IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CRN NOS. 1244/23, CRN 4,
CRN 173/24

POLICE

v

NGA WILLIAM LESLEY ELLIS

Hearing:	17 December 2024
Counsel:	Ms T Scott and Mr T White for Crown Ms M Tangimama and Mr N George for Defendant
Judgment:	18 December 2024

JUDGMENT OF THE HON. JUSTICE C GRICE

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[1] Mr Ellis faces charges of threatening to kill Akalipa Taufahema and wilful trespass of land, after being warned to stay off the land occupied by Akilipa Taufahema. Both relate to an incident on 18 August 2024. The charges are laid under s 329(a) (threatening to kill) which has a maximum penalty of 7 years imprisonment and s 102 of the Crimes Act 1969, (wilful trespass) which carries a maximum term of 3 months imprisonment.

[2] The defendant and the complainant (known as Lipa) are neighbours in Avatiu. On 8 November 2019, the defendant was given a trespass notice by a representative of the owner of the house that was occupied by the complainant and his family. The defendant was given the notice and warned to stay off the complainant's property. However, in the early hours of Friday, 18 August 2023, the defendant, who had been drinking at his home earlier, came over

to the complainant's home and he and the complainant had words. The defendant thought that the complainant had been having an affair with the defendant's partner, which the complainant denies. The complainant was inside and speaking to the defendant, who was outside, through an open window. It is common ground that the defendant threatened to kill the complainant, and after a short delay left the property at the complainant's behest. The details of what happened during that exchange is contested.

[3] The defendant was later interviewed by the police but did not make any comment on the events.

The evidence

[4] The defence and the Crown agree on various matters, which are recorded in an admission of facts. The admitted facts include the identity of the defendant and that he and the complainant were known to each other, as well as the fact that the defendant periodically resided at the property near to the complainant's residence in Avatiu.[1]

[5] Detective Inspector Ingaua gave evidence that the complainant had reported that Mr Ellis, in 2019, had been to the complainant's property with a bush knife and was causing trouble. At that time, the complainant, Mr Akilipa Taufahema, had asked the officer to tell Mr Ellis not to enter their property anymore as he was afraid Mr Ellis might take the law into his own hands. The officer was the caretaker of the family property where the complainant and his family were staying, therefore, the officer prepared a trespass notice and served it on Mr Ellis at the police station on 8 November 2019.

[6] The trespass notice included a warning to stay off the relevant property, citing s 102 of the Crimes Act. It was produced and had been signed by the officer but not by Mr Ellis. While there was a defence submission that the receipt of the notice should have been signed, Mr Ellis gave evidence and accepted, consistent with the evidence of Officer Ingaua, that he had received the trespass notice from the officer at the police station, that he was also verbally told of the contents of the trespass notice by the officer, and that he understood the warning that he should not go to the complainant's property.

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1 Admission of Facts dated 17 December 2024.

[7] The complainant, Mr Taufahema, gave evidence that at about 3 am on 18 August 2023, he heard banging on his house. When he opened the window he saw a man, he recognised as Mr Ellis, smashing his house and the window. The outside light was on, as were the inside lights which also shone outside. The window was made of wood and could be pushed out with a stick. However, the complainant said he could clearly see and recognise the defendant who was outside the window, standing only metres away from the complainant. When Mr Ellis saw the complainant looking out the window he said angrily, "Lipa, I'm gonna kill you" holding up a knife. Mr Ellis said this three or four times. The complainant said, "Willie go home! Go home your wife is not here." The complainant said the defendant did not leave for about 10 minutes despite the complainant telling him to go. Then the defendant turned around and left.

[8] The complainant's partner, Rebecca Rennie, gave evidence largely consistent with that of the complainant. She had come to the window and was standing beside the complainant. She said she was woken up by the banging. She heard the complainant telling her partner that he was going to kill her partner, and also saw the knife being brandished by Mr Ellis. She identified Mr Ellis as wearing a black T-shirt.

