Court file

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

M 70/84

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BETWEEN NEIL MAURICE MURPHY
Appellant

A N D CYRIL HAKARAIA
Respondent

Hearing: 24 August 1984

Counsel: B.D. Van der Kolk for the appellant
K.C. Bailey for the respondent

Judgment: - 6 SEP 1984

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JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

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Cyril Hakaraia, the respondent, was tried in the District Court at Levin on the 30th and 31st of May 1984 on three charges of assault. Two of these charges were laid under section 9 of the Summary Offences Act 1981 and one was laid under section 196 of the Crimes Act 1961. At the conclusion of the hearing the learned District Court judge found Hakaraia guilty on all three charges and convicted and discharged him. The informant, a police constable, has appealed, with the leave of the Solicitor-General, against this sentence on the grounds that it is clearly inadequate.

The circumstances surrounding the offences were, stated shortly, as follows. A 21st birthday party was being held at

Peka Peka, north of Waikanae, on the evening of Saturday the 26th November 1983. It took place in a clearing in the sand hills near the beach not far from the end of the road leading from the state highway down to the beach. The evidence was that it was a reasonably well behaved affair with about 60 people enjoying themselves around a bonfire with music, talk, and a certain amount of alcohol. The respondent and a group to which he belongs went to that party at about midnight. There were in the group about eight or 10 persons. The people in the group were referred to as Rastafarians and, though there was no evidence in relation to it, I was informed by counsel that Rastafarians are, generally speaking, persons who wear their hair in a particular way and are dark skinned. Whether this group was in fact invited to attend the party or not is uncertain, but the judge held that there was some evidence that they believed that they had been invited. At all events, whether invited or not, a conflict developed between those at the party and the Rastafarian group. Bottles and other missiles were thrown. The Rastafarians eventually retired to one end of the clearing and then returned, did a haka and withdrew. It was at about this point that the assaults which constituted the offences the subject-matter of the charges occurred. What happened was that one of the complainants, a Miss Kim McFarlane, was seated on a bank at the edge of the clearing watching the conflict between the Rastafarians and others. She had with her a seven month old German Shepherd pup, which no doubt was quite a large animal despite being only

a pup. The Rastafarian group appeared to withdrew, when the pup, which was not on a leash, started barking and ran over to a place where one of the Rastafarian group was. He took up a large piece of driftwood or some other substantial piece of wood and struck the dog. Miss McFarlane ran over to it, whereupon the Rastafarian, who was the respondent Hakaraia, struck her several times violently. A friend of Miss McFarlane, a Miss Carlene Edwards, ran across to assist Miss McFarlane and the respondent then struck her several times. A Mr Gordon Barrett, seeing what was happening, went across to get between the respondent and the girls to stop them being struck further, whereupon the respondent attacked him and struck him so violently with the piece of wood that he broke Mr Barrett's wrist. In a statement that he made to the police the respondent said this:

> "When the bottles were coming over I picked up a bit of wood for self defence. It was a big fat one. A bit of beach wood and would have been about two foot long. The dog was coming for me but my bit of wood was long enough for me to give him a bang. A good hard one. He just went off yelping. Then I just hit anybody that came in contact with me. I hit anyone that came in contact. I just had the bit of wood that I picked up off the ground and used in self defence. In the darkness you couldnt see people and bottles were flying. So we retreated into the lupins and hid away, hoping that they

> would get sucked in and come up seen they started it.
> After I hit the dog I ran up into the bushes and started hitting anyone. I hit her and anyone that was in the way."

It appears that when the Rastafarian group first got to the party there were some offensive things said. They were called "niggers", asked what they were doing there and told to "fuck off". Miss McFarlane was involved in this because she admitted in evidence, to use the judge's language, to "having traded insults of this nature with some other members of the Rastafarian group". It was not, however, one sided, for the person with whom she traded insults used gross language with sexual connotations to her. I record, too, that on the evidence it is clear that this gathering or party had degenerated by the time these offences occurred into an ugly and violent affair. I note in passing, though it is not relevant to this particular case, that later in the night a person was killed and in respect of his death another person was convicted of manslaughter.

The defence was self-defence. The judge rejected this and in his judgment said that the respondent had claimed that he thought Miss McFarlane was setting her dog on him but, in his view, even if the respondent had believed that, it was no justification for going into the attack against Miss McFarlane, Miss Edwards and Mr Barrett with the piece of wood that he had picked up. The judge went on to say that the worst of the

brawl had died down by then and he was quite unable to accept that the respondent's actions amounted to a reasonable use of force in self-defence. I add, having read the record of the evidence and the accused's statements, that I find the observation made earlier in his judgment by the judge that he assumed that the respondent was out to get Miss McFarlane in revenge for the earlier insulting remarks she had made about his race and that of his friends a little surprising. It is not consistent with what the respondent himself said in his own statement to the police, part of which I have quoted earlier.

The Summary Proceedings Act provides that appeals against sentence shall be allowed where it is shown that the sentence is either clearly excessive or clearly inadequate. The test is the same whether it is the informant or the defendant who appeals, save that the Court of Appeal has made it clear that the considerations justifying an increase in sentence should speak more powerfully than those that would justify a reduction in sentence: R v Wihapi [1976] 1 NZLR 422. Mr Van der Kolk submitted that this sentence was clearly inadequate. He urged a number of specific matters in support of this submission but prefaced them with a general submission that the learned District Court judge had been in effect unduly influenced in his decision to discharge the respondent without other penalty by his personal views on the subject of racism. The judge certainly had referred rather fully to his own impressions and experiences when living in the southern states of the U.S.A. some 30 years ago.

Mr Bailey, on the other hand, submitted that the judge was entitled to exercise his discretion to discharge the respondent without other penalty in the circumstances. Mr Bailey had been counsel at the hearing in the District Court and he emphasised that the racial overtones in the confrontation, which it is plain was a factor that substantially influenced the judge, were very clear at the hearing. Mr Bailey also submitted that it was not just an individual matter but that in effect it was one group against another group, the groupings being racially based. He also urged that the judge was right when he said that there were mitigating factors; in particular Mr Bailey emphasised as mitigating factors the racial abuse, the violence of the confrontation and the attack of the dog upon the respondent.

I think that for an attack of this kind upon others, with a substantial piece of wood, in this sort of violent situation, a discharge without penalty would ordinarily be clearly inadequate. Were the mitigating factors referred to a sufficient reason for not imposing a penalty? In my view, the answer is clearly "no". I do not think racist remarks are to be treated as a sufficient justification or a sufficient excuse for violence any more than sexually disgusting ones are. The fact that this was a violent confrontation is all the more reason for not excusing a person who takes up a weapon and attacks others, and particularly is this so when two of the persons attacked were women.

I accordingly uphold the appellant's submission that a discharge without other penalty is clearly inadequate, but I am unable to pass the sentence that ought to have been passed because I have insufficient information before me to determine what ought to have been the appropriate penalty. The learned District Court judge discharged the respondent immediately after he had convicted him at the end of the hearing. In those circumstances he naturally did not call for submissions from counsel on the question of sentence, nor did he obtain a probation report. In the view I take I think it necessary that both courses should be followed. I therefore direct that a probation report be made upon the respondent and, when it has been obtained, a date will be fixed for a hearing in Wellington at which I can hear submissions from counsel on the question of penalty. Counsel should arrange a convenient date with the Registrar of the Court at Wellington.

Solicitors for appellant: McKegg, Walshaw & Co. (Palmerston North)

Solicitor for respondent: P.H. Barbour (Levin)

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