19/2

IN THE COURT OF APPEAL OF NEW ZEALAND

CA.425/90

NOT RECOMMENDED

THE QUEEN

v

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SCOTT ANDREW McNABB

Coram: Richardson J (presiding)
Hardie Boys J
Thorp J

Hearing: 14 February 1991

Counsel: D.L. Stevens for applicant
I.G. Mill for Crown

Judgment: 14 February 1991

ORAL JUDGMENT OF THE COURT DELIVERED BY RICHARDSON J

Scott Andrew McNabb pleaded guilty on arraignment in the District Court at Timaru on a charge of being an accessory after the fact. The charge was that knowing certain persons whose identities were unknown to the prosecutor had committed the crime of assaulting James Holden using a hammer as a weapon, McNabb received those persons in order to enable them to avoid arrest. He had been initially charged and committed for trial on counts of unlawful assembly and being a party to the assault, but those charges were not pursued by the Crown after the introduction of the accessory charge. Following a plea of guilty and conviction he was sentenced to six months imprisonment. He now applies for leave to

appeal against sentence on the ground that a sentence of imprisonment was wrong in principle and a non custodial sentence ought to have been imposed.

The incident out of which the charge arose occurred in the main street of Timaru about 11-15 am on an ordinary working day. Mr Holden was attacked by four youths wearing masks. One had a hammer which was used in the beating. The victim sustained lacerations and bruises to his face and head. He had also been kicked and beaten about the body. He was admitted to hospital for observation, but it seems did not sustain any permanent injuries. After the assault, which lasted only a short time and was observed by a number of witnesses, the four masked youths ran up the street to where a Valiant car was parked with the engine running. McNabb was sitting in the driver's seat and he drove them away. He was not similarly masked and was not involved with the four youths in the actual assault itself. But the evidence at depositions was that he had been driving the car in the city a few minutes earlier, that shortly afterwards and while on foot he had stopped and spoken to Mr Holden, that the two started to shove one another around, that another car stopped and four youths wearing balaclavas got out and the other car drove on, and that the four youths assaulted the complainant. The sentencing Judge drew the inference that McNabb waited while the assault took place for the purpose of driving his friends from the scene. Later that day he was apprehended with the car at gang headquarters where he was then living.

McNabb was 19 years of age at the time of the offence. He had three previous convictions for relatively minor offending dealt with by way of fine. He had a good work record. His father died when he was 11 and it is clear from supporting testimonials that he and his brother have provided their mother with considerable financial and general support. The probation report noted that for reasons of loyalty McNabb refused to reveal the names of the others involved in the incident. Since the offence occurred he had left Timaru and was working well in a new environment.

The sentencing Judge had express regard to the positive features affecting McNabb, namely his youth, his sound and stable background, the absence of any significant previous offending and of any previous tendency to violence, and that he had acted spontaneously in driving the assailants from the scene. But this was an attack by a number of hooded men in broad daylight in a main public street of a city which had been subject to scenes of gang confrontation and violence. McNabb was a willing accessory and the Judge characterised the case as that of a number of thugs, helped by a person whose subjective morality was no better than their own. On his assessment of the culpability of the offending, and notwithstanding the positive features supporting the applicant, the Judge concluded that stern and disabling measures had to be adopted, if not to dissuade then to disable the applicant who had been prepared to condone in an active way violence of the kind described.

It was submitted for the applicant on the argument of the appeal, that a prison sentence for this offending by this offender was wrong in principle and manifestly excessive. It was not suggested however that if imprisonment was appropriate the term of six months was itself excessive. In his careful submissions Mr Stevens elaborated in some detail on the applicant's background, positive features of his present employment and family situation, and the indications that he clearly has a good future if through a non custodial sentence he can retain his employment. In relation to the circumstances of the offending it was submitted that the applicant had simply acted impulsively in the particular circumstances in driving away with the assailants who had clambered into his car, and that the sentencing Judge had erred in two areas of the case in drawing inferences adverse to the applicant.

The first relates to the evidence of an eye witness, a Mr Gifkins. Mr Gifkins described the applicant as holding on to Mr Holden and said it looked to him as if Mr Holden was trying to get away. Referring to Mr Gifkins' evidence that the applicant was holding on to Mr Holden, the Judge said that the inference to be drawn from that was that the applicant was holding on to Mr Holden so that he would not get away before the others arrived. Mr Stevens' submission was that it could equally be inferred from Mr Gifkins' evidence that Mr McNabb was holding on to Mr Holden as part of the altercation, and in those circumstances the Judge was wrong to draw any adverse inference. However, the Judge immediately went on to say this:

> Be that as it may, these four or five hooded men came along, one of them had a hammer, and they beat Mr Holden up. While they were doing this - an incident measured in time objectively not necessarily long, but so far as Mr Holden was concerned, long enough - you waited, and you waited for the purpose, in my judgment, of receiving, that is to say, giving your services to your friends to drive them away from the scene.

In the preparatory words "Be that as it may" the Judge discounts the significance of such an inference for sentencing purposes. Clearly that first inference did not weigh in any substantial way with the sentencing Judge.

The second inference which Mr Stevens submitted the Judge was not justified in drawing was that the applicant waited in his car for the purpose of driving his friends away from the scene. The alternative inference Mr Stevens suggested was that the applicant was taking time to recompose himself. But he was sitting in the car with the engine running and, as the guilty plea reflects, knew that the masked men who were his associates assaulted Mr Holden using a hammer and came to the car to escape. We are satisfied that the Judge was well entitled to draw the inference he did.

For the reasons given by the Judge the circumstances of the offending called for a stern response from the Court, and while there are many good features in the applicant's youth and background and current situation, and while a Court always prefers wherever possible to impose a non custodial sentence on such an offender, we are satisfied that imprisonment was the proper sentence in this case.

The application for leave to appeal against sentence is accordingly dismissed.

<u>Solicitors</u>

Crown Solicitor, Timaru