

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 101/2009  
[2010] NZSC 17**

**MONCELLO DAVID SHIRLEY**

v

**THE QUEEN**

Court: Elias CJ, Blanchard and McGrath JJ

Counsel: R G Glover for Applicant  
S B Edwards for Crown

Judgment: 5 March 2010

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed.**

**REASONS**

[1] The applicant seeks leave to appeal against the dismissal by the Court of Appeal of his appeal against a sentence of six years' imprisonment for wounding with intent to do grievous bodily harm imposed on him concurrently with a sentence of two and a half years for aggravated burglary. The applicant was found guilty at trial of both offences and so cannot claim any benefit from a guilty plea.

[2] While on bail on the robbery charge, where the applicant had been armed with a weapon, the applicant stabbed the victim in the upper chest with a knife after

some pushing and shoving between them, with the applicant having been held up against a fence by the victim who uttered a threat to kill him.

[3] This is not a case raising any question of general sentencing principle and, whilst some of the factual criticisms of the sentencing remarks and of the narrative in the Court of Appeal judgment made by Mr Glover appear well founded (in particular, in relation to suggested pre-meditation and prior aggression on the part of the applicant), we are not persuaded that the Court of Appeal erred in confirming the sentence.

[4] The offending was obviously very serious. Indeed the type of wound inflicted could well have been fatal. Provocation was offered by the victim but it was not substantial. The victim was not armed. The threat to kill is most unlikely to have been seriously intended or taken that way. Any form of retaliation using a dangerous weapon, let alone a stabbing in the upper body, was entirely disproportionate particularly when the victim appears to have been moving away at the time of the wounding.

[5] Although the sentence was stern for someone aged 17 years, we do not consider it arguable that it was plainly beyond the available range for such dangerous offending with the aggravating features that the applicant had been dealt with on several occasions in the Youth Court for carrying knives and was on bail on the aggravated robbery charge.

Solicitors:  
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