IN THE COURT OF APPEAL OF NEW ZEALAND C.A.273/87

THE QUEEN v. BRIAN DOMINIC CARSON

Coram: Somers J.
Bisson J.
Gallen J.

Hearing: 3 March 1988

Counsel: W.R. Flaus for Crown
B. Davidson for Applicant

Judgment: 25 March 1988

JUDGMENT OF THE COURT DELIVERED BY GALLEN J.

The applicant pleaded guilty in the High Court at Rotorua on 17 September 1987 to a charge of attempted murder. On 23 September 1987, he was sentenced in that Court to a term of imprisonment for 3 years.

Counsel did not take issue with the account of the circumstances as set out in the decision of the sentencing Judge. The events out of which the charge arose occurred in Minginui. The applicant is said to have gone to a private house in the company of others where he demanded access to supplies of beer in nearby club premises over which the man spoken to had control. When he was refused the access demanded, the applicant obtained an axe from the vicinity and broke in the door

to the house which had been closed by the householder. Having broken in the door with the axe, he swung the axe at the complainant in an action which he frankly admitted to the police was an attempt to kill the man concerned. The reason given was, in the words of the applicant "because he was getting smart". The Judge had available to him a pre-sentence report which contained worrying material giving cause for concern. It stated that the applicant showed no remorse for his actions and that he was concerned that the sentence imposed should be such as to give him status with gang associates. Having said that, the Probation Officer stated that the applicant impressed as an intelligent and honest young man "who has a lot of aroha within him and two families who support and love their son very much." The report suggested that the applicant might benefit more from a term of corrective training than the alternative of a full time custodial sentence. The Judge referred to a concern within the community at what was described as unreasoning violence and the consequence that the Court ought to impose severe penalties in cases where physical violence occurred. This is a consideration which he was clearly entitled to take into account.

The Judge referred to the youth of the applicant and weighed against that the need to impose a deterrent

sentence to make it clear that the Courts would not tolerate the type of conduct evidenced.

Having taken into account the plea of guilty, he considered an appropriate sentence was a term of imprisonment for 3 years.

Mr Davidson understandably, puts a considerable emphasis on the youth of the applicant. The information before the Court was somewhat confused with regard to this. In the statement the applicant gave to the police, he gave his birth date as 20 June 1972, a date which appears on the information. That date would have meant that at the time of the incident out of which the charge arose, he was 14½ years of age. The probation report indicates that he was born on 28 June 1970 and this is the date which appears on his record of criminal offending. That would have made him 16½ years old at the time of the offence.

Counsel informed us that the matter was raised at the time of sentence and the Judge advised the true year of birth was 1971, which would have made the applicant 15½ years old at the time. We caused enquiries to be made with regard to this aspect of the matter and it now appears that his true age was 15 years 5 months. The significance of the submission is that

immaturity affected both culpability and the appropriate response.

The Judge referred to the fact that the applicant was physically large and strong. The violence was extreme and the whole incident displays behaviour and an attitude of mind which is utterly unacceptable. The Judge was concerned with deterrence. In a case such as this, deterrence shades into the need for protection of the community. As Mr Flaus submitted, Minginui is an isolated community. In such a situation it is encumbent upon the Courts to provide such reinforcement as is possible of the stand that behaviour of this kind will not be tolerated. The position of the applicant is not improved by the attitude and motivation indicated in the probation report. No Court likes to see a young person spend a period in prison. There is room for hope in the assessment of the Probation Officer that the applicant has good qualities and may yet make a worthwhile contribution to his community. While that is encouraging, it would not justify interfering with a sentence which could not in the circumstances be described as manifestly excessive.

The application is declined.

Solicitor for Crown: Crown Solicitor, Wellington