

THE QUEEN

v

ALLAN HARWOOD

Coram: Richmond P
Woodhouse J
Quilliam J

Hearing: 14 November 1980

Counsel: K.G. Stone for Crown
D.C. Fitzgibbon for Appellant

Judgment: 19 November 1980

JUDGMENT OF THE COURT DELIVERED BY WOODHOUSE J

On 12 August 1980 Allan Harwood was convicted on two of three counts in an indictment. He was convicted on a charge of injuring a man named Koti with intent to injure but acquitted on the more serious alternative charge of injuring with intent to cause grievous bodily harm. He was also convicted on a charge of common assault on a man named Pickup. He was sentenced to imprisonment for nine months on the charge of injuring Koti. He seeks leave to appeal against that sentence.

Koti and Pickup are showmen who had been drinking with colleagues and friends at the Showgrounds in Christchurch during the late afternoon and evening of 19 August 1979. Some time later Harwood and a friend of his joined them and remained there for an hour or two. It is not certain from the evidence what happened when

Harwood and his friend left the caravan in which all concerned had been drinking. Apparently Pickup left with them and some kind of argument developed. Then an altercation took place in the course of which Harwood struck the man Pickup and soon after he was himself knocked to the ground by a blow from Koti. The latter is apparently a large man and he fell onto Harwood who was lying in an awkward position over some kind of frame. When Harwood was in that position Koti aimed several further blows at him. Unfortunately three years earlier Harwood had suffered the grievous loss of his left arm in an accident and at a different time a leg had been injured; and as he lay beneath Koti, unable to defend himself, he drew a knife that he habitually carried and stabbed the other man in the stomach. It was a penetrating wound of about four inches. Almost at the same time Koti was attacked by Harwood's friend and he made off. Fortunately the wound inflicted by the knife did no permanent damage.

At the trial it was submitted on Harwood's behalf that the knife was used for the purposes of self-defence at a time when he was under serious attack. The verdict of the jury reflects their rejection of this defence although they did acquit Harwood on the more serious of the two alternative charges. On sentence the Judge referred to the heavy drinking that had taken place and his opinion that the charge of assault on the man Pickup was not particularly serious. Then in relation to the stab wound he said :

"Having read the evidence I am satisfied that all the fault was certainly not on one side and that there was a basis for your defence of self-defence, but the jury was obviously satisfied that the use of a knife was not justified. They did acquit you on the more serious charge.

You have had a difficult life, Harwood, and I have got a real measure of sympathy for you, but I would be failing in my duty if I didn't take a serious view of the use of a knife in any circumstance because unfortunately it is becoming far too common. I cannot accede to your counsel's suggestion that you should be given a lesser sentence than imprisonment. I bear in mind that you have been two months in custody."

The sentence of imprisonment for nine months then imposed indicates that the Judge took the view that the offence justified an effective sentence of imprisonment for twelve months. As to that decision we would simply say that once it is accepted that the Judge's assessment was correct, that a sentence of imprisonment was appropriate if not inevitable, then it could hardly be argued that an effective term of twelve months was excessive, even taking into account the mitigating considerations referred to by the Judge in his remarks.

It happens, however, that for some reason the Judge who had presided at the trial was unable to deal himself

with the matter of sentencing Harwood. That fact was mentioned during the argument in support of the present application on the basis that the sentencing Judge did not have the advantage of hearing and seeing the witnesses give evidence in regard to a somewhat confused altercation and in circumstances where the written transcript of what took place at the trial does not really enable a fair or accurate estimate to be made of Harwood's level of culpability. In addition, he himself had given evidence.

It is desirable for reasons that are obvious that it is the trial Judge who should sentence an accused person found guilty by a jury. Nearly always this is what happens of course and the fact that it did not happen on the present occasion was due no doubt to some important practical difficulty that had arisen. In any event, taking into account the nature of the case, we reserved our decision on the application for leave to appeal because we felt that we should have the opportunity of reading carefully the notes of evidence at the trial and other relevant material associated with the application. It was clear that the only ground that could be seriously advanced in favour of an appeal against the sentence is the argument that the sentencing Judge may have taken a rather more serious view of what Harwood had done than would have been the case had he presided at the trial.

We have now considered carefully all the available material and we have satisfied ourselves that if a lesser

sentence than imprisonment had been imposed it could have been done only by a decision that Harwood should be dealt with on a particularly merciful basis. That, of course, could not justify interference by this Court. The use of the knife was a serious matter and it is quite impossible to feel that a prison sentence was wrong in principle. It should be said perhaps that clearly the experienced Judge who passed sentence intended to, and did in fact, deal with the applicant in a lenient way.

Accordingly the application must be and is dismissed.

M. D. Wallman