[9] The complainant describes the knife as being about 12 inches long, and demonstrated to the court a length of approximately 12 inches or slightly longer. The complainant describes the knife as a kitchen knife. Ms Rennie described the knife as a bread or kitchen knife of about 17 inches long. Ms Rennie is a chef by occupation.

[10] In responses to the questions under cross-examination, both the complainant and his partner maintained that the defendant had been brandishing a knife threateningly while he was making the threats. Both said they had a clear view of the defendant through the window, and also that the outside light was on in addition to light shining from the inside out. They were able to observe the defendant clearly.

[11] When it was put to the complainant in cross-examination that Mr Ellis must have been there for a reason, the complainant said he did not know but thought it had something to do with Mr Ellis's wife; who had on occasion been at the complainant's home sheltering from

Mr Ellis. Mr Rennie was also unsure of why the defendant was there, thinking that he may have got his former wife (also a Rebecca) mixed up with her. In response in cross-examination the complainant denied having an affair with the defendant's partner at the time. He said his family helped her out when she was there alone, before the defendant returned from New Zealand. Ms Rennie also denies denied that she was aware of any affair. It appears no explanation was articulated by the defendant at the time of the incident.

[12] Both the complainant and his partner also confirmed that when asked to leave, the defendant did not do so immediately but waited 10 to 20 minutes before he left. Ms Rennie thought he left after the police had been called. The complainant said he had asked a friend to alert the police as he did not have credit on his phone to make the phone call. The police arrived sometime in the early hours of the morning.

[13] The evidence of Mr Ellis is consistent in many respects with that of the complainant and his partner. He confirms that he had been drinking earlier in the evening. He stopped drinking about midnight; and sometime after that, having being stewing over his suspicion that his wife was having an affair with the complainant, went over to the complainant's house, which was only a few metres away, to confront the complainant on the issue. He said he did not bang on the window but called out loudly (not shouting) for the complainant. The outside light was not on, but there was adequate lighting from the street lights so there was good visibility.

[14] When the complainant came to the window Mr Ellis agrees that he said he was going to kill the complainant. The defendant also confirms that he intended to kill the complainant when he said those words. However, the defendant denied that he was carrying any knife at the time. Mr Ellis agreed that he was told to go home by the complainant, and he did not do so immediately but waited around. He agreed it could have been some time, perhaps up to 10 minutes, before he left.

Propensity

[15] Pursuant to a ruling of Justice Potter[2], evidence of a previous conviction of the

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[2] *Police v Ellis*, CRN 1244/2023, Oral Ruling of the Honourable Justice Dame Judith Potter J, 12 April 2024.

defendant in 2019 for a threatening act under s 331(b) of the Act, was admitted as propensity evidence for the purpose only of assessing the credibility of the Crown's witnesses, in the event that the defendant gave evidence at trial that he was not carrying a knife. Her Honour indicated the jury would be directed that the 2019 offending is not relevant in relation to proof of threatening to kill, but only for the purposes of propensity for carrying a weapon.

[16] The defendant did give evidence and denied that he had been carrying a knife, although he accepted that he had come over to the complainant's home in the early hours of the morning as alleged, and threatened to kill him. In those circumstances the propensity evidence in terms of the Ruling of Potter J is admissible. As Ms Tangimama emphasised, the propensity was admitted only for the purposes set out in the ruling which reads:

> [38] If the defendant gives evidence at trial that he was not carrying a knife, evidence of the 2019 conviction will be admissible only as to the admitted fact that he carried a machete, to assist the jury to assess the credibility of the Crown witnesses on that aspect. The jury will be directed that the 2019 offending is not relevant in relation to proof of threatening to kill.
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> …
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> [40] The facts of the 2019 offending evidence a single incident which occurred four years prior to the alleged offending in 2023. They fall well short of evidencing an escalating confrontational relationship between the defendant and his neighbours which could be properly regarded as an integral part of the background to the alleged events in 2023, which give rise to the charge of threatening to kill.
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> [41] The evidence of the 2019 offending does not qualify for admission on the basis of *res gestae.*

