

STATE OF TASMANIA v ZEKE CHARLES KEVIN GODFREY 2 SEPTEMBER 2016
COMMENTS ON PASSING SENTENCE **BRETT J**

You have pleaded guilty to one count of aggravated assault. Your actions constitute that crime because the assault involved a threat by you to use a firearm to shoot Mr Whelan.

The circumstances of the offence are as follows. On 1 July 2015, some workmen, including Mr Whelan, arrived early in the morning at the building site adjacent to your house and wanted to use electricity from your house pursuant to a prior arrangement between you and the builder. One of the workmen knocked loudly on the door, waking up the occupants of the house. One of the occupants was your mother, who, you have told me, was at that time, and still is, suffering from cancer. After this, the workmen started using electric tools, which created considerable noise. Your mother became angry, went outside and expressed her displeasure to the workmen. She became involved in an argument with Mr Whelan. During the course of this argument, he became verbally abusive towards, and swore at, your mother. He came onto your property and appeared to be approaching the front door of your house where she was standing. You then went back into the house to search for a weapon, located a replica pistol and returned outside with it. By the time you got outside, Mr Whelan, who may have noticed you with the pistol, had retreated from the property and returned to the building site on the other side of the fence. You went to the fence, pointed the gun at his head and said, "*I am going to shoot you*". You did this because you wanted to intimidate him because of your fear that he may renew his verbal and threatening attitude to members of your household, in particular, your mother. There was further confrontation between you and the workmen. You told police that during the course of this confrontation, one of the workmen threatened you with a nail gun. In the end, the workmen left and you went back to your house.

You were arrested by police a short time later.

The replica pistol in question is a firearm within the meaning of the *Firearms Act* 1996. I am satisfied that it is not a toy. It is, to casual observation, indistinguishable from a layperson's expectation of the appearance of an actual firearm. I have no doubt that Mr Whelan and the other workmen thought that he was being threatened with a real firearm. That is probably why one of them responded by threatening you with the nail gun.

The serious aspect of your conduct is the use of the firearm and the direct threat to shoot Mr Whelan in the head. It is relevant to sentencing that the pistol was not actually an operative firearm but, of course, the victim of your conduct would not have been aware of this. Although I have been given no information as to any impact of this offence upon him, it is a reasonable inference that he would have felt fear and apprehension as a result of being threatened with the weapon. Another serious aspect of the use of a weapon in these circumstances is that the production and threat to use a weapon can act as a catalyst for a response which can easily escalate into serious violence. An example of this is that one of the workmen obviously felt it appropriate to threaten you with the nail gun as a defensive measure.

On the other hand, I accept that you acted rashly and without premeditation. You were responding to a situation in which you believed that it was necessary to defend your mother, other members of the household, yourself and your property. Your actions well and truly exceeded what was reasonable in the circumstances to conduct that defence and, accordingly,

your conduct was not justified, but your motivation is relevant to the question of sentence. I regard the fact that you were genuinely acting in defence of yourself and others as a mitigating factor.

You are 25 years of age. You have endured some serious challenges in your upbringing, and have underlying issues with drugs and the misuse of alcohol. You have a lengthy criminal history, which commenced when you were very young, and includes a substantial history of offending before you reached 18 years of age. I place less emphasis on the offending as a youth, but you have continued to offend as an adult. Your criminal conduct includes a wide variety of offences which include a number of assaults. In 2010, you committed the crime of aggravated armed robbery, which involved threatening another person with a knife. You have been to prison on a number of occasions and have been given the benefit of suspended sentences and non-custodial community-based sentencing options on several occasions in the past.

In November 2015, you were sentenced to a short period of imprisonment for offences which included assaulting police. That sentence ended in early February of this year. Through no fault of your own, you were then released from custody, notwithstanding that you had been earlier remanded in custody on this matter, and were not entitled to be released. You were eventually rearrested and have been in custody in respect of this matter since 1 July 2016. Prior to your return to custody, you had been subject to a probation order which was imposed on 12 January 2016 for a period of 12 months. You claim to want to act responsibly, particularly for the benefit of your ill mother, but also to rehabilitate yourself generally. You have a partner and it would seem that your immediate family cares about you. The builder who employed the workmen concerned in the commission of the offence has provided a positive reference for you, as has the owner of a local grocery store, for whom you have performed some volunteering work. The owner is prepared to have you back in that capacity when you are released from prison.

In respect of your wish to rehabilitate, I accept that you genuinely do want to improve your conduct and lead a law-abiding life. It is well and truly time that you made that decision and acted on it. It seems that your involvement with probation has been useful, although there has not really been an opportunity for supervision under that order to have a long-term positive impact. I cannot overlook the seriousness of this offence notwithstanding the mitigating factors, but you have now been imprisoned for just over two months and I think that that is an adequate period of actual incarceration in order to mark the community's denunciation of your conduct and give effect to the need for general deterrence. I intend to impose a longer sentence but will suspend the balance of it. There will be conditions that you are not to commit an offence punishable by imprisonment, and you will be subject to the supervision of a probation officer. That supervision will operate concurrently with the existing probation order but extend the overall period of probation for a longer period, 12 months from today. Make no mistake, though, if you breach the conditions of the suspended sentence, in particular by committing a further offence punishable by imprisonment, it is highly probable that you will serve the balance of this sentence.

Accordingly, the orders I make are as follows:

- 1 You are convicted of the offence to which you have pleaded guilty.

- 2 You are sentenced to a term of 6 months imprisonment, which will be backdated so that it commences on 1 July 2016. The balance of the sentence from today will be suspended for a period of 12 months from today on the following conditions:
 - a. That you are not to commit an offence punishable by imprisonment during that period.
 - b. That you will be subject to the supervision of a probation officer during that period. All of the optional and core conditions of a probation order will be incorporated into the sentence.
- 3 You will pay a victims of crime compensation levy of \$50 within 28 days.
- 4 Pursuant to s 16 of the *Crime (Confiscation of Profits) Act* 1993, I order that the replica firearm be forfeited to the State. I should say that it does seem to be something of an anomaly that if a person is convicted of a number of specified offences under the *Firearms Act* involving the possession or use of a firearm, that the firearm is automatically forfeited to the Crown, but that an offence under s 115 is not included in that list, nor is any discretion given to a court specifically under that Act to forfeit the firearm. I comment on this because an offence under s 115 is one of the more serious offences under this legislation, particularly when it is dealt with on indictment.