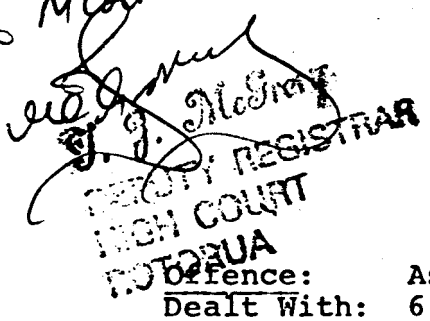
File.

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M.250/83

Decision delivered on 20 March 1984



BETWEEN: TIMOTHY JOSEPH DOBBYN
of Tokoroa, Bushman

Appellant

A N D: THE POLICE

Respondent

Offence: Assault with Intent to Injure (1)
Dealt With: 6 October 1983 At: Whakatane By: Green DCJ
Sentence: Imprisonment 2½ years

Copies to McDonald & McKechnie 20/3/84

Appeal Hearing: 16 March 1984

Judgment: 20 March 1984

Counsel: M S McKechnie for appellant
D J Macdonald for respondent

JUDGMENT OF GALLEN, J.

On the 20th September 1983 the appellant was convicted in the District Court at Whakatane that on the 16th of July 1983 with intent to injure Ross Alexander Wilson he assaulted the said Ross Alexander Wilson. He was sentenced on that charge to a period of 2½ years imprisonment and now appeals against conviction and sentence. He was, at the same time, convicted on a further charge of unlawful assembly. On this charge he was sentenced to imprisonment for a period of 6 months. He has not appealed against conviction or sentence in respect of this charge.

The charges arose from events which occurred on the 16th July 1983. Mr Gary William Hogg was on that day holding a house-warming party at the house he had just built at 5 Awatapu Drive, Whakatane. Some time after 11:30 p.m. a number of persons arrived at the party who had not been invited and who were not welcome. The appellant was among them. A confrontation developed between the invited guests and those who had arrived uninvited, and this developed into a series of fights. Clearly the whole incident was extremely unpleasant, and there was evidence of considerable violence.

One of the guests at the party was a Mr Ross Alexander Wilson. Mr Wilson gave evidence that he went outside when the intruders arrived, and he refers to the initial discussion which appears to have taken place. He says in his evidence :

> "All I can really remember is someone coming at me and hitting me on the head there. I thought it was a bottle. I saw a bottle coming down. All I can really remember is tussling with a guy while holding me and trying to stab me. I didn't hear cars getting smashed or anything like that. I thought I was hit on the head with a bottle. I saw something coming towards me and a hand up in the air. I was trying to dodge it, and it caught me on the head as I was trying to go back and miss it. From memory, I think I tried to get the guy that did it. I couldn't really remember the guy that did it. Another person attacked me. I can't really ... I knew there was a guy onto me. The guy tussling me held me from behind by my jacket, and the other guy was trying to get me with a knife. It was that long ... and a narrow blade. I have no doubt in my mind it was definitely a knife. It was a very thin-bladed knife. It looked as if it could have been sharpened on both sides. It looked like it could have been a bayonet stiletto."

Subsequently in his evidence Mr Wilson referred to the injuries he received in the following terms :

> "Going back to the knife incident, I received stitches to my head, up here, and I had marks I don't know whether they were knife marks. I had knife marks in my chest. I had a wound right to my ribs. I had a wound under the chin. Bruises to my chest. I was admitted to Hospital as a result of those injuries. I was in just overnight, let out the next day, about midday. I honestly could not identify my assailants. It all happened so fast."

Clearly, therefore, Mr Wilson was not able to identify the person who he alleges assaulted him with a knife. The identification of the appellant came from a Mr Gary William Hogg, the person actually giving the party. Mr Hogg said :

> "When I left my neighbour's house I went back up the side. I came round the corner, saw another of my guests, there were groups of fights still happening. One of my guests was holding one person down, another two persons were holding him back. Then another guy attacked him. He appeared to be holding a knife. I presume it was a knife. It was a shiny object. I presume it was a knife. I cannot describe it. It was a shiny object. He was holding it in his right hand. The friend of mine was Ross Wilson. Having a look around the Court today the person I say had that knife with Ross Wilson is this guy (indicates). He is wearing a blue cardigan with a zip on the front with a white T-shirt. (INDICATES DEFENDANT DOBBYN). This defendant I have pointed out, all I saw was him going in to Ross. As I have said, two people were holding Ross. Ross was holding someone and this ended up on the ground, and this guy went in. There were things happening all over the place. He just seemed to go in on top of Ross. That is all I saw."

The reference to the neighbour's house is a reference to the fact that Mr Hogg had gone to the neighbour in order to telephone the Police. He was on his way back when he observed the incident he describes.

The prosecution called twelve witnesses, but the only identification of the appellant was that already referred to by Mr Gary Hogg. The appellant was interviewed by Constable Taylor, who gave evidence, and during the course of the interview he categorically denied that he had any weapon.

