in s 239 subsequent to the 2003 amendments.

19 *R v Hare* (1910) 29 NZLR 641 (CA).

(a) the maximum penalty was seven years' imprisonment; and

(b) a colour or claim of right defence was available.

[64] It was therefore possible to discern across the sub-part a pattern of cascading seriousness. Together with aggravated robbery and compelling the execution of documents by force, extortion/blackmail carried the most severe maximum sentence (14 years' imprisonment, down from life). The severity of the sentence undoubtedly reflected the historical view that blackmail was akin to "moral murder" because of the ongoing fear and distress it causes. Moreover, threats of the kind specified in s 238 would have been regarded as particularly pernicious because a recipient of such threats is likely to feel constrained by their content from seeking the assistance of the law enforcement authorities.[20] The particular and innate perniciousness of threats of the kind covered by the charge was one of the policy reasons given by the Court of Appeal in 1995 when it rejected the availability of the colour of right defence to a blackmail charge.[21]

[65] It is clear beyond argument that, prior to the replacement of pt 10 in 2003, there was no possibility that someone who sought to induce a person to part with money or property by threatening physical harm either to that person or another could have been charged with the more serious blackmail offence; threats of that kind simply did not qualify. Rather, (and by way of summary):

(a) if there was an actual taking accompanied by actual violence or a threat of violence then the charge would be one of robbery under s 234 (maximum penalty 10 years);

(b) if there was a threat of violence but no actual theft then the charge was one of demanding with intent to steal under s 239 (maximum penalty seven years);

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[20] A lesser form of extortion or blackmail was dealt with under s 238(3), which provided that everyone is liable to imprisonment for a term not exceeding seven years who does any of the acts mentioned in (a) to (e) of subs (1), with intent to induce any person (a) to do any act against his will, other than an act that it is his legal duty to do; or (b) not to do any lawful act.

[21] *R v Cargill,* above n 16, at 270–271.

(c) if there was an assault with a view to robbery but no robbery was effected then the charge was assault with intent to rob under s 237 (maximum penalty seven years).

[66] Notwithstanding that all these offences involved violence or threats of violence the maximum penalties plainly indicate that they were regarded as significantly less serious than blackmail. And all were subject to a colour of right defence.

The 2003 amendments

[67] The enactment in 2003 of a new pt 10 had its genesis in the Crimes Bill 1989. While, as a result of the 1991 recommendations made in the *Crimes Bill 1989: Report of the Crimes Consultative Committee*, the Bill as a whole did not proceed, the Committee had agreed that pt 10 should be simplified and updated.[22] In general terms, the Committee endorsed the 1989 draft of pt 10, which included a clause (cl 189) extending the reach of the blackmail offence to include any threat of disclosure. The Committee recommended that the 14-year maximum penalty could not be justified and that it be reduced to 10 years.[23] Significantly (in the present context), this recommendation was not adopted.

[68] The Committee also endorsed the continued exclusion of a claim of right defence to blackmail *unless* the making of the threat was a reasonable and proper means of effecting the desired purpose.[24] The Committee considered that this approach "[struck] the right balance". That limited defence was carried through into the new s 237.

[69] As well as extending the offence to cover any threat of disclosure, by the time of enactment the new blackmail provision had been broadened still further. The new s 237 provides:

(1) Every one commits blackmail who threatens, expressly or by implication, to make any accusation against any person (whether

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22 Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (Department of Justice, Wellington, 1991).

23 At 70.

24 At 70.

> living or dead), to disclose something about any person (whether living or dead), or to cause serious damage to property or endanger the safety of any person with intent—
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> (a) to cause the person to whom the threat is made to act in accordance with the will of the person making the threat; and
>
> (b) to obtain any benefit or to cause loss to any other person.
>
> (2) Every one who acts in the manner described in subsection (1) is guilty of blackmail, even though that person believes that he or she is entitled to the benefit or to cause the loss, unless the making of the threat is, in the circumstances, a reasonable and proper means for effecting his or her purpose.
>
> (3) In this section and in section 239, benefit means any benefit, pecuniary advantage, privilege, property, service, or valuable consideration.

[70] Thus:

(a) the class of actuating threats had been expanded to include threats "to cause serious damage to property or endanger the safety of any person"; and

(b) a limited claim of right had been expressly included.

