IN THE COURT OF APPEAL OF NEW ZEALAND

CA27/2016
[2016] NZCA 217

BETWEEN		BODIE HOANI NGAPAKI STEWART Appellant
AND		THE QUEEN Respondent

Hearing: 10 May 2016 (further submissions received 17 May 2016)

Court: Wild, Courtney and Gilbert JJ

Counsel: M J Phelps for Appellant
A Markham for Respondent

Judgment: 23 May 2016 at 10 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] At the end of a trial in the Napier District Court in November 2015 before Judge Mackintosh, the jury found Mr Stewart guilty on three charges and not guilty on five others. Mr Stewart had previously pleaded guilty to five other charges and been discharged on four. The 17 charges all related to domestic violence against Mr Stewart's partner. The charges, and their disposition, are summarised in the schedule to this judgment.

[2] Judge Mackintosh subsequently sentenced Mr Stewart to four years and eight months imprisonment with a minimum period of imprisonment (MPI) of 50 per cent.[1]

[3] Mr Stewart appeals against his conviction and sentence.

[4] As to Mr Stewart's conviction, Mr Phelps submits justice miscarried for Mr Stewart at his trial as a result of the combination of the following factors: the jury was reduced to 10; the Judge gave majority verdict and then *Papadopoulos* directions;[2] and the jury returned its verdicts shortly after the latter direction. Mr Phelps contended there is a real risk the *Papadopoulos* direction "inappropriately put pressure on minority jurors to yield to majority demands". He submitted this must particularly be so, given there were only 10 jurors and because "there had been considerable disruptions to the flow of the trial".

[5] At the hearing, the Court raised with counsel whether, in terms of s 22 of the Juries Act 1981, the second juror had been properly discharged. We invited and have received further submissions on that point. Accordingly, the issues on the conviction appeal are whether a miscarriage of justice occurred in Mr Stewart's trial either because the second juror was not properly discharged, or for the reasons advanced by Mr Phelps, or both.

[6] The challenges on the sentence appeal are to the Judge's sentencing starting point, the discount she allowed for the guilty pleas at trial, and to the imposition of a MPI.

The course of the trial

[7] Mr Stewart's trial began on 6 November 2015. Counsel informed us a Friday start was unusual, but it appears it was possible because the jury panel had been summonsed for a fortnight.

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1 *R v Stewart* [2015] NZDC 25885.

2 The form of a *Papadopoulos* direction is set out in *R v Accused (CA87/88)* [1988] 2 NZLR 46 (CA) at 59, and derived from *R v Papadopoulos* [1979] 1 NZLR 621 (CA) at 623

[8] After the Judge's opening remarks, a juror told the Judge she knew the appellant's mother. Although counsel for the appellant (Mr Phelps) asked the Judge to discharge all the jury and start the trial afresh with a new jury on the following Monday morning, the Judge decided to dismiss just the one juror. No issue is taken about that decision on this appeal.

[9] The trial resumed on Monday 9 November. Shortly after 2 pm one of the jurors provided a note to the Judge advising she had a longstanding commitment to attend a concert with family in Auckland the following evening, Tuesday 10 November. The juror told the Judge she had booked air tickets, including to fly from Napier to Auckland departing at 1.10 pm the following day.

[10] The Judge gave defence counsel the opportunity to take instructions. Having done so, Mr Phelps indicated that the appellant did not consent to the Judge discharging this second juror and continuing with 10. Mr Phelps invited the Judge to declare a mistrial and discharge the jury. At that stage it appears the Judge and counsel were unaware the Court could proceed with 10 jurors without the consent of the parties: s 22(1A) Juries Act.[3]

[11] After exploring the situation further with counsel, the Judge asked the juror to come back into Court. The Judge told the juror she was prepared to adjourn the trial at, say, 4 pm the next day and to resume at about 10 am on the following day, Wednesday 11 November, if the juror could alter her flights to accommodate those times. The juror's response is not recorded ("response too quiet to pick up"). But it is apparent the juror agreed to do that because the Judge then asked:

> Q Yes and just so that for everybody, I think it's important that I just ask you that, I wouldn't like you to feel that this, that because of the situation you had now been compromised in your role as a juror. Are you still, you still feel you can be impartial on the trial and give it the attention that it deserves both for, of course, for the sake of Mr Stewart because it's a very important matter to him and also for the Crown?

