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M NO 96/84

IN THE HIGH COURT OF NEW ZEALAND

CHRISTCHURCH REGISTRY

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BETWEEN

NAUER

Appellant

AND

Police

Respondent

Hearing: 29 March 1984

Counsel: Mrs D J Orchard for Appellant
Miss K P McDonald for Respondent

Judgment: 29 March 1984

ORAL JUDGMENT OF JEFFRIES J

This is an appeal against sentence of 3 months' imprisonment followed by probation for 12 months following a plea of guilty by appellant of assaulting a female, being an offence contrary to s 194B of the Crimes Act. Before the sentencing Judge in the lower court was a summary of facts which very briefly were as follows. On Friday 3 February 1984 appellant and complainant visited a local hotel. They returned to an address in Papanui at about 11.30 p.m. Appellant had definitely been consuming alcohol and one assumes complainant had also. A fight or argument broke out between the two, he alleging that

complainant was associating with another male person. I now give the verbatim account of the facts that were placed before the sentencing Judge:-

When this was denied the defendant commenced assaulting her. For the following eight hours the defendant repeatedly struck the complainant, both with open and closed fists to her face, head, and upper body. The complainant stated to the police that she was unable to leave the room because the door had been locked and the key thrown to another part of the room, the lights had been smashed and because she had been 'too sore to move'."

Those facts which were placed before the sentencing Judge disclose not only a brutal physical attack but also one carrying psychological overtones of terror. By the sentencing remarks of the learned District Court Judge he clearly accepted all, or most of, the facts as put before the court by the police. Mrs Orchard, who appeared for appellant in the lower court, informs this court that she clearly indicated a dispute in those facts but did not offer to call evidence, which is the only way such a sharp dispute can be solved. She now says in this court that the attack lasted only half an hour, was not as severe physically as the facts disclose in the summary, and that it was complainant who had control of the key. Those are three areas of very great importance and they are now in dispute. Once this emerged from Mrs Orchard's argument in this court it became clear that if the facts were as she was submitting there may be room for deciding

that the sentence was excessive. However on the other hand if the facts were as placed before the court the sentence of 3 months' was well merited, and perhaps could even have been higher. I explored with counsel the possibility of this court deciding the case by hearing evidence but this is not possible because the Crown, through Miss McDonald, adheres to the account of the facts given in the lower court. Therefore to ensure that justice is done to all parties in this case, and the public interest is protected, I have resolved to return the case to the lower court for re-sentencing and if there continues to be a dispute on the facts of the assault then evidence must be called and findings of fact made. That is the course the court adopts. The case is returned for re-sentencing.



Solicitors for Appellant:

Weston Ward & Lascelles

Solicitors for Respondent:

Crown Solicitor,
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