[71] In a clear statement of legislative purpose, the Minister of Justice in his second reading speech in relation to the Crimes Amendment Bill (No 6) 1999 (322-2) said:[25]

> The offence of blackmail replaces the current offence of extortion by certain threats. The new offence will apply to any threat of disclosure. At present the threatened disclosure must relate to sexual or criminal conduct. *The scope of the threat has also been widened to cover a threat to cause serious damage to property or endanger the safety of any person. The purpose of this addition is to capture certain types of industrial blackmail, such as where the threat may be to contaminate a product unless the company does not do what the blackmailer wants.* This is to ensure that we have sufficient force to penalise people who may want to commit blackmail by way of tampering with supermarket products.

[72] Contrary to the view expressed by the plurality, it is not, in my view, difficult to see why threats of the kind referred to by the Minister (industrial blackmail) are

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[25] Above n 5 (emphasis added).

regarded as particularly pernicious and thus warranting inclusion as blackmail and made subject to the severe penalty that goes with it. The widespread fear caused by such threats and the difficulty and cost in addressing them seems to me to be obvious.

[73] That view is, I think, supported by the decision that appears to have led to this aspect of the amendment. In *R v Duckworth* the aptness of a charge under s 239 (and the relatively low maximum penalty) in a case of industrial blackmail had been discussed by the Court of Appeal.[26] In that case (which involved a demand for gold bullion worth approximately $100,000, backed by threats to contaminate Coca Cola bottles), the Court said:[27]

> There is not in New Zealand as in some other countries a specific offence of commercial blackmail of the kind involved here. The accused was charged under s 239 of the Crimes Act 1961 with demanding with menaces. That section provides a maximum penalty of seven years' imprisonment of which the sentencing Judge said that it is one of those situations where the maximum penalty may not be sufficient. The specific offences overseas attract much higher maximum penalties.

[74] Although there was apparently no dispute that the offending was covered by s 239, the Court noted that:[28]

> In no real sense could such threats to poison a popular beverage be described as in essence a property offence.

[75] And the Court concluded:[29]

> We are satisfied that the seriousness of the offending and the need for deterrence fully justify the [five-year] sentence imposed. Indeed but for the plea of guilty and the co-operation of the accused we do not think the maximum sentence for the offence charged would have been out of place. It is not inconsistent that even worse examples of this kind of conduct can be contemplated. Should they eventuate in spite of this deterrent sentence the maximum sentence will doubtless be imposed if by then a specific offence with a greater maximum penalty has not been enacted.

[76] In short, the Court of Appeal considered that a s 239 demanding with menaces charge neither:

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26 *R v Duckworth* [1992] 3 NZLR 322 (CA).
27 At 323.
28 At 324.
29 At 324.

(a) adequately reflected the serious nature and quality of the threat involved in industrial blackmail; nor

(b) carried a maximum penalty that appropriately reflected the seriousness of such activity.

[77] As I have said, the 2003 amendments replaced pt 10 in its entirety. It is relevant to note that s 239 was also amended by:

(a) combining it with s 236 (compelling the execution of documents by force, for which the 14-year maximum penalty remained); and

(b) adding the words "or by any threat" to the original demanding with menaces offence.[30]

[78] While some of the maximum penalties for pt 10 offences were changed, the pre-existing hierarchy of penalties for blackmail, aggravated robbery, robbery and demanding with menaces was effectively confirmed and re-enacted.

What do the words of s 237 mean?

[79] The issue raised by Ms Skeet's case is whether a threat "to endanger the safety of any person" includes a threat of direct physical violence or harm. If it does, then she was rightly found guilty of blackmail.

[80] In terms of the literal meaning, I consider the phrase "to endanger the safety of any person" simply means to do something that puts any person at risk of harm. The phrase cannot sensibly be said to be synonymous with "to harm any person". Its focus is on the creation of a potentially inchoate risk to a person or persons who may or may not be identified, rather than the actuality of causing harm. It is used throughout the statute book consistently with this focus on risk rather than actual harm. By way of example only, see:

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[30] So what is now subs (2) reads (with added emphasis):
Every one is liable to imprisonment for a term not exceeding 7 years who, with menaces *or by any threat*, demands any property from any persons with intent to steal it.