[17] The defendant's Criminal and Traffic History was produced through Mr Ellis. While the relevant Information on which the defendant was convicted, was not produced, the Ruling of Potter J recorded that the conviction was for a threatening act under s 331(b) of the Crimes Act, and the defendant entered a plea of guilty to that charge. The summary of facts noted that the defendant, at approximately 3 am on 8 November 2019, in the early hours of the morning with a machete had gone to the complainant's house and told them to lower the volume of the music and their voices. The defendant told the police that he taken the machete with him for protection. Counsel agreed that this specific information, and the context which is contained in that material is favourable to the defendant. It is admissible in terms of the

Ruling of Potter J only as to propensity for the defendant to carry a knife, in view of the defendant's denial that he carried a knife here.

[18] I direct myself that I may only use the propensity evidence for the limited purpose of the fact that there was a conviction on the specified charge and that the defendant had been armed with a machete. It is available as propensity evidence only for the purpose of considering whether the Crown witnesses, the complainant and his partner, who said the defendant carried a knife, should be believed, in view of the denial by the defendant.

Legal - Threatening to kill or do grievous bodily harm

[19] Turning to the legal position, under s 329, insofar as relevant:

> Every person is liable to imprisonment for a term not exceeding 7 years who—
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> (a) threatens to kill or do grievous bodily harm to any person; or
> (b) …

[20] The intent required is that the threat is deliberately made with an intention that threat be taken seriously. The provision is not intended to capture, "remarks made in the heat of the moment which are not of a sufficient degree of seriousness to amount to a crime"[3].

[21] An actual intention or ability to carry out the threat is unnecessary[4] The intent of the defendant can be determined at least in part by the words used by the defendant in the context in which they were spoken and who they are addressed to. The reaction of the person to whom the threat is addressed may be of evidential significance.

[22] The complainant said when he and his family moved into the home they had become friendly with the neighbour, the defendant's partner, whom they assisted to do various chores such as cutting the grass and the hedges. Mr Ellis came home from New Zealand and moved into the house with his partner.

[23] Mr Ellis invited the complainant to have a few drinks and the invitation was accepted. It appears that relations between the two men were convivial. Subsequently, the problems

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3 *Wederell v Police* HC Christchurch CRI 2010-409-33, 4 March 2010 at [14].
4 *R v Adams* [1999] 3 NZLR 144(CA).

developed. It seems this was due to a concern by Mr Ellis that the complainant was having an affair with Mr Ellis's partner. This had also been, according to Mr Ellis, a motivating factor in relation to the August 2019 incident, when he also threatened the complainant. He accepts that he was carrying a machete at that time.

[24] Mr George in his submissions, said that the threat could not be taken seriously. He pointed out that the threat made in August 2019 had not been followed through; and that the threat made in November 2023 was not followed through either. Mr George submitted it was not a credible threat and it had no potential for being carried out.

[25] Both the complainant and his partner say that the defendant was brandishing a kitchen knife. They both described as similar knife, although not exactly the same – the inconsistency of description is merely one of detail as to the length of the knife. Both said it was stainless steel. The complainant said it was about 12 inches long or more. Ms Rennie said it was about 17 inches long and had a black handle. The complainant said he did not see the handle because Mr Ellis was holding the handle. They have been consistent in saying there was a knife involved – describing the episode to the police when they arrived shortly after the incident.

[26] Reminding myself that the defendant was not obliged to give evidence, nevertheless he did so. Mr Ellis gave straightforward evidence and answered questions put to him candidly. He made admissions against his interests, including the fact that he intended to kill the complainant at the time he made threats outside the window. He agreed that he had been drinking but he was not drunk, nevertheless he was angry. He maintained that he was not carrying a knife at the time. He also agreed that he had been convicted in 2019 of a threatening act toward the complainant involving a machete.