[12] After a further exchange with counsel the Judge again spoke to the juror:

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[3] Section 22(1A) came into force on 5 March 2012. It provides: "(1A). The court may proceed with fewer than 10 jurors under subsection (1)(b) only if all parties consent to doing so and the court, having regard to the interests of justice, considers that it should do so."

Q All right well are you, I think it's probably preferable since the trial is going and time is marching on that we continue on with the trial and then perhaps when we adjourn for the evening you can make your inquiries and then we can have a discussion about it first thing tomorrow morning and you can let us know, if you've been able to change them or not. Can I just also ask you just for everybody's, if you were unable to go to Auckland I wouldn't like you to feel that you have put yourself in a situation also that because of the disappointment of that you weren't sort of, you weren't able to give your sort of full attention and consideration to the trial.

A I would give my full attention so that's not an issue.

Q That's not an issue for you?

A No.

Q All right, okay. Thank you. Thank you very for that [juror]. Thank you.

[13] The Judge spoke again to the juror before the Court adjourned for the day on Monday, but the juror had not had the opportunity to try to alter her flights. It was left on the basis the Judge would deal with the matter the following morning.

[14] The Judge recorded all of this in a ruling:[4]

> [6] Whilst I appreciate that it is not desirable to have jurors flitting around the countryside during the course of their deliberations the reality is now that they are entitled to go home and to go about their own lives during the course of their deliberations. There is no requirement now for them to be kept together 24/7 as it was in the past. So what she does in her own time really is no business of the Court so long as she does not talk to anybody [about] the case or anything that she does do, compromise her ability to continue in her deliberations.
>
> [7] So with that in mind I have had her back into Court and discussed the option of changing her flights. She is open to that. She has also said that in the event that it got to the point where she was unable to change her flights and unable to go that that would not compromise her ability to be a fair and impartial juror, essentially saying that notwithstanding the disappointment she would continue on and do her best as a juror.
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> [8] So at this stage I am not prepared to declare a mistrial. I am going to continue with the trial. We will continue to hear the evidence giving the juror an opportunity to change her travel arrangements and that that is unable to be done just at the moment, but to avoid wasting any further time we will box on and in the event that she is unable to do so then I can give a decision at that point on Mr Phelps' application for a mistrial.

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4 *R v Stewart* [2015] NZDC 22576.

[15] By the time the Court resumed on the Tuesday morning, the Judge had looked at s 22 of the Juries Act and was aware she could discharge a second juror, providing one of the s 22(2) criteria was met, and continue with 10 jurors without the consent of the parties. She outlined the correct position to counsel.

[16] Mr Phelps raised the question as to whether the s 22(1) threshold for discharge was met:

> … whether in these circumstances someone wanting to get to a family concert constitutes the juror being incapable of performing or continuing to perform.

[17] The Judge then requested the juror to come into Court and the transcript records the following:

> **THE COURT:**
>
> … I just wondered how you got on overnight, and what, if you were able to make alternative arrangements?
>
> **JUROR:**
>
> (inaudible 09:51:46)
>
> **THE COURT:**
>
> Yes, right.
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> **JUROR:**
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> (inaudible 09:52:01)
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> **THE COURT:**
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> So the whole family get-together's been planned around you, has it? Are people coming from overseas? No.
>
> **JUROR:**
>
> (inaudible 09:52:12)
>
> **THE COURT:**
>
> Right. Okay. I suppose by not going, do you think that, that actually would have any effect on you doing your job as a juror?
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> **JUROR:**
>
> (inaudible 09:52:36).

THE COURT:

Hard to say?

JUROR:

It's hard to say (inaudible 09:52:42).

THE COURT:

All right, so just so everybody can hear (inaudible 09:52:54), so I have asked her that question. She said it's hard to say. Whilst yesterday you gave the answer quite quickly, last night you went home and discussed the matter with your family and has that changed your mind?

JUROR:

Well, it's (inaudible 09:53:10).

THE COURT:

Right.

JUROR:

(inaudible 09:53:25).

THE COURT:

Disappointed? Right?

JUROR:

(inaudible 09:53:33).

