

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.210/84

BETWEEN JOHN DONALD McNEILL

Appellant

A N D POLICE

Respondent

Hearing: 12 October 1984

Counsel: P.B.H. Hall for Appellant
 G.K. Panckhurst for Respondent

18 JUL 1985

ORAL JUDGMENT OF HARDIE BOYS J.

This is an appeal against conviction on two charges of common assault and one of careless use of a motor vehicle, but the last-mentioned was abandoned during the course of argument. The alleged assaults, one upon a person named Jamieson and the other upon a person named Bremner, took place as part of an altercation involving a number of people following a collision between two motor vehicles, a Toyota in which the complainants were passengers, and a Victor driven by the appellant. Some of these people came from a third vehicle, a Holden, which also appeared on the scene, which made off before the arrival of the police and the occupants of which have not been identified. As one would expect in a situation of this kind, where there was a great deal of action and movement, people being beaten and kicked, people becoming angry and excited, the evidence as to exactly what occurred and in what sequence is a little confused. There was one independent witness, a young woman who saw what happened from the other side of the road, but the difficulty

with her evidence is that it seems to conflict here and there with everybody else's. The picture that does emerge however is that originally there was some kind of a confrontation, perhaps only a verbal one, between Jamieson and some people from the Holden, and that that turned into a fight, certainly when McNeill arrived on the scene. Jamieson claims that McNeill punched him front on in the face whereas Bremner and Lundy, who was the driver of the Toyota, say that he jumped on him from behind and pulled him onto the ground. Jamieson says that the man who pulled him on to the ground from behind was not and could not have been McNeill. Jamieson, however, may well have been confused in identifying the person who hit him in the face as McNeill because his description of the clothing that that person was wearing does not tally with the evidence of others on that subject. Although the Judge held that McNeill had in fact punched Jamieson in the face, Mr Panckhurst has acknowledged that at best the evidence can really go no further than the kind of tackle from behind, perhaps with a punch added in, which in a general way corresponds with the description given by Bremner and Lundy and by the defence's own witnesses and by McNeill himself in what he said to the police. Mr Hall had to concede that there really was ample evidence to convict McNeill of assaulting Jamieson and of course the question of the kind of assault which it was is a matter relevant to penalty rather than to conviction. It is quite clear on all the material that was put before the District Court Judge that there was ample evidence that McNeill did indeed assault Jamieson, although probably not in the way the Judge found.

The charge of assaulting Bremner is a little more difficult because of a finding which the Judge himself made. Bremner was very clear about what happened and because he was an observer initially, his ability to perceive the course of events was greater than that of Jamieson for example, who was embroiled in the midst of it from the start. Bremner said that the man who jumped on Jamieson from the rear and whose description as he gave it corresponded with that of McNeill, after having fought with Jamieson, then came towards him and took to him with fists and boots; that that man then hit him with a rubbish tin taken from a lamp post nearby; and that a little later that same person again made some threatening approach to him at the entrance to a restaurant and caused him to retreat into it. McNeill himself admitted that approach towards Bremner at the entrance to the restaurant, so there is some degree of confirmation of Bremner's account in that regard. Jamieson said that the same people who had assaulted him moved on to assault Bremner, whereas Lundy said that both Bremner and Jamieson were being beaten up at the same time: a statement which of course is not inconsistent with the notion that McNeill might have left Jamieson to his friends and gone to deal with Bremner. Miss Waddell, the girl watching from across the road, was however quite clear that the person who hit Bremner with the rubbish tin was not the man with the big build who everyone has assumed to have been McNeill. Although there was certainly evidence from Bremner himself which might well have justified the Judge in accepting his account of the attack on him, the Judge nonetheless seems to have given some weight to Miss Waddell's evidence in this regard because he said that he was not entirely satisfied that McNeill was

responsible for weilding the rubbish tin. As a matter of logic, if he was not satisfied about that he could not have been satisfied that it was McNeill who attacked Jamieson with fists and boots before using the rubbish tin, because it was Bremner himself who said it was the same man who did both. It is that particular finding by the Judge that creates an inconsistency that is impossible for me to resolve on appeal, and that in my view makes the verdict unsafe and requires me to allow the appeal in respect of that charge.

Therefore the appeal against conviction on the charge of assaulting Bremner is allowed but the appeal against conviction on the charge of assaulting Jamieson is dismissed.

So far as penalty is concerned, the Judge, who of course was dealing with two charges of assault, one of which was on the basis of some punches directed to Jamieson's face, considered that some form of detention was required and chose a short term of imprisonment of six weeks instead of a term of periodic detention. This was largely on account of the necessity for a deterrent sentence, because, as he said, confrontations between motorists seem to be becoming frequent nowadays. The basis upon which the sentence is now to be considered is somewhat different from that which was before the Judge, although I agree with him that some deterrent element is required to prevent those who think they have been done wrong by another motorist taking the law into their own hands and beating him up on the spot. I think however that this case does not call for a sentence of imprisonment. The assault did not

fortunately result in any really serious injury. And although this man has been before the Court on a number of previous occasions on charges of assault, in the last seven years he has only made one appearance on such a charge. The others predate that time. He does have to learn to keep his fists to himself and to let the Transport Department take care of erring drivers. In view of the expense to which the appellant has already been involved by this matter, I think the proper course is to deal with the case by way of a fine. The sentence of imprisonment on the surviving charge will be quashed and in its place the appellant will be fined \$500.



Solicitors:

Wood, Hall & Co, CHRISTCHURCH, for Appellant
Crown Solicitor, CHRISTCHURCH, for Respondent.