(a) section 19(6) of the Civil Aviation Act 1990, which places limits on the Director's obligations to disclose information where the disclosure "would endanger the safety of any person";

(b) section 24L of the Conservation Act 1987, where there is a right of public access to certain land unless that access "would be likely to endanger the safety of persons or property";

(c) section 134P of the Copyright Act 1994, which provides that a person exercising search and entry powers under the Act is required to announce his intention to enter and search and to identify himself unless doing those things would "endanger the safety of any person"; and

(d) section 200 of the Criminal Procedure Act 2011, which empowers a court to order name suppression where publication would be likely to "endanger the safety of any person".

[81] In my view, doing actual violence to, or hurting, another person is not an act that puts that person's safety at risk. There, the harm has eventuated; any "risk" of harm has disappeared. And although the existence of a *threat* to hurt someone arguably means that that person is then at risk of harm, that is not the focus of s 237. The section does not contemplate that the endangerment is synonymous with the threat. The actuating threat must be a threat of some future act of endangerment, of putting another person at risk.

[82] I accept entirely that the presumption that criminal statutes should be strictly construed has only limited application today.[31] But here, I think my reservations about the breadth of the literal meaning of the words are supported by a more liberal and purposive interpretation of s 237, for the reasons that follow.

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[31] See for example *Kirby v Police* [2012] NZHC 2397, [2012] NZAR 975 at [12]; Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 219.

[83] First, there was no legislative gap that needed to be filled by the expansion of the blackmail offence to include direct threats of physical harm. As I have said, the amendment appears to have been a direct legislative response to the decision in *Duckworth* and the perceived shortcomings of s 239 in terms of dealing with industrial blackmail. And blackmail's historic focus on the perniciousness of particular kinds of threat dovetailed with the Court of Appeal's concern that threats of the kind at issue in *Duckworth* were particularly pernicious (and not aptly covered by s 239).

[84] Relatedly, the difference in penalty between blackmail and a charge of demanding with menaces is very significant (both twice as long and seven years more). Again, the amendment of the more serious offence to include industrial blackmail directly reflects the Court of Appeal's concern in *Duckworth* that a seven-year maximum penalty was a potentially inadequate deterrent for that particular kind of offending. And importantly, because pt 10 was replaced in its entirety in 2003 it must be assumed that the relativities between the different penalties for the various offences were expressly considered and intentionally confirmed. This is not a case where it can be said that inconsistent penalties have developed in an ad hoc way due to piecemeal amendments over time; the differences are deliberate.

[85] In short, I consider that the 14-year maximum penalty reflects a considered legislative view that it is only threats of a particularly insidious kind that fall within the ambit of the blackmail offence. Thus the brief survey of (pre-amendment) cases contained in *R v Takao* led Keane J to comment "nothing less than a sentence of imprisonment, so far as I can see, has ever been imposed for this offence in New Zealand". [32]

[86] A purposive interpretive approach would require this clear legislative signal to be taken into account. And given the size of the differential, I am not attracted by

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[32] *R v Takao* HC Rotorua CRI-2004-087-2227, 29 April 2005 at [21]. By contrast, there have been several post-amendment cases under s 237 involving threats of harm to persons or property that have resulted in non-custodial sentences. Ms Skeet's is an example. But see also *R v Connolly* HC Wellington CRI-2008-085-4626, 11 December 2009 (four months' community detention) and *R v Verma* [2012] NZHC 3160 (10 months' home detention).

the proposition that Parliament intended that the two charges could simply be laid interchangeably where "menaces" or threats of physical harm were at issue.

[87] A purposive approach also requires account to be taken of the fact that a claim of right defence is available in relation to a charge under s 239 but not in relation to a charge under s 237. That reflects the historical (and, in my view, present) position that they are qualitatively different charges. Again, I am unable to accept that Parliament intended that the availability of a defence was to be left as a choice for the prosecuting authorities (that is, that its availability would be determined by whether the charge is laid under either s 239 or s 237).

[88] And lastly, to the extent the words can properly be said to be ambiguous (which, given the obvious difference of opinion, perhaps they can) there is a very clear statement of legislative intention that supports a more specific meaning.

[89] Against all that, however, there are two points that must be acknowledged.

[90] The first is that the expansion of s 237 in 2003 also involved the inclusion of threats to "cause serious damage to property". It is fair to ask why such a threat would fall within the ambit of blackmail when (on my analysis) a threat to cause serious physical harm to a person does not.