[27] In view of Mr Ellis's admission that he intended to kill the complainant when he made the threat, and the complainant's evidence that he was scared of Mr Ellis effecting that threat, I find that all the elements of the charge of threatening to kill are made out. The evidence of the complainant is supported by the evidence of his partner, and I am satisfied beyond reasonable doubt that the defendant is guilty, the Crown having proved all the elements of the charge beyond reasonable doubt that the defendant threatened to kill the complainant.

[28] The defendant deliberately used language that meant, and was intended by him to mean, that he would cause really serious bodily injury or, as is alleged in this case, death to the complainant; and the defendant intended the complainant to take the threat seriously as a threat that might be carried out. The complainant thought the defendant meant to carry out the threat and both he and his partner were scared.

[29] In summary, I do not accept evidence of the defendant that he was not carrying a knife. I prefer the evidence of the complainant and his partner who both gave evidence as to the presence of the knife. While he claimed his recollection was clear Mr Ellis was admittedly angry having stewed upon his view that the defendant was having an affair with Mr Ellis's partner. He agreed that he was angry when he went over, had been drinking and he intended to carry out his threat to kill. I prefer the evidence of the complainant and his partner as to the knife. It was detailed and consistent between them except for minor details which are not material in the circumstances.

[30] I also remind myself that while I have not accepted the evidence of the defendant as to the knife, the Crown must still prove every element of the charges and I must be satisfied on all of those elements beyond reasonable doubt the basis of the evidence before me before I can find the defendant guilty. I cannot jump from a finding that the defendants cannot be believed on the issue of the knife to a finding of guilt. I am so satisfied.

[31] I am supported in my view by the fact that the propensity evidence that the defendant, on a previous occasion on which he was convicted for a threatening act, had also used a knife, that time a machete. The charge in that case to which the defendant pleaded guilty was that he with intent to intimidate or annoy any person by the discharge of firearms or otherwise (in this case carrying a machete) he alarmed or attempted to alarm any person in any dwelling house.[5] However even without the propensity evidence I would have found that the defendant was holding a knife based on the evidence before me.

[32] Accordingly, I am satisfied that the defendant is guilty on the charge of threatening to kill.

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5 That offence under s 331(b) of the Crimes Act carries a maximum penalty of 3 years' imprisonment. Mr Ellis received a suspended sentence,

Legal position - Wilful trespass

[33] Section 102 of the Act provides:

> 102 Wilful trespass after warning to leave
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> Every person commits an offence and is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $100 who wilfully trespasses in any place, and neglects or refuses to leave that place after being warned to do so by the owner or any person in lawful occupation of the place, or any person acting under the express or implied authority of the owner or person in lawful occupation.

[34] At the end of the Crown case, an application was made pursuant to s 111 of the Criminal Procedure Act for a dismissal of the charge. I dismissed that application. I was satisfied at that stage that there was sufficient evidence adduced to support the charge to enable it to go to a final determination. I noted that I would give my reasons later. This judgment sets out those reasons. At the end of the Crown case I was satisfied on the evidence as to the issue of the trespass notice in 2019 and the warning which was not heeded to leave the premises on 8 November 2023, that the evidence was sufficient to support the charge. For the reasons set out below I also did not accept the legal arguments made in support of the applications for the dismissal.

[35] The charge is:

> That Nga William Ellis on 18 August 2023 at Avatiu did wilfully trespass after being warned to stay off the land occupied by Akilipa Taufahema.

[36] Ms Tangimama in her opening, and Mr George in the closing for Mr Ellis, submitted that the trespass notice issued in 2019 was spent. First, because the New Zealand Trespass Act 1981 provides that trespass notices lapse after two years. They submit that the New Zealand legislation should be taken as a "guide" for the application of the Cook Islands provisions, in the same way as s 3 of the Criminal Procedure Act 1980–81 provides:

> … Provided that as to any matter of criminal procedure for which no special provision has been made by this Act or by any other law for the time being in force in the Cook Islands, the law as to criminal procedure for the time being in force in New Zealand shall be applied so far as it does not conflict or be inconsistent with this Act or any other law for the time being in force in the Cook Islands.