[18] Following this the Judge then asked counsel whether they wished to be heard further. Most of Mr Phelps' response was not recorded, but he accepts he indicated to the Judge that she should err on the side of caution and discharge the second juror. That is the reason Mr Phelps considered it was not open to him, on this appeal, to submit the second juror had not been properly discharged.

[19] The Judge then gave a further ruling.[5] After recording what had occurred the previous day the Judge continued:

> [3] I have heard from her this morning and she has indicated that the only other flight available is at 6.00 pm tonight which really hardly gets her there in time but would and a very early flight to come back in the morning. The reality for her though is it fair to say that the cost is prohibitive so it

5 *R v Stewart* [2015] NZDC 22589.

> essentially means if she cannot go on the flights that she has booked today she will be unable to attend. I asked her now how did she feel about continuing on as a juror and being unable to attend the family gathering. She said to me that whilst yesterday she quickly answered the question saying that it would not affect her ability, on reflection overnight and in discussions with her family members given the obvious disappointment all round, that the situation had changed for her.
>
> [4] That being the case in terms of s 22 Juries Act 1981 I do have the power to discharge her from continued jury service. Under subs (1)(a) if I find that she is incapable of performing or continuing to perform her duty in the case I may proceed with fewer than 10 only if all parties consent. At this stage we are running with 11 jurors because I had to discharge one on Friday who had some association with the defendant's family. At this stage if I discharge [the juror] we will still have 10 jurors.
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> [5] I am satisfied that this jury are an attentive jury, that as far as [the juror] is concerned I am concerned that there is a risk that she will become somewhat preoccupied with her personal situation and would be incapable of performing her function as a juror in the case. So that being the case I do have the power to proceed with 10 jurors and in the circumstances that is what I am going to do.
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> [6] I am going to discharge [the juror] from any further jury service.

[20] The jury of 10 began its deliberations at 9 am on Wednesday 11 November.

[21] At 2.44 pm, the jury indicated it was having trouble reaching unanimous verdicts on charges 1, 8, 9 and 15. The Judge gave the jury a majority verdict direction, supplemented by a handout.

[22] By 3.17 pm the jury indicated it had reached verdicts on all but three of the charges. After hearing from counsel, the Judge gave the jury a *Papadopoulos* direction.

[23] At around 3.47 pm the jury returned verdicts of guilty on charges 1, 11 and 15 and not guilty on the remaining five charges.

Conviction appeal

Was the second juror properly discharged?

[24] First, we thank counsel for their prompt but nevertheless very thorough further submissions. With the benefit of these, we are not persuaded the Judge was wrong to discharge the second juror.

[25] Ms Markham is right to submit that considerable latitude must be afforded a trial judge in the type of situation that confronted Judge Mackintosh here. After all, the trial judge is able to assess the situation, and in particular the situation and demeanour of the juror in question, in a way an appellate court cannot replicate. As is apparent, Judge Mackintosh explored ways of accommodating the juror and sought counsel's views, before she made her decision to discharge the second juror.

[26] If there is a lesson emerging from this situation, it is that it is best to avoid it arising in the first place. Notwithstanding the video the jury panel will already have viewed, trial judges should go out of their way when empanelling a jury to ensure:

- The estimated length of the trial is made abundantly clear to jurors. And, in doing that, it is best to err on the side of an over-estimate.

- Any juror with a commitment or commitments during that estimated trial period comes forward and explains his or her position to the judge, who can then, if appropriate, stand the juror aside.

[27] We have said "judges should go out of their way" because the empanelling of a jury is an unfamiliar process in an unfamiliar surrounding for most prospective jurors. Instructions from the judge therefore need to be conveyed carefully and perhaps repeated.

[28] We are not suggesting Judge Mackintosh, with her very considerable trial experience, did not do this. The aim of our comments is to assist trial judges in avoiding this situation arising in the future.

[29] The essence of the Judge's reason for discharging the second juror is this:

> I am concerned that there is a risk that she will become somewhat preoccupied with her personal situation and would be incapable of performing her function as a juror in the case.

