

IN THE DISTRICT COURT  
HELD AT AUCKLAND

T No. 980938

98/2410  
31  
QUEEN

v

TE KAHA

Date of Hearing: 18 December 1998

Counsel: R. J. A. M. R. Marchant for Crown  
A. G. W. M. A. Webb for Prisoner

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~~NOTES ON SENTENCING~~ <sup>OF</sup> ~~BY~~ JUDGE SA THORBURN

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*Solicitor:*  
*Crown Solicitor's Office, Auckland*

The prisoner, Te Kaha - he requests that he not be referred to as "Mr" - is to be sentenced now, he having pleaded guilty at arraignment, on the 23rd November to two counts first, that on the 5th of June 1997, at Aniwhaniwa, he broke and entered a building, namely, the Aniwhaniwa Visitor Centre, with intent to commit a crime - a charge of burglary, and secondly, that at the same time and place he stole a painting entitled "The Urewera Triptych", valued at \$1.2 million, the property of the Department of Conservation - a charge of theft. Burglary carries a maximum penalty of <sup>10</sup>~~14~~ years imprisonment, and theft - seven years.

It is important to note at this stage that with regard to the theft, having pleaded guilty, Te Kaha must be taken as acknowledging the essential element of intention to permanently deprive the owner of the object. I mention that because a good deal of time has been spent in reference to that particular matter, the painting now having been voluntarily returned to its owner. Te Kaha has conveyed to his counsel and the probation officer, and has endeavoured to suggest to the Court, that there never was any intention to permanently deprive the owner of the property.

I also mention at the outset, that counsel has been instructed today to make an apology on the part of Te Kaha to the two persons who have provided Victim Impact Statements. I cannot, of course, do any more than note that. In real terms, what is needed to give that meaning is yet to be determined.

The Crown is represented by Mr Marchant. Te Kaha is represented by Mr Webb. The facts

are well known having been much publicised, but the Court was favoured with a brief but adequate summary of facts in any event. The break-in occurred in the morning of the 5<sup>th</sup> July 1997. The stolen artwork was not recovered for a long period of time.

I pause also to point out that of great significance in this case is the value of the item taken. Counsel has described it as a significant national icon. That is a description to which nobody could take exception.

I do suggest that the painting, by its own images and symbols, and by the very place where it was housed, means that it can be regarded as Taonga for both Maori and Pakeha, it being a work which in its own way symbolizes a bridging of cultures. It was and is a most special treasure in national terms for all New Zealanders.

If the item taken was worthless or of no monetary or symbolic significance, then, of course, the offences and the alleged motivation for them, which I will refer to shortly, would basically be negated or emptied of any wide or far reaching public significance. Therefore, the targeting, which is obviously what happened here, of this particular item, makes the burglary and theft, in my view, very serious indeed.

Te Kaha is a man in his forties. There is a probation report, which is full and very thorough. I am, of course aware of his record of previous convictions. It is apparent, this matter aside, that he has settled as a quiet citizen, putting behind him some mildly troublesome traits of younger years. I am prepared to categorise him today as a person who is not a career criminal,

nor is he, this matter aside, a citizen known for demonstrable attitudes of lawlessness.

He has advised the probation service and his counsel, that he will accept sentence today, being fully appraised of the likely outcomes. The thrust of counsel's submission on his behalf has been that I ought to accept the recommendation for community service and reparation, and, in the course of submissions, a nudging comment that perhaps a conviction and discharge would not be inappropriate.

At present he is a beneficiary residing, I am told, between two addresses, Paritai Drive in Auckland and Rahi Road in Ruatoki. He is regarded with respect by those who know him. He seems to have left drug and alcohol dependency well behind. Those remarks are probably the main observations before the Court for mitigation, mitigation significantly having being levelled at good character really, for it is said that the offending was for an overarching purpose of political nature, for want of a better word - a protest arising out of tribal based frustration of the Tuhoi people (Te Kaha being one), because the way their lands have been dealt with by the Department of Conservation has been improper and marked with disrespect, and that their knocking on the door of the Department of Conservation has been unheeded. A protest was devised that meant the Department would be deprived of one of its great assets in order to see how it felt when it lost something that was dear to it.

I do not suggest I have adequately summarised an issue of complex and societal nature. I simply seek to outline the nature of the submissions that have been made to me as to the purpose and motivation that the prisoner puts forward for the offending.

Today I am told that he has never ever shrunk from responsibility for what happened. The Crown naturally has some difficulties with that, for in the immediate backwash of the offence there was huge social outrage and concern at the disappearance of this precious item with very little indicators that anybody was prepared to take responsibility for what had happened.

