LOW PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 185/91

THE QUEEN

v.

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Coram: Cooke P.
Hardie Boys J.
Holland J.

Hearing: 12 September 1991

Counsel: V.C. Nisbet for Appellant
G.J. Burston for Crown

Judgment: 12 September 1991

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is an appeal against an effective sentence of six years' imprisonment. The sentence was in fact imprisonment for five years nine months, but there was an allowance for three months spent in pre-sentence custody. In considering whether the sentence was appropriate, it is necessary to look at the totality of the offending.

The most serious offence was wounding with intent to cause grievous bodily harm. It was indeed a bad case of that serious crime. The incident occurred on 16 February 1991. The appellant, who had separated from his wife, objected to her association with another man. He came upon them lying, probably asleep. (We interpolate that he seems to have admitted in his

original statement to the police that his victim was asleep, but has now instructed his counsel that his victim was standing up at the time of the assault.) They were in a park to which they had gone after drinking and being together in a motor vehicle for some considerable time. Evidently there was a sexual relationship between them. The appellant took a claw hammer from his own van. He struck the man very severely about the face, inflicting permanent damage to an eye and damage to a cheek, which requires a plate; the victim also lost 12 teeth. He could well have killed his victim by the degree of violence in which he indulged, and there was some further incidental violence which need not be detailed.

Mr Nisbet, who has appeared for the appellant today, has contended that the incident was unpremeditated but we have no doubt that at least some significant degree of premeditation was involved. We take the opportunity of adding that Mr Nisbet has said everything possible that could be said on behalf of the appellant this morning. That point needs some emphasis because, in a letter written by the appellant from the prison, there was a complaint of the service received by him from counsel previously assigned to him on legal aid. We have no doubt that this Court has had the advantage of hearing the appellant's case put as well as he would wish it to be put, and that no consideration has been overlooked.

That was the most serious offence, but there was another serious offence some two months earlier which was charged as attempted arson. It consisted of pouring some petrol over his wife and setting fire to some paper and threatening to set her on fire. There was some minor bruising suffered by the wife in the course of the incident to which we referred first - the one with the hammer - but that pales into insignificance by comparison with the violence inflicted on the man and the very serious threat to her on the earlier occasion.

It should be mentioned that, to her credit, although the marriage has clearly broken down and the parties had indeed agreed on a separation and were already living apart, she has kept in touch with the appellant and has been visiting him regularly in prison. However, the victim impact statement concerning her does reflect concern on her part as to being harassed by him and his failure to accept that she is entitled to live her own life. We must emphasise that that is the case.

For crimes as serious as this, a total sentence of six years' imprisonment could not possibly be described as excessive. Like the sentencing Judge, we do not overlook that the appellant pleaded guilty. Some allowance can be made for that, but in this particular instance not a great allowance, for conviction was inevitable had he sought to defend the charges. We have

regard also to factors relating to his Samoan background and the cultural significance of the blow to his pride caused by the breakdown of the marriage and his wife's relationship with the other man. Those are factors to be weighed in the sentencing process. Unfortunately though there are other factors tending against the view that this is a case in which leniency or mercy can be appropriately extended. There is his record, which includes in 1982 a conviction for manslaughter, for which he was sentenced to 18 months' imprisonment, and before that a number of much lesser offences: offences minor in themselves but nevertheless pointing to a tendency to violence. It is true that from his release from prison after the manslaughter sentence until the present offence, he had kept out of trouble with the law so far as the records go, and we assume that this is the case, but a probation officer found herself compelled to describe the appellant as dangerous and still capable of being extremely dangerous. She made a recommendation, to which the sentencing Judge referred, for some attempt to find a suitable Samoan-focused rehabilitation programme for this man. We can only endorse that hope. The prison authorities and the Parole Board will have that consideration in mind.

Notwithstanding all that the appellant's counsel has urged, we are satisfied that for crimes of this

seriousness by a man with this record, it would be totally wrong for this Court to interfere. The appeal is dismissed.

R B Cooke P.

<u>Solicitors:</u>
Crown Solicitor, Wellington, for Crown