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IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 86/92

1327

THE QUEEN

v.

YOUNG

Coram: Eichelbaum CJ
Casey J
Holland J

Hearing: 8 July 1992

Counsel: Mrs M Grills for Crown
L A Anderson for Appellant

Judgment: 9 July 1992

JUDGMENT OF THE COURT DELIVERED BY CASEY J

Following a jury trial in the District Court at Dunedin the appellant was convicted on two counts of assault with a weapon and one of wilfully damaging a van and was sentenced to concurrent terms of 120 hours community service in respect of each on 3 April 1992. He appealed against his sentence, and against his conviction on the assault charges, but the sentence appeal was not proceeded with and is dismissed.

The charges arose out of an altercation between the appellant and a group repossessing television broadcasting equipment which he claimed was his property.

As the repossessors were moving off with the equipment in their van he hit at the driver's window with an iron fencing stake and this formed the basis of the first count alleging assault on Mr Welham, who was the driver. That window was not broken. The appellant then used the bar to smash a side window at which a passenger, Mr Wilson, was sitting and he said he was struck on the head and suffered a slight injury. This was the basis of the second count. The third count of wilful damage (in respect of which there is no appeal) arose from appellant's actions in smashing the van's rear windows after it had stopped.

Several grounds were set out in the notice of appeal, but at the hearing only one was advanced - namely, that the trial Judge had wrongly directed the jury to the effect that recklessness was sufficient to constitute the mental element necessary for assault as defined in s2(1) of the Crimes Act 1961 :

> "'Assault' means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; and 'to assault' has a corresponding meaning."

We were informed that the Crown based its case at the trial on the act of applying or attempting to apply force to the persons of the complainants. The appellant maintained that his intention was to disable the van, and his actions were not directed at its occupants.

There had been an application under s347 for his discharge at the close of the Crown case, which was refused by the Judge. In his ruling he said that he was satisfied the Crown was properly entitled to put its case on the bases that the accused intentionally assaulted Mr Wilson, or that he assaulted him with the mens

rea ingredient of recklessness; and that recklessness was also sufficient in the case of the attempted application of force to Mr Welham. Mrs Grills, who prosecuted at the trial, told us that she had put these propositions to the Judge relying on English authority in **Fagan v Metropolitan Police Commissioner [1969] 1 QB 439**, and **R v Venna [1976] 1 QB 421**. Those were decisions of the Court of Appeal dealing with common law concepts of assault and battery. But, as we said in **R v Kerr [1988] 1 NZLR 270, 274,** the definition of assault in s2(1) of the Crimes Act operates to the exclusion of the common law definitions of assault and battery, and that definition should not be read down by reference back to the common law if it is otherwise clear.

We have no doubt that an intentional application of force to the person of another (or an intentional attempt to do so) must be proved before an accused can be guilty of assault within the definition of s2(1), and Mrs Grills acknowledged this must be so. Reckless conduct may, of course, be an important evidential factor in determining whether such an intention can be inferred. Insofar as the summing-up indicated that a reckless application of force or a reckless attempt could be sufficient it was in error, and the convictions on the first two counts cannot be sustained.

In the end the only question was whether we should order a new trial. Mrs Grills submitted that even though there might now be problems with that part of the section relied on by the Crown at the trial, nevertheless the evidence would support a conviction under the later part, referring to threats to apply force.

The same sentence was imposed for all three convictions and still stands in respect of the third. It was a very lenient one for the assault charges, had they been properly established. Nevertheless, assuming the appellant is convicted on a new trial, we think it unlikely that the same or another Judge would impose a different

penalty. Accordingly there would seem to be little point in our directing another trial with its attendant expense and inconvenience to all involved.

The appeal is allowed and the convictions on the assault counts are quashed. We make no order for a new trial.

McCarey J.

Solicitor: Crown Solicitor, Dunedin