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LOW PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND CA162/97

AN ORDER PREVIOUSLY MADE FORBIDS PUBLICATION OF THE NAME AND ADDRESS OF THE VICTIM, OF HER RELATIONSHIP TO THE APPELLANT AND ANY OTHER MEANS OF IDENTIFYING HER

THE QUEEN

v

M

Coram: Gault J
Keith J
Blanchard J

Hearing: 10 June 1997

Counsel: Appellant in person
M A O'Donoghue for Crown

Judgment: 10 June 1997

JUDGMENT OF THE COURT DELIVERED BY GAULT J

On a trial before a Judge alone in the District Court on 14 April 1997 a charge against the appellant under s194(b) Crimes Act 1961, male assaults female, was found proved. On 8 May 1997 the appellant was sentenced to imprisonment for nine months. The appeal initially was against both conviction and sentence.

The circumstances have been mentioned in an earlier judgment of this Court on an appeal pre-trial against a ruling that certain evidence was admissible: CA17/97, judgment 17 March 1997. On the evening of 25 January 1996 the appellant's partner of some years sought refuge in a service station complaining in a distressed state that she had been beaten up. She pleaded that the appellant, with whom she had arrived, be kept out. She was injured about the face and the left eye in particular.

The complainant subsequently sought to withdraw her complaint. She and the appellant were married so that she was not a compellable witness. The Crown pursued the prosecution relying on the evidence of others.

At sentencing, through his then counsel, the appellant admitted the assault. The conviction appeal was confined to one point. Having not raised the matter until the present appeal reached this Court, the appellant complained that an application made after committal but before trial for an order under s347 Crimes Act 1961 that the matter not proceed was heard by Judge Gaskell who had been a member of the District Prisons Board which had delayed his release from prison on a previous occasion.

The issue on the application under s347 was whether there was sufficient evidence to warrant the case going to trial. That in turn raised the question of the admissibility of evidence of the service station attendants as to what the complainant said at the time.

First, we do not accept that merely because a Judge has had some previous dealings with an accused person there is thereby raised an issue of bias. The work of Judges in the District Court in particular is such that it is not uncommon for the same persons to come before them again. The legal position was dealt with in this Court in ***Inform Group Ltd v Fleet Card (NZ) Ltd*** [1989] 3 NZLR 293,298. With no greater foundation than the assertion that the Judge previously dealt with the appellant when a member of the District Prisons Board, we see no ground for concern as to actual bias nor as to the reasonable appearance of bias.

In any event, after Judge Gaskell dealt with the application under s347, the question of the admissibility of the challenged evidence was dealt with both by Judge Unwin on an application under s344A of the Crimes Act and then by this Court. Further, the sufficiency of the evidence was established at the trial which resulted in conviction.

Neither the appellant nor his counsel raised objection to Judge Gaskell hearing the application at the time nor during the two weeks her decision was reserved. Plainly it is now too late to ventilate the issue for the first time.

The appeal against conviction is dismissed.

We turn to the sentence appeal. This was not proceeded with and the circumstances should be recorded.

Once it was held that the evidence of the two service station attendants could be given as to what the complainant said conviction was inevitable. Nevertheless the appellant went to trial putting the Crown to proof contending that among other things that self defence had not been excluded. Subsequent claims of contrition and remorse are the less convincing for that.

The appellant is a man of 55 years of age. He has a long history of difficulties with the police to the point that he now harbours a strong sense of victimization. His first conviction for assault was as long ago as 1961. Since then he has accumulated close to 40 further assault convictions. The pre-sentence report records that he fully admits that violence has been a problem area in his life.

The present offence is of violence against a woman. His partner. It is not the first such offence. This Court has previously dealt with similar offending. The judgment of the Court delivered on 18 October 1993 CA391/93 dismissed his appeal against concurrent sentences of 18 months imprisonment for each of 10 offences of assault against the same complainant in the period October 1990 to May 1992. The judgment noted that the evidence showed a history of assaults extending from May 1989 to August 1993 which included many other incidents of a similar nature. The assaults were violent and prolonged causing at times serious injuries. Understandable only to those familiar with the patterns of spouse battering, the complainant supported the appellant at that time and pressed for rehabilitative treatment.

Against that background it can come as no surprise that the police should press on with prosecution in this case without the co-operation of the appellant's wife. The pre-sentence report indicates dissatisfaction by the appellant because of that. There can be no reasonable basis for his criticism.

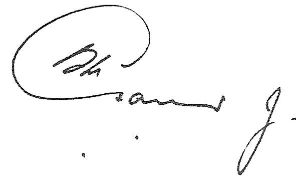
It was entirely predictable that there should be expressions of remorse by the offender, absence of co-operation by the victim and no victim impact report at sentencing. Perhaps what is surprising is that the probation officer should recommend that the matter might be dealt with by a sentence of Community Service without supervision.

The sentencing Judge determined on the evidence, comprising the descriptions of the witnesses at the service station, photographs and unchallenged deposition evidence of a medical practitioner read at the trial, that there was not serious violence in terms of s5(1) of the Criminal Justice Act. He held the evidence suggestive of at least one strong blow to the forehead and perhaps more general assault. That is a finding somewhat generous to the appellant in view of the medical evidence.

The Judge indicated that a sentence of imprisonment, and not a short one, was warranted. He then appears to have drawn back from the sentence otherwise thought justified, apparently because of protestations of contrition, claimed support from the victim and what he termed a "watershed" in the appellant's life. However, since sentencing, indeed only today, there has been received a statement from the victim which indicates that the relationship has been very different from that professed for, and by, the appellant. It appears that she may now have reached the point of emotional competence to break out of a violent, submissive dependency relationship. If that is the case, it is to be hoped that she will receive support from responsible bodies and such sense of security as may be sought.

Because of the receipt of this victim impact statement the sentence appeal was abandoned. Had it not been, this would have been one of those rare cases in which an

increased sentence would have been imposed.



Solicitors
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