The appellant gave evidence and denied that he saw any weapons, and specifically denied that he had a knife or any shiny object. His account of the incident was, in summary, that after having a fight with a Mr Jones he was hit with a bottle and collapsed. He gave evidence that he was dragged out to a car and this was confirmed by other defence witnesses who all denied that the appellant had at any time had a knife or any weapon.

That is a very general summary of the evidence. In his judgment, the learned District Court Judge outlines the commencement of the incident, refers to the confrontation between the appellant and Mr Jones, concluding that the appellant first struck Jones, and that it was in consequence of that blow that all the subsequent violence occurred.

Dealing with the incident the subject of the charge under appeal, the learned District Court Judge said :

> "Dobbyn in the meantime, having 'king-hit' Jones (for which incidentally he is not charged) then, I am satisfied, became involved in an attack on Wilson - not the defendant Wilson but the complainant Wilson, Ross Alexander Wilson. He was not alone in attacking Wilson. There were others about it. Wilson was defending himself from other attackers

> "when Dobbyn saw fit to join in. I am satisfied that he was armed with a knife, and I am satisfied he inflicted injuries on Wilson with that knife the injuries described by Wilson."

The only reference in the decision to this incident is effectively a repetition of the above statement, where the learned District Court Judge said :

> "Dobbyn: I am satisfied, as I have said before, he was armed with a knife and inflicted injuries upon Ross Alexander Wilson with that knife. In respect of that charge I am satisfied that the use of his knife was such that I may infer that he intended to injure Wilson and of course he assaulted Wilson with, in fact, a knife. On that charge he will be convicted."

There is no doubt that Mr Ross Wilson did receive injuries from some instrument and, as I understand the appellant's argument, this is not disputed. But the appellant claims that he was not responsible, and that the evidence of identification was not such as to justify the conviction.

In a very careful and comprehensive argument Mr McKechnie, for the appellant, analysed the evidence and then made submissions in relation to thatanalysis on the law as it is generally understood relating to identification.

First, Mr McKechnie pointed out that although the learned District Court Judge expressed himself as being satisfied that the appellant was involved in the attack on Wilson, there was no analysis of the evidence and no reasons given for the satisfaction of the Judge.

Mr McKechnie drew attention to the evidence of Mr Hogg. He pointed out that the evidence of Mr Gary Jones was not too dissimilar from that given by the appellant,

and sought to draw from this the conclusion that more reliance could be placed upon the evidence of the appellant because of this.

He drew attention to the fact that Mr Jones stated the uninvited intruders were all dressed in black, and that the night was dark. He emphasized that Mr Ross Wilson was unable to identify his assailant although he was the prson most directly involved. He expressed some concern at the form of interrogation adopted by the Police when interviewing the appellant, and he drew particular attention to the fact that in cross-examination the prosecuting sergeant put directly to the appellant in cross-examination the statement that he had been identified by Mr Ross Wilson. This was not correct. Mr Ross Wilson did notidentify his assailant at all, and certainly did not identify the appellant.

Mr McKechnie also drew attention to the fact that evidence was given by one of the intruders, a Mr Sarsfield, to the effect that no knives were seen by Mr Sarsfield, and relied on the fact that the learned District Court Judge appears to have placed more reliance upon the evidence of Mr Sarsfield than on the other defendants who gave evidence. I do not think, in fact, there is very mucy significance in this submission. Mr Sarsfield was asked if he saw any knives. He said he did not. He was then asked whether he saw much, and the answer was:

"You cannot see much when you are getting done".

This could hardly be regarded as a conclusive statement.

Mr McKechnie considered that the identification by the witness Mr Gary Hogg was unsatisfactory. Mr Hogg was asked what the appellant was wearing at the time of the incident and answered :

> "At the time I think he was wearing a swan-dri. A green swan-dri."

Mr McKechnie points out that this does not accord with the evidence of the witness Jones, who referred to the intruders as being dressed "in black", and he further submits that this was a totally inadequate examination for the purposes of identification.

The evidence of a Mr Tawharau confirms that some of the intruders were wearing swan-dris, so that any discrepancy between the evidence of Mr Hogg and Mr Jones, to that extent, loses significance. Mr McKechnie however takes the further point, that if a number of the intruders were wearing swan-dris any identification of the appellant by reference to a swan-dri is, to that extent, inadequate.

Effectively, Mr McKechnie says that the identification by the witness Gary Hogg of the appellant was unsatisfactory for the reasons outlined above; and further,that his identification of the appellant in Court was an unacceptable identification. In this case there was no identification parade. The only occasion on which Mr Hogg, or any other witness, was asked to identify the appellant was actually in Court. The appellant was not known to Mr Hogg previously. He saw him for only a comparatively short time during the midst of what must have

been a confused melee taking place at night. In the face of the discrepancies, as well as the denial of the appellant and of other witnesses called on his behalf, Mr McKechnie contends that it was notopen to the learned District Court Judge to accept the positive identification, in Court, as sufficient for a conviction.