[30] This Court considered a somewhat similar situation in *R v Wilson*.[6] In that case the jury had, in the course of its deliberations, put two questions to the Judge. At about 6 pm, while the Judge was answering the second of these, a juror sought to be discharged because she had a plane to catch at 6.45 pm. The Judge discharged her at 6.09 pm. In a report requested by this Court, the trial Judge explained that he thought, if he did not discharge the juror, she would become preoccupied about missing her flight and incapable of continuing to perform her duty with proper deliberation. He reported that he "thought that she would have been agitated and unable to concentrate and that her predicament might have had the effect of putting pressure on other jurors".[7]

[31] Dismissing the appeal, this Court said:[8]

> We consider that a juror who is likely to be distracted and upset about missing her plane can properly be considered to be "incapable of performing … her duty". These words should, given the variety of situations which can arise for jurors during a trial, be accorded a broad meaning. This Court said in *R v M* (1991) 7 CRNZ 439 at 442 that "incapable" must include the case of a juror whose continued presence on the jury would jeopardise the fairness of the trial to either side, or make the verdict abortive or seriously vulnerable.

[32] This Court went on to explain why it accepted the Judge's concern, if he had refused to discharge the juror, that the continuing deliberations of the jury would have been compromised because other jurors would have felt under pressure to reach an early verdict to enable the travelling juror to depart.

[33] We acknowledge that was a different situation — in the present case the jury had not yet begun its deliberations and the juror had been given an opportunity to make alternative arrangements. But we consider Judge Mackintosh was entitled to assess that not discharging the second juror risked continuing the trial with a juror preoccupied with her personal predicament, and therefore incapable of performing her duty as a juror in the case. The Judge had the advantage of speaking to the juror and being able to assess her demeanour and ability to continue to perform her duty as a juror. The Judge was entitled to conclude her apparent inability properly to

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6 *R v Wilson* CA17/03, 29 September 2003.
7 At [7].
8 At [16].

perform her function risked affecting the other jurors, and with that jeopardising the fairness of the trial and the resulting verdicts.

[34] The English Court of Appeal made a similar point in *R v Hambery.*[9] It commented that, although a juror's holiday plans will not always provide sufficient reason to discharge the juror, the trial Judge was entitled to infer from the juror's demeanour that her holiday was important to her and that she may be unable to continue effectively on the jury if she became aggrieved and inconvenienced at having to cancel her plans.

[35] In their further submissions, both counsel accepted trial judges must be able to exercise discretion according to the circumstances of each case. For example, Mr Phelps referred to the need for "a broad, fact-specific inquiry … on the issue of incapacity …". We agree.

[36] None of what we have said should be interpreted as suggesting that discharging a juror is other than a serious step, only to be taken for sound reason. Once a defendant is given in charge of a jury, all the jurors have embarked on a solemn task from which they should not lightly be discharged.

[37] Two instances where discharging a juror was not warranted are given in this Court's decision in *R v Harris*.[10] They reinforce the point we have just made:

(a) While the jury was deliberating, one juror sent a note to the Judge advising that he feared he was getting a migraine, his pills for which were at home. When the Judge spoke to the juror, the juror reported that his migraine was "getting worse" and he feared he might "throw up".[11] This Court said:[12]

> A better course than discharging the juror at that stage would have been to send the jury out for the night. (That did happen subsequently in any event.) Court staff could, with the juror's consent, have gone to the juror's home to pick up

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9 *R v Hambery* [1977] 1 QB 924 (CA (Crim)) at 930.
10 *R v Harris* [2008] NZCA 300.
11 At [9].
12 At [9].

> his medication; alternatively, substitute medication could have been obtained from a late hours pharmacy.

(b) While the jury was continuing its deliberations the following day, a second juror sent a note to the Judge advising he felt he could not "give 100% to this case" as he had been having problems with his wife.[13] He said that his wife had not come home that week and had cleaned out their joint bank account. This Court stated:[14]

> We do not consider that was sufficient justification for discharge, especially when the trial was so close to completion. (As it happens, the jury of ten returned its verdicts within about three hours of being allowed to resume deliberations on 17 August.) Performing jury service often creates tensions for jurors, whether they be job-related or family-related. Often, jurors find the deliberation process itself stressful. It is quite common for one or more jurors to burst into tears when verdicts are announced. The judicial response to juror stress must be reasonably robust; otherwise, juror and jury discharges would be common with disastrous consequences for the system as a whole, and, in particular, defendants and victims.

