IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

GR.113/84

BETWEEN ALISTAIR SINCLAIR DYER

Appellant

A N D POLICE

Respondent

Hearing: 22 November 1984

Counsel: A.J. Shaw for Appellant
N.J. Scott for Respondent

ORAL JUDGMENT OF HARDIE BOYS J.

This appeal is against a sentence of four months' imprisonment imposed on two charges, one of unlawful assembly and one of assault with intent to injure. The District Court Judge in imposing sentence said that he had listened to one of the most eloquent pleas he had heard, and today I have had the benefit of an extremely able submission from Mr Shaw on the appellant's behalf. I am satisfied that in this case the Judge did not give sufficient consideration to the requirement of the law that imprisonment is not to be taken as the first and immediate response to a sense of outrage at a person's behaviour, but that the option of a non-custodial sentence must be carefully considered first. I say that without wishing to be thought critical of the Judge because his reaction to the facts of this case was quite understandable. On its face the episode was a serious one, really destructive of the whole basis on which a civilised society functions. Because the appellant understood the young woman he had been living with had been indecently assaulted, he led a posse of his friends to the home of the alleged assailant and he then took to this assailant with a baseball bat while they waited outside. The Judge regarded that as self-administered justice of a kind that is quite unacceptable in an ordered society, as indeed it is. It has been put to me

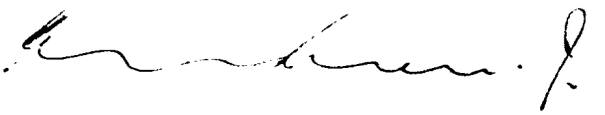
that the appellant's real motive in going there was not so much to inflict punishment as to conduct an inquiry into the truth of the allegation, by methods which certainly the police would not be allowed to employ. But he seems to have gone considerably further than that, because he struck the complainant a number of times with this baseball bat. Yet to put that into perspective, the fact is the complainant sustained only bruising, whereas no doubt if the appellant had been so minded some much more serious injury could have been inflicted. The purpose of his friends being there was no doubt intimidatory but there does not seem there was any suggestion they were there for the purpose of attack. It also seems to be the case that they were all young men who went there voluntarily, rather than under any form of domination from the appellant.

The Judge thought that the case called for a custodial sentence because in his view if one were not imposed the community would feel that he had failed "miserably" in the execution of his duty. There are cases where the facts completely outweigh the personal circumstances of the offender but they are not frequent and the community interest requires that each case be judged on its own facts, and that the Court, acting as it does on the community's behalf, respond in a measured way that takes into account all the circumstances and not just the appearances.

This appellant had had no previous convictions and I have before me I think it is fair to say more and more glowing references than I have seen before in the case of anyone appearing in the Court on a criminal charge. They all testify to qualities of citizenship and leadership in various kinds of activity, particularly in the territorial army, and the appellant's commanding officer is present in Court to confirm what he has already put in written form as to the appellant's qualities. Those qualities of leadership of course were turned to poor account on this particular occasion. And those who know him cannot understand why he acted as he did because it is so out of character. But the reason why he did is clear. Coming back with his high expectations of an Outward Bound course dashed because in the course of rescuing someone from a possible drowning he broke his arm, he found that the girl he

was living with was badly upset by the incident which had occurred to her and he reacted to that provocation with great indignation and distress. That is the explanation for what happened. Everyone is entitled at least once to call in aid his previous good character in mitigation of a penalty that might otherwise be appropriate, and although what this appellant did certainly requires a stern response from the Court, the calling in aid of his good character and the circumstances that prompted this offence, make it clear that prison is not the only response that the Court can and should make. Prison will deprive the appellant of one of the most positive aspects of his life where he can make a very definite contribution to the community. That point is made by the probation officer in a very perceptive and helpful report which concludes with a recommendation that the appropriate sentence may be one of periodic detention.

I agree with that recommendation and accordingly I allow the appeal and on each of the two charges. On each the sentence of imprisonment is quashed and the appellant is sentenced to eight months' periodic detention. He is to report tomorrow evening at 6 o'clock to the periodic detention centre and thereafter as the warden directs in accordance with the form which will be given to him when he leaves the Court.



Solicitors:

Petrie, Mayman, Timpany & More, TIMARU, for Appellant
Crown Solicitor, TIMARU, for Respondent.