IN THE COURT OF APPEAL OF NEW ZEALAND C.A.97/96

THE QUEEN

v

JOHN WHAREMAKO GILLIES

Coram:	Gault J Henry J Blanchard J
Counsel: (Written Submissions)	Appellant personally M T Davies for Crown
Judgment:	1 October 1996

JUDGMENT OF THE COURT DELIVERED BY GAULT J

On 25 May 1995 Gillies, a sentenced prisoner, assaulted a woman visitor in the visitors' room at the prison at Paremoremo. He was charged with injuring with intent to cause grievous bodily harm. After a preliminary hearing at which he was committed for trial, his counsel negotiated a reduction of the charge to one of assault with intent to injure under s 193 Crimes Act 1961 for which the maximum penalty is imprisonment for three years. He pleaded guilty to that charge and the Crown contends that agreement on a summary of facts to which he pleaded was relied upon when the charge was reduced.

Gillies now appeals against the sentence of imprisonment for two years and nine months cumulative upon the sentence of 12 years that he is serving. One of his principal grounds of appeal is that he contested the summary of facts on which he was sentenced and that the disputes were not resolved by the sentencing Judge by hearing evidence. We do not accept that the Judge proceeded on a view of the offending as more serious than the appellant was admitting to. In his sentencing remarks the Judge referred to the fact that some of the summary of facts had been negotiated between defence counsel on the prisoner's behalf and the Crown and items in it had been resolved in the prisoner's favour.

The visitor was the appellant's friend and the mother of his two children who accompanied her. In the course of the visit there was an argument and the appellant punched her in the side of the head. He says it was a glancing blow. In an affidavit made otherwise in support of the appellant she says that is incorrect. She stood up and moved away towards the door. He followed her and pushed her. She fell headlong towards a concrete pillar striking that with her head and shoulders. He then kicked her several times about the head, stomach and hips and stomped once on her head. She was unconscious. He picked up a plastic chair. Prison officer witnesses said at depositions that he struck her with it. He maintains he desisted before doing so because he realised she was not moving and he heard one of the children crying.

Crown submissions referring to aspects of the facts beyond those stated have been disregarded. Even so, for the offence as ultimately charged, the appellant's

actions were at the top end of the range of seriousness. We find no error in a starting point, before consideration of mitigating factors, of the maximum sentence for the offence of assault with intent to injure. That is particularly so for this appellant who has a bad background of violent offending.

The appellant has presented comprehensive written submissions in support of his contention that the sentence imposed is excessive. He has submitted that inadequate discount was given for his guilty plea; that no competent and factually correct pre-sentence report was available to the sentencing Judge; that he was not given credit for contrition and remorse; that no emotional harm report was obtained and that the sentence is out of line with other sentences imposed for no less serious offending.

The Judge expressly mentioned the need for recognition of the plea of guilty. That must be considered in light of the negotiated reduction in the charge, after depositions, and the inevitability of conviction. The pre-sentence report available to the Judge was brief, but the personal circumstances of the offender had been canvassed in an earlier report prepared in February 1994. The emotional harm report was not prepared because of difficulties in the victim and the probation officer meeting. However, we now have the affidavit of the victim and the extensive material supplied by the prisoner that he submits should have been available to the Judge in a pre-sentence report.

The victim informs us that the appellant has expressed remorse and contrition to her and she urges the Court to consider rehabilitation for the prisoner rather than any increase in the length of his imprisonment.

We have carefully weighed these matters. The offence was entirely unrelated to the offending for which previous sentences were imposed and plainly called for a cumulative sentence. To respond to offending in prison with a concurrent sentence would be to impose no effective additional punishment and would provide a disincentive for orderly behaviour by prisoners.

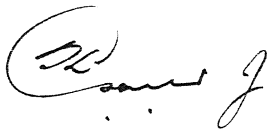
The continuing support for the appellant from the victim, though commendable, does not reduce the culpability of a violent and cruel attack upon a woman and supportive friend.

The appellant has cited a number of cases where sentences less than that he received have been imposed. Direct comparisons are difficult and there must be kept in mind that sentencing is not a precise exercise but a task in which sentences within the range of a properly exercised discretion will not be interfered with on appeal. That other offenders may have been dealt with leniently does not warrant this Court interfering with a sentence that cannot be said to be outside the range open to the sentencing Judge.

In the present case there is the significant factor that the sentence is cumulative upon the sentence of imprisonment for 12 years. That in itself is a long

sentence albeit for very serious offending. The impact of a cumulative sentence to be served at the end of that is perhaps harsher than the same sentence imposed in other circumstances. There is a point at which the accumulation of sentences is to be moderated in light of the totality of sentences in relation to the totality of offending. That is a factor to be taken into account on this appeal. When that is done, and the other matters advanced in support of the appeal are also weighed, we conclude that a lesser sentence than that imposed is appropriate.

Accordingly the appeal is allowed. The sentence of two years nine months is quashed and there is substituted a sentence of imprisonment for two years cumulative upon the sentence of 12 years being served.



Solicitors
Crown Law Office, Wellington, for Crown.