[37] Secondly, even if the New Zealand legislation does not allow the inference of a lapse date for Cook Islands trespass notices, it is unreasonable for a trespass notice to remain extant for the 5 years over which it is alleged that the relevant trespass notice in this case remained operative. Finally, Mr George submitted that the Cook Islands provision, without a lapse date, was arcane, that this was more like a civil trespass matter that should have been resolved in another way and therefore the court should not allow it to be enforced.

[38] I agree with the Crown submissions that I must apply the law as it applies in the Cook Islands, and that the substantive provision as to criminal trespass as provided in s 102 of the Crimes Act 1969, must be enforced in its terms. The provisions of the Criminal Procedure Act allowing for guidance from New Zealand criminal procedure provisions, relates to matters of procedure, not matters of substance. The New Zealand Trespass Act does not operate to modify or vary the provisions of the Cook Islands Crimes Act.

[39] However, I do agree that whether or not a trespass notice remains operative as a warning to stay off land depends on the context. It is not necessary to take that issue further as in this case I accept the Crown's submission that, given the underlying extant trespass notice which Mr Ellis accepted he received and understood the implications of in 2019, the warning by the complainant to Mr Ellis to leave the property in the 2023 incident operated as a further and timely lawful warning to leave the property. Mr Ellis agrees that he did not immediately leave. The complainant and his partner estimate it was 10 to 20 minutes before he did leave. That lapse of time was sufficiently long to satisfy me that a warning had been given in terms of s 102 by the lawful occupier of the property and the defendant did not leave for the purposes of the section.

[40] Mr George also submitted that the achievement of a technically lawful trespass notice required careful wording, and an oral warning of the nature of that given by the complainant is insufficient. However, there is no requirement in s 102 that the warning must be in writing. Nor are there any technical requirements as to service. I do not accept the submission made by the defence that a written receipt of the trespass notice was required from Mr Ellis. Officer Ingaua gave evidence that he served it on Mr Ellis, and Mr Ellis said he accepted that he was served. I am satisfied service of that notice was effected. That notice provided the

background knowledge that allowed the warning by the complainant to operate as a further warning under s 102, which was not heeded within a reasonable time in the circumstances.

[41] Mr George also submitted that because a police officer had been involved in the drafting and service of the trespass notice, it had escalated matters beyond the level at which they should have been dealt with. He suggested there might have been some discussions and resolution to the matter but for the involvement of the police officer. However, he noted that these submissions were not directed at the integrity of the officer involved, but merely in the way the matter had been escalated.

[42] While there may be some substance in Mr George's submission as to the way the matter was treated, it does not affect liability. I am satisfied that a trespass did occur and that Mr Ellis, following warnings both contained in the 2019 trespass notice and renewed orally by the complainant at the premises, wilfully trespassed on land occupied by the complainant.

[43] For completeness, I reject the contention that because under cross-examination the complainant said he did not tell Mr Ellis he was trespassing, or frame his warning as a notice under s 102, the warning was invalid or there was no trespass. The complainant was clear he issued a warning to Mr Ellis to leave, Mr Ellis acknowledged that and Mr Ellis did not comply within a reasonable period in the circumstances.

[44] I am satisfied all elements of the charge of wilful trespass under s 102 of the Crimes Act have been proved beyond reasonable doubt and I find the defendant guilty of wilful trespass.

Conclusion

[45] Accordingly, I am satisfied that the Crown has proven all the elements of both the threatening to kill charge and the wilful trespass charge, beyond reasonable doubt.

[46] In view of the nature of the charges I do not consider it necessary for the provision of the probation report, subject to the views of counsel. However I would be in a position to sentence the defendant on these charges at the end of the week if counsel agree, and are able to file the sentencing submissions on or before 3 pm, Thursday, 19 December 2024.

Arrangements can then be made with the registrar for a time for sentencing on Friday, 20 December 2024.