[38] To summarise, having raised this point at the hearing, and with the benefit of counsel's further submissions, the appellant has not persuaded us the Judge was wrong to discharge the second juror.

Majority verdict and Papadopoulos *directions inappropriate to the jury of 10?*

[39] Mr Phelps takes no issue with the form of either of the Judge's directions; first the majority verdict direction, then the *Papadopoulos* direction.

[40] Rather, Mr Phelps submitted the combination of the following factors gave rise to a real risk that one or more jurors had "yielded to majority demands":

- The trial began on a Friday and was adjourned over the weekend.

- The first juror was discharged in the very early stages of the trial on Friday.

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13 At [10].
14 At [10].

- The second juror was discharged on the morning of the third day of the trial.

- The jury had overnight "to think about issues" before beginning its deliberations at 9 am on Wednesday 11 November.

- The jury had been deliberating for six hours before indicating to the Judge at 2.44 pm that it was having difficulty reaching unanimous verdicts on four of the charges.

- The majority verdict direction had already been given when the jury informed the Judge that it had reached verdicts on all but three of the charges.

- The jury returned its verdicts 17 minutes after the Judge had given a *Papadopoulos* direction.

[41] We do not accept Mr Phelps' submission that these points, particularly when taken together, demonstrate justice miscarried. There is nothing concerning about a trial being adjourned over a weekend, or about a jury beginning its deliberations on the morning following the Judge's summing-up. Both are commonplace.

[42] No issue is raised about the discharge of the first juror. We have already dealt with the concern we raised about the discharge of the second juror.

[43] The timing of the majority verdict direction (after six hours of deliberation) is not of concern. Nor is the giving of a *Papadopoulos* direction some three quarters of an hour later. The order in which the Judge gave those two directions correctly accords with what the Supreme Court said in *Hastie v R*.[15] In our experience, verdicts often follow reasonably soon after a *Papadopoulos* direction is given, and jurors appreciate that "views honestly held can equally honestly be changed".[16]

[44] There is nothing in any of these points, thus nothing in them when taken in combination.

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15 *Hastie v R* [2012] NZSC 58, [2013] 1 NZLR 297 at [15].

16 This is part of the *Papadopoulos* direction..

[45] But the most convincing answer to Mr Phelps' concern that minority jurors yielded to undue pressure is the jury's verdicts, which demonstrate jurors adhered to their views, one way or the other:

- Two majority verdicts of guilty.
- One unanimous verdict of guilty.
- Three unanimous verdicts of not guilty.
- Two majority verdicts of not guilty

[46] This ground of appeal fails.

Sentence appeal

Sentencing starting point

[47] We have not found it necessary to detail Mr Stewart's offending. It suffices to say that the Judge, in sentencing, rightly described it as a "very serious case of ongoing domestic abuse".[17]

[48] The Judge took an overall starting point of five years imprisonment to reflect all of the offending. In terms of the *Taueki* guidelines,[18] applied "by analogy" to the lesser charges here as this Court in *Nuku* indicated they can be,[19] we consider this was well within the range available to the Judge. Mr Phelps' submission that the starting point should have been "no more than three years imprisonment" is untenable.

Discount for guilty pleas

[49] As recorded in the schedule to this judgment, Mr Stewart pleaded guilty upon arraignment at the start of his trial to four of the less serious charges he faced. Then,

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17 *R v Stewart*, above n 1, at [43].
18 *R v Taueki* [2005] 3 NZLR 372 (CA).
19 *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 3.

immediately before the Judge summed up, he pleaded guilty to a fifth comparatively less serious charge.

[50] The Judge allowed Mr Stewart a discount of four months to reflect these guilty pleas. In terms of the Supreme Court's guidance in *Hessell v R*, we accept Ms Markham's submission that no greater discount was appropriate.[20] All those pleas were entered during the trial and, as Ms Markham submitted, had little utility to the justice system nor did they relieve the complainant from the ordeal of giving evidence. We cannot accept Mr Phelps' submission that a discount of "at least 10 per cent was appropriate".

MPI

[51] Mr Phelps assembled a number of factors that, in combination, he submitted argued against imposition of a MPI. For example, he suggested Mr Stewart's history of violent offending had tapered off significantly since his last convictions in 2007, and he pointed to his guilty pleas to some of the charges in the present case.