[91] One answer to this is that prior to 2003 there was a legislative gap that required to be filled specifically in relation to threats to property. The only other then-existing offence dealing with threats to property was s 307, which provided (as it still provides):

> (1) Every one is liable to imprisonment for a term not exceeding 3 years who sends or causes to be received, knowing the contents thereof, any letter or writing threatening to destroy or damage any property, or to destroy or injure any animal.
>
> (2) Nothing shall be an offence against subsection (1) of this section unless it is done without lawful justification or excuse, and without claim of right.

[92] As the much lower maximum penalty of three years' imprisonment indicates, s 307 was not designed to deal with:

(a) threats of damage to property made with a dishonest intent; or

(b) threats of really serious property damage.

[93] And nor was there any offence that dealt with threats to damage property made in order to extort some other kind of benefit (such as a job).

[94] In my view, it is reasonable to surmise that one of the purposes of the 2003 amendments was separately to address threats involving these aggravating features by:

(a) amending s 239 to include intended stealing by way of "any threat" as well as "menaces" (which had arguably been confined to threats of physical harm[33]); and

(b) including the most "serious threats to property", which were also driven by extortion or motivated by personal gain in s 237.

[95] The second point that must also, in fairness, be acknowledged is that charges under s 237 have been laid and successfully prosecuted in a number of cases involving demands accompanied by direct threats of violence, where s 239 appears to have been equally available. I need only mention the case of *Qiu v R*, which went to the Supreme Court on other questions.[34] The matters discussed above were not raised in that or other cases.

Conclusion

[96] As I have said, I consider that a persuasive case can be made for giving a more limited meaning to s 237. I consider that such a case is based both in a proper interpretation of the wording and purpose of s 237 and the associated statutory provisions, as discussed above. The language used matters. The purpose and policy underlying the words matter too. And even to the extent that the language and purpose can be beaten into submission, or that no bright line can ultimately be drawn

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[33] See WHD Winder "The Development of Blackmail" (1941) 5 MLR 21. I acknowledge that this is contrary to the view I tentatively expressed in *R v Winn*, above n 2, at [13]–[14].

[34] *Qiu v R*, above n 7. Others are mentioned at above n 33.

between the relevant provisions, it seems wrong in principle to lay charges on a basis that ignores a clear legislative indication of cascading seriousness or fails to have regard to the availability (or not) of defences. But I neither need nor intend to take on the famously unjusticiable issues of prosecutorial discretion here.

[97] In Ms Skeet's case the reservations I have expressed above are principally relevant to charge 2, which was articulated as follows:[35]

> Sara Jane Skeet between the 1st day of May 2013 and the 31st day of October 2013 at Napier did threaten expressly to endanger the safety of Brent Alan Willis and Samara Edwards to cause Brent Alan Willis to act in accordance with the will of Sara Jane Skeet and to obtain a benefit, namely cash.

[98] On my analysis threatening to harm Mr Willis and his daughter was not blackmail, it was demanding with intent to steal or, given that Mr Willis actually handed over the cash, it was robbery. But even if the views I have expressed above were not the minority view, I would not be prepared to say that she should have been acquitted and to allow her appeal. That is because a court on appeal has the power under s 234 of the Criminal Procedure Act 2011 to substitute a conviction and sentence for a different offence if it is satisfied that:

> (a) the person could have been found guilty, at the person's trial for offence A, of offence B; and
>
> (b) the trial judge or the jury, as required, must have been satisfied of facts that prove the person guilty of offence B.

[99] In my view, the notes of evidence in Ms Skeet's case show quite clearly that the necessary facts to found a charge under s 239 (or s 234) were established. On the basis of those facts any claim of right defence that she might have wished to advance would have been far-fetched. On the evidence there is simply no tenable basis for saying that she was owed or otherwise entitled to the money she demanded (and received) from Mr Willis. And even if that was not the case there would have been a further available charge based solely on the making of the threats. There is no reason to think that her sentence (which she has, in any event, already served) would

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[35] Charge 1 (of which she was acquitted) was plainly blackmail properly so called because it involved threats to disclose that Mr Willis was trading while bankrupt, avoiding tax and receiving welfare benefits to which he was not entitled.

have been different. Again, the relatively low sentence she was given simply serves to emphasise the inaptness of the blackmail charge.

Solicitors:
Crown Law Office, Wellington for Respondent