The prosecution's submission is that this was a seriously well thought out, deliberately and carefully planned crime, which is indicative of a well organised intention and plan to successfully achieve an object as well as successfully avoid detection. Others, it is said, were involved, and with the prisoner accepting as he does that he was the main influence, or organiser, others were used, as the Crown say, as a decoy, in order to throw investigation off the scent in the early stages. A long time went by with huge resources applied to this inquiry, but, in due course, and as has been well publicised, this painting was returned to its owners. Only then was the prisoner publicly willing to take responsibility and hence plead to the charges. In terms of matters the Court takes into account, Te Kaha ought not to get any benefit for his plea, for it came very late in the piece. That issue has been addressed by both counsel with, of course, strong and urging submissions from the defence that all is not as it seems in respect to that, and there was never any intention other than, at the end of the day, to take responsibility and return the painting.

Those preliminary remarks set the stage for me to move on. The offence of burglary has a maximum penalty of <sup>10</sup>~~14~~ years of imprisonment. This is not an ordinary burglary. The Court of Appeal has endowed this jurisdiction with many decisions to assist in sentencing career

burglars or those who are committing burglaries for personal gain and selfish interest with arrogant disregard for the effect emotionally, physically and materially of the invasion of privacy that burglary symbolises for citizens whose houses have been entered and so often trashed. Similarly, too, with commercial premises. Clearly, this is not such a case.

I have indicated earlier that I am persuaded this case is one which could be called a “protest” case and, therefore, sources of precedent from the Court of Appeal in dealing with persons making political, public or protesting statements by resorting to lawlessness are applicable. Suffice it to say that there is a clear foundation to regard such persons who might be of honest and sincere motivation, as different from the disrespectful and arrogant criminal behaving lawlessly without regard to the rights of other citizens.

In respect to where sentencing should be pitched, I will approach this case on the basis that it is one of political and/or protest nature. If imprisonment is appropriate, that would be in the range that the Prosecutor has suggested, - 6 to 18 months. If it was another type of burglary and theft, then, of course, there could be a completely different picture, with the possibility of many years of imprisonment being quite sustainable. The Crown does not concede that the crimes were not for personal gain or that they were for purely protest purposes, but I have decided, considering all that I am aware of now, that the appropriate way to approach the matter is to regard them as a protest and thus derive what assistance I can from previously decided protest cases.

There are two main cases which I have been referred to where there is lawless behaviour, but for political or protest purposes. The most recent one is the well known case of the America's Cup damage. That decision, R v Nathan (1997) 15 CRNZ 381 (CA), refers back to the second case that relates to the Springbok tour of 1981, namely R v. Burton [1982] 1 NZLR 602(CA).

In Burton, the principle was well established that deterrent aspects of sentencing had to be emphasised in order,

*"...to persuade anybody, who might wish to make public protests for reasons, no matter how compelling, that they must act within the law". (p. 604)*

I observe, in mentioning that principle, that I can only deal with Te Kaha on the basis that there is one system of law in New Zealand and that particular principle must be the one that I am guided by. Therefore, if a person such as Te Kaha behaves in a way which offends the Criminal Code, albeit that there might be some motivation which has a moral point of view, there has to be, of course, a risk that the perpetrator assumes and must take responsibility for, that stepping outside of the law will have consequences for him or her. In other words, this is part of the price of motivation to protest outside the law.

Nathan and Burton, were both intentional damage charges laid under the Crimes Act and with maximum penalties of five years imprisonment. In respect to Burton, the object that was damaged was a microwave transmitter. There was \$45,000 worth of damage resulting from

steps taken to try and disrupt broadcasting of particular rugby match. Nathan is the case of the well known destruction in an aggressive and rather terrifying way, of the America's Cup. I think damage around \$60,000 resulted.

In Burton, a term of imprisonment was set aside and a non-custodial penalty was imposed by the Court of Appeal, namely, community service. That Court took the view that the impact of a non-custodial sentence can be severe in the case of persons such as the particular appellants. They were people who were good citizens with no record and whose behaviour could only be explained by a high degree of motivation that came from a strongly felt moral point of view.

In respect to Nathan, the America's Cup case, the Court does appear to accept that there was a strongly held motivation from a moral point of view, but Nathan was in a slightly different category personally because of previous convictions, and also because of the nature of the damage and the way in which it was incurred. Imprisonment was regarded as the only appropriate sentence. The Court said at page 385:

*"What is common in the two cases is the mitigating impact of motivation. We are not saying that those who wish to make public protests, for what they see as compelling reasons, are free to act outside the law. They are not. Indeed, the appellant, by his withdrawing of his appeal against conviction, now accepts that, but the underlying motivation in this case is not one of destruction for the mere sake of destruction. As in Burton the appellant was demonstrating and advertising what he felt was a moral*



*point of view."*

My conclusion is that this is a bad case of its sort and a term of imprisonment is inevitable. The prisoner says that it was a peaceful political protest. I am told that he had no intention to damage the artwork and I am persuaded that that is probably right. As it happens, there was some damage. There is a reparation report to cover that. His counsel points out that the damage is really rather token when one considers the overall value of the item. Costs of \$5,366.25 were incurred in restoring the recovered item to its best possible condition. Damage was consistent with folding, abrasion and surface dirt, but, overall, nothing of long term effect, fortuitously.

