

9/8

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 94/91

THE QUEEN

v.

GRAEME McCRAY NICOL

1408

Coram: Casey J (presiding)  
Hardie Boys J  
McKay J

Hearing: 26 July 1991

Counsel: Ms Anna Tutton for Crown  
Ms Rennie Gould for Applicant

Judgment: 26 July 1991

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JUDGMENT OF THE COURT DELIVERED BY MCKAY J

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This is an application for leave to appeal against a sentence of six months imprisonment on a charge of assault with intent to rob, cumulative on a sentence of 2 1/2 years on three charges of aggravated robbery. All four offences occurred during the one night, 15-16 September 1990. The applicant and a co-offender Jones pleaded guilty to the three charges of aggravated robbery and were each sentenced to 2 1/2 years on those charges. No appeal is brought from this sentence. The applicant pleaded guilty to the further charge of assault with intent to rob and was sentenced at the same time as on the other charges. The appeal was directed to the cumulative nature of the sentence.

On the evening of 15 September 1990 the applicant, Jones and another man Thompson were driven from the Porirua area into Wellington by a female associate. They were driven around the city, and on three occasions between 10.30 pm and 12.30 am identified persons walking alone along the streets whom they decided to rob. In each case violence was used and property was stolen from the victim. In one case the applicant sprayed the victim in the face with a spray can of mace.

The offence to which this appeal relates took place at 3.30 am. The applicant and Thompson alighted from the car. The intended victim was attacked by Thompson with a baseball bat, but although struck in the knee managed to escape. His assailants returned to the vehicle and were driven around the block in an attempt to relocate the victim. He was then attacked a second time and again struck in the knee with the baseball bat while the female associate attempted to spray him in the face with the can of mace. The victim ran from the area and was chased by the applicant who brought him to the ground and demanded money. The victim again managed to gain his feet and attempted to escape and at this stage a Police patrol car arrived and intervened.

The applicant who is 21 years of age has a formidable list of previous offending over the past 7 years. He has a long list of convictions on charges of burglary, theft and

receiving, as well as other offences, although none of the nature of the present. Over the past three years he has been sentenced on a number of occasions to terms of imprisonment.

Of his co-offenders, the only one who has been finally dealt with at this stage is Jones. We were told that he was a 25 year old, but with a lesser record of past offending than the applicant, and no previous custodial sentences.

Counsel for the applicant accepted that the offending was of a serious nature involving four people in a car acting in concert and resulting in a terrifying ordeal for each of the four victims. She accepted that the Judge was entitled to place weight on the fact that there was an additional charge in the case of the applicant, and also on his previous offending.

Two principal matters were put forward in support of the application for leave to appeal. The first was that this offence was part of the same course of criminal conduct as the other three, and should therefore attract a concurrent rather than a cumulative sentence. The Judge appears to have treated this offence separately because it did not involve Jones who was before him for sentence at the same time. It appears that Jones had claimed not to have participated in this offence, although apparently still with the others at the time when the offence commenced. He was not charged as a party to it, but so far as the applicant is

concerned, this offence appears to have been part of the same course of criminal conduct on the night in question, notwithstanding the three hour time lapse between it and the latest of the three aggravated robberies.

The other matter urged upon us was the evidence of contrition and reform, and the wise use made by the applicant of the unusually long seven months period while he was on bail prior to sentencing. The Judge accepted that immediately after the assaults and following the intervention of the police, the applicant showed true contrition and remorse, that there was a lot of good in the applicant, and that in the right circumstances he could act responsibly and with a good deal of competence. He had before him a written statement by a chartered accountant who had employed the applicant for a period of four weeks from 23 October 1990 as one of a number of staff to assist him in realising the assets of a business of which he had been appointed liquidator. The report speaks highly of the applicant as a good and willing worker, totally trustworthy and with a positive and helpful attitude. The accountant said that he had known the applicant for some 18 months and believed that a fundamental change was taking place in his life, both in his social attitudes and his own self image. He now had the confidence to take positive steps forward and to perceive things much more constructively and meaningfully. He had since working for the accountant obtained a full time job.

Also before the Judge was a report from Puangi Hau which recorded that the applicant had made a commitment to become drug free and was attending individual and weekly group sessions. His input was positive, he was fully participating and his attendance was consistent.

The accountant showed his support for the applicant by his presence at the hearing in this Court. It seems that he will take an ongoing interest in the applicant, who is also now in a positive relationship with his father.

We were informed that the Police arranged a meeting between the applicant and his co-offender with one of the aggravated robbery victims. The applicant then paid his share of the appropriate restitution. In addition, the applicant who was in employment at that time voluntarily paid the victim a further \$500 as a reparation for his actions. We were informed that the meeting with one of the victims had had a salutary effect on the applicant. The payment of compensation is a matter which can be taken into account in sentencing : Criminal Justice Act 1985, s.12.

We take into account these positive features of his conduct over the unusually long period of 7 months between arrest and sentencing as showing a more hopeful sign than had been apparent from his previous record of offending. Taking these factors into account, as well as his age, we agree with the Judge that it was appropriate to impose the

same sentence on each of the two offenders in respect of the aggravated robberies. We accept, however, that the further charge of assault with intent to rob should be regarded as part of the same course of criminal conduct in which all four were involved. Although the co-offender sentenced at the same time was not charged as a party to that offence, it was still part of the same sequence of events so far as the applicant is concerned. Any basis for distinction between the two offenders can properly be offset against the positive steps evidenced by the accused and described above.

We therefore allow the appeal and direct that the sentence of 6 months imprisonment on the charge of assault with intent to rob be served concurrently with the sentence of 2 1/2 years on the charges of aggravated robbery.



Solicitors  
Crown Solicitor, Wellington, for Crown