LOW PRIORITY

NZLR 26/11

IN THE COURT OF APPEAL OF NEW ZEALAND

CA.284/93

2116

THE QUEEN

v

PATRICK ROBERT MALLIN

Coram: Gault J (presiding)
Holland J
Henry J

Hearing: 15 November 1993

Counsel: M Knuckey for Appellant
J C Pike for Crown

Judgment: 15 November 1993

JUDGMENT OF THE COURT DELIVERED BY HENRY, J.

Patrick Robert Mallin appeals an effective sentence of 4½ years imprisonment imposed in the District Court at Auckland on 24 June 1993. He was found guilty at trial on charges of aggravated burglary and of wounding with intent to injure. Concurrent sentences of 4½ years imprisonment were imposed on each of those two charges.

The brief facts are that at about midnight on 30 October 1992 the appellant and two co-offenders wrongfully and forcefully entered a private home. All of them were wearing balaclavas or their equivalent as disguises and amongst them they were carrying weapons identified

as a baseball bat, a chisel and a hammer. Residing and present in the home at the time were the complainant, his wife and two young children. The complainant was attacked and in the course of the altercation suffered an injury to his head probably caused by the hammer. The complainant was able to take retaliatory action by the use of a sword kept on the premises, and this was used to inflict a wound to the appellant's thigh which required hospital treatment. It appears that this retaliatory action was the reason for bringing the intended attack to a close. The forced entry and the subsequent attack on the complainant were related to allegations earlier made against the complainant of his sexual abuse of a child of the partner of the appellant's co-offender, Hodgkinson. Hodgkinson was sentenced to three years imprisonment; the appellant and the second co-offender, Whitehead, each to 4½ years imprisonment.

Mr Knuckey first submitted that in sentencing the appellant the Judge speculated, as he termed it, on some aspects of the appellant's involvement in the incident. The jury's verdict negated the appellant's explanation for his presence at the scene and his description of his actions at it, and he was proved to have been a party to the dual offending. The Judge was entitled to conclude that the appellant and Whitehead were present to assist in the intended infliction of violent retribution on the complainant at the request or instigation of Hodgkinson - indeed it seems to us that such an inference is really inevitable once the appellant's explanation for his presence is rejected. We can see no error in the Judge's summation of the relevant factual bases, in particular there is nothing in the point that appellant apparently entered the premises some little time after the other two.

Mr Knuckey, responsibly, accepted that a sentence of 4½ years imprisonment for the forced entry at night into a private home by three persons armed with such weapons and the consequent infliction of actual injury on the householder could not be classed as excessive. It was clearly well within the range available to the Judge. In essence, the appeal comes down to a disparity submission. The Judge saw no distinction between the appellant and Whitehead, both of whom have previous records of violent offending. The appellant is a mature man of 28 years of age and his record extends over some period of time and includes the use of serious violence. Whitehead has also lodged an appeal against sentence but that is now not pursued. Neither of these two offenders had any semblance of a legitimate reason or justification for their involvement in this violent intrusion. The Judge drew a distinction as regards Hodgkinson for two reasons. First and importantly, his absence of any previous record of offending, and second, the fact that he was labouring under what was described as a considerable degree of pressure or stress in respect of a belief as to the complainant's responsibility for the sexual abuse of his partner's child and it was said that this is what lay behind and explained although of course not excusing his actions. The distinction was in our view entitled to be drawn, and those particular factors given weight as part of the exercise of the sentencing discretion. When that is taken into account we are not persuaded that the claimed disparity could be said, objectively, to lead to the conclusion that the administration of justice has miscarried.

Accordingly the appeal will be dismissed.

Solicitors:
Crown Solicitor, Auckland, for respondent