I have regarded it as a serious case and one warranting a term of imprisonment for the following reasons. Whilst I am prepared to accept the motivation that I have referred to earlier, this was a very seriously organised if not crafted crime that involved and indeed used others. There were risks. It must be, I believe, acknowledged that things could have gone wrong and the subjective recollections of the two men who have provided Victim Impact material of the night in question, when they were required to monitor a roadblock in remote country parts, are self-explanatory. It was scary. At one stage there was a car ( I think this must be the decoy car that has been suggested by the Crown), which broke through the roadblock. That could have, in my view, in such quick and tense circumstances, resulted in

something going awry and/or not as planned.

Also, the targeting of such a vastly valuable item is not to be overlooked and although this is not a robbery, it is a theft of something which, in monetary terms, would, as it were, almost skin out the bank if it was cash from some sort of payroll theft. It is hugely significant that something precious was taken. There would be little point otherwise. This was a deliberate targeting of an icon of New Zealand culture. There must have been risks that its care could have fallen short of what was appropriate for such a valuable item. Having mentioned that, I do tend to accept that Te Kaha had no intention to be negligent or reckless in this regard. But the unique nature of such an item requires special attention and something could very easily have gone wrong with ultimate loss to all New Zealanders<sup>s</sup> of one of its proudest possessions.

The actions, in my view, were as much - and I use these words advisedly - a publicity stunt as anything else. That might be offensive to persons motivated by a high sense of moral justification, but this was crime directed to an item of unspeakable value in monetary, symbolic and cultural terms, which had immense potential to derive tremendous notoriety, and/or infamy, to the person or persons who were responsible for it.

By comparison with the Burton case, where the protestors in the era of the Springbok Tour damaged the transmitter to prevent broadcasting, this particular matter of Te Kaha's is in a very different category, in my view. The actions must have been committed for the potential to create national outrage and foment. I judge the actions of Te Kaha to have, in national

terms, less moral justification as a protest, being more self-serving or ego pampering. I regard the case as more akin to Nathan rather than Burton. It is to be pointed out, too, that in both Nathan and Burton the charges were intentional damage. The charges that Te Kaha is being sentenced on are more serious.

My view is this: a sentence of 15 months imprisonment is appropriate and I sentence accordingly. I have an assurance and an undertaking that I will record now and make as part of the overall sentencing picture, for I am about to conclude, that reparation in the sum of \$5366.25 is payable forthwith. That must be an obligation which ought to be insisted upon by the Court, in my view and I order payment accordingly.

I also consider that if resources are available, there should be some substantial award of costs to the prosecution. I fix that now in the sum of \$10,000, and order accordingly. I am prepared to suspend the term of imprisonment. Te Kaha should know now that for a period of two years, for that is the term that I determine the imprisonment sentence ought to be suspended for, if he offends and is convicted of any matter which could give rise to a sentence of imprisonment, this sentence that I have passed now can and perhaps would be activated. I am mindful of the Petersen principle in respect to suspending sentences of imprisonment. I do not believe that Te Kaha is a man who is likely to appear before the Court again. If he has any silly notions, then his wings are clipped by the suspended term of imprisonment for the next two years. I am told by his counsel that he has finished - he has made his statement, the desired result, in a sense having been achieved, and that he has finished with this sort of

public profile. I tend to believe that that is quite likely. I say that because of the last 10 years of quiet and tranquil life to which I have referred in my opening remarks.


In respect to deterrence, the sentence that I have imposed is, in my view, an appropriate sentence which has its deterrent factor for persons who might be inclined to behave with the lawlessness that Te Kaha has in the particular circumstances. The consequences of such behaviour must be known and they are demonstrated, I believe, by the sentence that I have fixed.

I do not think, given assurances of the immediate availability of the financial resources, that there is any imbalance in the overall by the sentence that I have imposed. It is a rarity for sums such as these to be recovered, and where there is the capacity today to do that, it is a factor which I think is able to be taken into account when one spreads the overall balance of an outcome in today's sentencing.

Therefore, I will sentence as follows: 15 months imprisonment on both charges, suspended for two years. There will be 200 hours of community service on both charges. That is covered in the probation report and must form part of the sentence that I impose as well. There will be reparation in the sum of \$5,366.25. There will be costs to the prosecution in the sum of \$10,000. Those sums are to be paid before the closing of the Court today.

Having announced my sentence and given reasons, I will adjourn until 4 o'clock today, on the

basis that those payments will be received, and upon confirmation that that has taken place, I will complete sentencing as indicated.



SA Thorburn  
District Court Judge