In New Zealand the law as to identification in criminal cases stems substantially from the decision of the High Court of Australia in Davies (1937) 57 CLR 170. This was a case which related substantially to the dangers of accepting evidence of identity where the identification has taken place in circumstances which might tend to make it unreliable. That case has been followed in New Zealand in a number of decisions - See, for example, Jeffries (1949) NZLR 595. Mr McKechnie referred to a number of decisions. It is no disrespect to his argument to say that it is unnecessary to analyse these in detail. There is one common thread running through them all. Wherever the circumstances are such as to throw doubt on the reliability of the identification, then it is unsafe to convict, and a jury must be warned accordingly.

An identification in Court is often suspect because an accused in the dock is almost identified by his position in the Court. In the same way, identification parades, or situations where the person identified is effectively identified by circumstances in which the identification takes place, are unsatisfactory - these being such as to lead to identification by the circumstances

rather than by a true recognition.

In this case, the identification of the appellant occurred at the Court - a situation which has always been regarded as somewhat unsatisfactory and certainly leading to the necessity to warn a jury of the dangers of relying upon such an identification. In this case, however, the appellant was one of six defendants. He was therefore much less likely to be identified simply by being the defendant in the defendant's position in Court. To that extent the identification was less suspect and less unsatisfactory.

Further, the emphasis in most of the cases upon which Mr McKechnie relies is on the necessity to direct a jury of the dangers inherent in such identifications. I think it must be accepted that an experienced District Court Judge will know and apply the law, and direct himself in accordance with it. I am not prepared to hold that the learned District Court Judge approached identification in this case without the necessary caution which would be emphasized to a jury.

Mr McKechnie pointed out that in a number of cases where there has been a doubt as to identification the identification has been accepted because there were some other factors which made the identification more satisfactory. He claimed there were no such factors here. For example, in Chalklen v Kirk (1970) NZLR 553, a farmer who identified

a trespassing illegal hunter, whom he had not previously known, was considered by the learned Judge in that case to be likely to have taken particular note of the offencer because of the concern a farmer would have in such case for such a trespasser. In other words, there was some factor in the original identification which was likely to have caused the person making the identification to take particular note. But, if it is acceptable to hold that a farmer will be sufficiently concerned over a trespasser to remember his appearance, surely it must be equally reasonable to consider that a person who sees a friend being attacked with a knife is likely to have the circumstances impressed upon his memory.

Mr McKechnie referred to the unreported judgment of Chilwell J. in R v McGee (Rotorua, 22nd September 1978, T.12/78) where that learned Judge considered there was no case to answer in circumstances where the opportunity to identify was fleeting. I think it is important in that case to remember that the learned Judge was impressed with the fact that although the witness identifying the alleged offender was quite definite in his identification, he was equally definite in identifying the Police officer who was present on that occasion, and it was accepted by the Crown that this identification was wrong.

I accept that where the person identified is a complete stranger to the identifying witness, and where the glimpse is fleeting, and where the subsequent

identification takes place in circumstances where the person identified may be identified by reason of the circumstances in which he finds himself such as being placed in the dock, a Court will have to exercise extreme caution in accepting that identification, satisfactory for the purposes of conviction, has taken place.

In this case, the witness Gary Hogg was definite in his identification and was not shaken under cross-examination. He referred to the appellant as having been wearing particular clothing - a green swan-dri. There was evidence from another witness that some of the intruders were wearing green swan-dris. There was evidence from Ross Wilson that the area where he was, was reasonably light because there were windows on both corners, the light was reflecting outside, and the windows were not fully draped. The appellant was identified in Court as part of a group of six and not on his own. He gave evidence, and did not deny that he had been wearing a green swan-dri on that occasion or indeed give any evidence which affected the evidence given against him, other than a flat denial that he had used a knife.

Clearly the circumstances were such as to require a cautious approach in terms of the cases, and had this been a matter before a jury a clear warning would have been essential. It was, in fact, heard by an experienced District Court Judge who may be assumed to have approached the matter with that caution which the law requires. He expressed himself as satisfied.

The appeal against conviction will be dismissed.

So far as sentence is concerned, I agree with the learned District Court Judge that any matter involving knives is serious. I think, too, that the learned District Court Judge was justified in taking into account, as he did, that people in the privacy of their own homes are entitled to expect not to be assaulted and abused. Any intrusion by uninvited persons is totally objectionable. Clearly he was entitled to reflect the abhorrence which the community undoubtedly has for crimes of this kind in the sentence which he imposed. However, the maximum sentence for the particular offence is 3 years imprisonment. It seems clear that the injuries inflicted were superficial. There is recent authority from the Court of Appeal to the effect that it is appropriate to consider the level of the penalty in relation to the maximum penalty which can be imposed. With some reluctance, I come to the view that it cannot be said that this particular offence was such as to take it so close to the maximum penalty as that which was effectively imposed in this case. The penalty also appears to be out of line with penalties imposed in similar cases. I consider that the sentence should be varied to bring it into line with the general run of penalties imposed for offences of this kind.

Accordingly, the appeal against sentence will be allowed, and a sentence of imprisonment for 18 months substituted for that originally imposed.

Solicitors:

McKechnie Morrison & Shand, Rotorua, for appellant

Crown Solicitor, Rotorua, for respondent