[52] Mr Phelps then supplemented this with an argument that a MPI was unnecessary, because, absent a MPI, Mr Stewart was unlikely to be released on parole after having served only one-third of his sentence given his unwillingness to take responsibility for his offending.

[53] We are not at all attracted to those submissions. As Ms Markham pointed out, this Court in *Taueki* observed:[21]

> In cases of serious violence, where denunciation and deterrence are both important sentencing values, and where protection of the community from the offender may well be a relevant factor, it can be expected that minimum periods of imprisonment will not be rare or even uncommon.

[54] Mr Stewart had been in prison for a good part of the four years since his last violent offending in 2007. The offending with which this appeal is concerned involved numerous breaches of the conditions on which he had been released.

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[20] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [74]–[75].
[21] *R v Taueki*, above n 18, at [57].

[55] When Judge Mackintosh sentenced Mr Stewart he was only 32 years old. But he had amassed 71 convictions, of which 13 were for violent offences including assaults on a female (these figures exclude Youth Court matters). He had been sentenced to imprisonment on 14 previous occasions. The report the Judge had before her assessed Mr Stewart as at high risk of reoffending.

[56] A further concern for the Judge must have been the fact, which emerged in evidence at the trial, that Mr Stewart had attempted to telephone the complainant from prison 37 times while she was in the middle of cross-examination. And Mr Stewart's mother had also attempted to contact the complainant. Mr Stewart accepted this when it was put to him in cross-examination. He really had no explanation other than to say "I was angry".

[57] In terms of s 86 of the Sentencing Act 2002, the Judge was well justified in taking the view that protection of the community, and particularly of the complainant, demanded imposition of a MPI.

Result

[58] The appeal, both against conviction and sentence, is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

SCHEDULE

Charge No.	Nature of charge	Date and place of incident	Disposition
1	Injuring with intent to cause grievous bodily harm (GBH)	Between 1 January 2012 and 24 March 2012 at Karamu Rd, Hastings	Guilty verdict (majority verdict)
2	Injuring with intent to cause GBH	Between 1 January 2012 and 10 March 2012 at Karamu Rd, Hastings	Discharged at close of Crown case
3	Threatening to cause GBH	Between 1 January 2012 and 10 March 2012 at Karamu Rd, Hastings	Discharged at close of Crown case
4	Assault with intent to injure	4 October 2012 at Jellicoe St, Hastings	Pleaded guilty on arraignment at commencement of trial
5	Injuring with intent to injure	7 July 2013 at Beattie St, Hastings	Not guilty verdict
6	Assault with a weapon	Between 1 December 2013 and 31 December 2013 behind Karamu High School, Hastings	Not guilty verdict
7	Dangerous driving	Between 1 December 2013 and 31 December 2013 behind Karamu High School, Hastings	Not guilty verdict
8	Kidnapping	Between 1 December 2013 and 31 December 2013 behind Karamu High School, Hastings	Not guilty verdict
9	Injuring with intent to injure	Between 1 December 2013 and 31 December 2013 behind Karamu High School, Hastings	Not guilty verdict
10	Intimidation	4 January 2014 at Marine Parade, Napier	Pleaded guilty on arraignment at commencement of trial
11	Assault with intent to injure	13 March 2014 at Beattie St, Hastings	Guilty verdict (unanimous)
12	Kidnapping	Between 1 April 2014 and 31 April 2014 at Lyndon Rd, West Hastings	Discharged at close of Crown case
13	Breach of a protection order	Between 1 April 2014 and 31 April 2014 at Lyndon Rd, West Hastings	Discharged at close of Crown case

14	Breach of a protection order	24 May 2014 at Lyndon Rd, West Hastings	Pleaded guilty immediately before the Judge summed up
15	Injuring with intent to cause GBH	24 May 2014 at Lyndon Rd, West Hastings	Guilty verdict (majority verdict)
16	Breach of a protection order	6 June 2014 at Hastings Police Station	Pleaded guilty on arraignment at commencement of trial
17	Breach of a protection order	7 June 2014 at Hawkes Bay Regional Prison	Pleaded guilty on arraignment at commencement of trial