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NZLR X

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

M.76/84

1306

BETWEEN WHEATLEY
of Poutu, Forest Worker
Appellant

A N D THE POLICE
Respondent

Hearing: 18 October 1984

Judgment: 24 October 1984

Counsel: J G Ross for appellant
C Ramsdale for respondent

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JUDGMENT OF HENRY, J.

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Appeal against conviction and sentence on one charge of assault. The incident giving rise to the charge occurred in the course of a rugby football match which was played at Te Kopuru on 20 August 1983. There appears to have been a considerable amount of feeling between the two teams engendered in earlier games between them and which continued into this particular game. Mr Neeley, the complainant and captain of one of the teams, suffered a double fracture of his lower jaw and it was the prosecution case that the injury was the result of an assault committed by the Appellant. For the Appellant it was submitted that the only blow struck by him to Mr Neeley was to his chest, and that his actions in that regard were

justified under the provisions of s.48 of the Crimes Act 1961 (as amended in 1980). The first enquiry must be as to whether it was the blow by the Appellant which broke Mr Neeley's jaw, because as I see it a blow to the chest in the circumstances such as described by him in the course of this match would not warrant the intervention of the criminal law, nor did the Crown so contend.

There were a number of witnesses called for the prosecution, and a number called for the defence, all of whom gave their individual accounts of what happened at and at about the time of the incident in question. In his decision, the learned District Court Judge referred to what he described as a major conflict of evidence and indicated his preference for the prosecution witnesses, but unfortunately in terms that were less clear in indicating what evidence he accepted and what he rejected, and his views on credibility either in general or in particular. That lack of clarity makes the task of this Court on appeal more difficult than it should be, in that it requires a more detailed analysis of the evidence than might otherwise be necessary to determine whether the evidence was sufficient to justify the conviction. This difficulty is highlighted when regard is had to the important passage of the judgment in which the finding of guilt is made. It reads as follows :

> " That is the major conflict in the evidence. The defendant acknowledges that he struck the complainant. He says he struck him in the chest and a number of other witnesses said exactly that. Bearing in mind that various of the witnesses had various views of the incident, I am bound to say that the greatest strength in the evidence appeared to me to come from the prosecution witnesses who saw this Defendant leave his position in the back line, move into the scrummage and the ruck that was engaging the two packs of forwards, and deliberately strike a blow to the complainant and in my view, and I remind myself of Mr Ross's submissions, he is not entitled to do that and I consider it constituted assault."

When it is realised that there was no dispute that the Appellant had left his position in the backs and come out to where Mr Neeley was and deliberately struck him, it will be seen that the important findings of fact are not expressly covered. However, having regard to the manner in which the case was conducted, the factual issues which were traversed in the course of the evidence and also the content of defence counsel's submissions, I think the essence of the finding is that the description of the incident as given by the prosecution witnesses was accepted by the learned District Court Judge.

I therefore now turn to see whether such a finding, namely that Mr Neeley was deliberately struck on the jaw by the appellant, was open on the evidence. The test is whether this Court is satisfied that the entering of a conviction was not justified. There were three main prosecution witnesses, including Mr Neeley, all of whom gave evidence of Mr Neeley being struck as he was intervening in an altercation between two other players. Mr Neeley said he received a blow to the jaw, which he knew had fractured it, and he then left the field. He did not know or see who had hit him. Mr Bellamy saw the Appellant come running in and hit Mr Neeley, but did not see precisely where the blow landed. Mr Bond saw the Appellant run in and hit Mr Neeley with his fist on the jaw.

In the course of his submissions, Mr Ross for the Appellant drew attention to what he described as discrepancies, particularly as to which side of Mr Neeley

the Appellant had come. Such matters I think are of minor significance and lose what significance they may have at appellate level unless there is other compelling evidence to demonstrate the witnesses' unreliability. In a situation such as here pertained, there is bound to be differences in detailed descriptions of an incident of this type. The Appellant gave evidence and referred to intervening when another player, Mr Walters, was on the ground, and that he struck Mr Neeley on the chest as Mr Neeley was throwing his arms around. Mr Bond had denied Mr Walters' involvement in any such incident. Mr Walters gave evidence that when he was on the ground, with Mr Neeley close by, the Appellant came in and struck Mr Neeley on the chest. Mr Burke gave similar evidence, as did a spectator Mr Hewetson. Mr Boon, coach for the Appellant's team, saw the Appellant with Mr Neeley but could not see where he was struck. Mr Vanstone, another player, saw the Appellant rush past him and hit Mr Neeley in the rib cage. There were also other witnesses called whose evidence did not bear directly on the blow in question.

It will be seen from the above that there was a direct or major conflict as referred to by the learned District Court Judge. It was a clear case of credibility, which the Judge has obviously decided in favour of the prosecution witnesses. Two of them, one being Mr Neeley, spoke of him receiving a blow to the jaw; he undoubtedly did receive a blow to the jaw of sufficient severity to fracture it, and to leave the field virtually immediately.

The descriptions given by the Appellant's witnesses as to the incident could not explain that injury, neither was there any compelling evidence otherwise to show it was due to some other happening entirely. A matter such as this is not to be determined on numbers alone, and the learned District Court Judge was, in my opinion, entitled to act on the evidence of the prosecution as he did. It was open to him to reject the defence evidence that the blow struck only the chest - just as it would have been open to him, in his assessment of the witnesses after seeing and hearing them, to either have a reasonable doubt or to be satisfied the blow was to the chest. It was essentially a question of fact, and I am not satisfied that there are sufficient grounds to disturb that finding on appeal.

Mr Ross also submitted that the s.48 defence had not been properly considered. It is implicit in the judgment appealed from that justification for the assault had been ruled out by the learned District Court Judge, it having been specifically and fully raised in the course of defence counsel's submissions. The sort of altercation which Appellant and other defence witnesses described as going on between Mr Walters and Mr Neeley,with the latter said to be swinging his fists, even if accepted (and it clearly was not accepted in the Court below) could not justify the severe blow to Mr Neeley's jaw. Such an action, even in those circumstances, I do not think could properly be held, looked at objectively, to be the use of reasonable force in the defence of another. There was

in my view on the facts little room for the operation of s.48, and it certainly could not be said that its operation had not been excluded by the totality of the prosecution evidence. The appeal against conviction must therefore be dismissed.

As regards sentence, Mr Ross submitted that the discretion under s.42 of the Criminal Justice Act 1954 should have been exercised. This was expressly open to the learned District Court Judge, and expressly rejected by him. I can see no error of principle in the decision not to exercise the discretion. Neither can I see that undue weight has been given to any factor, nor that insufficient weight has been given to other relevant factors. All the matters urged by Mr Ross are proper factors to take into account, but the final decision must be the exercise of a discretion, and I do not think there are sufficient grounds made out to require this Court to interfere in the present case. There being no challenge to the amount of the fine, the appeal against sentence is also dismissed.

McGarry J

Solicitors:

Mahood Ross & Co., Whangarei, for Appellant

Crown Solicitor, Whangarei, for Respondent