15/7/87 N.Z.L.R.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

HIGH PRIORITY

AP. 94/87

BETWEEN MORGAN NGAWIRI FORBES

Appellant

V

AND THE POLICE

Respondent

LR 300

Hearing: 3 July 1987

Counsel: Appellant in Person
Miss Gordon for Police

Date of Reasons:

REASONS OF SMELLIE J.

This is an Appeal in respect of a sentence of six months Period Detention imposed upon the Appellant in the District Court at Otahuhu on 16 March last.

Mr Forbes, who appeared for himself on this Appeal was represented by the Duty Solicitor in the Lower Court where he pleaded guilty to a charge of Common Assault laid pursuant to Section 9 of the Summary Offences Act 1981. The maximum penalty for that offence is imprisonment for a term not exceeding six months or a fine not exceeding $2,000.

At the conclusion of the case late on Friday 3 July, I allowed the Appeal, quashed the sentence of six

months Periodic Detention and imposed a fine of $500 to be paid at the rate of $100 per month. I indicated the first payment should be made forthwith. Because it was late in the day and there was still another case waiting to be heard, I indicated that I would record my reasons for the decision at a later stage.

THE HEARING IN THE LOWER COURT

The notes which the District Court Judge caused to be kept only occupy about two pages. Because of their significance I attach them as a Schedule to this Judgment.

It will be seen that the assault occurred late one Saturday night at the end of a journey in a truck from the Western Springs Stadium where a Rock Concert had been staged and an address in Mangere. The Police Summary recorded that Mr Forbes had "walked up to the complainant and struck him several times on the side of the head. The complainant suffered a small lump behind his ear but was otherwise uninjured." The Summary also recorded that the Defendant admitted that he had struck the complainant "in a manner often seen used by the British Comedian Benny Hill on television". The Defendant described a rapid open hand striking movement.

Mr Forbes had the benefit of representation by the Duty Solicitor. It appears that even before Miss Johns was able to make any submission on behalf of Mr Forbes, the District Court Judge presiding commented upon two earlier convictions for assault and the penalties then imposed. He then said "Yes Miss Johns, I will look at Periodic Detention"

Miss Johns then made submissions indicating that the Defendant disputed the Police Summary and in conformity with what he had told the Police at the time, contended that "He touched the complainant lightly on the face to show that he was serious.....".

The Judge then addressed Mr Forbes saying "You really wouldn't do Periodic Detention, the alternative is prison of course."

There then follows a passage in which the Judge addressed Mr Forbes as follows:-

> "You are obviously a tough guy, you are in a tough mob of thugs. What happened in the back of that truck is obviously subject to intensive Police enquiries at the moment regarding the sexual violation of the girl who was foolish enough to hitch hike with animals and then you do this to the young man involved."

Mr Forbes then protested that he had been cleared of anything to do with the molestation of the girl whereupon the Judge responded:-

> "You are charged with cracking this young fellow in a way you thought must have been smart but I think it was quite brutal and unnecessary.....You had better leave now before I change my mind and give you jail."

THE GROUNDS OF APPEAL

As earlier indicated, Mr Forbes appeared in person in this Court and apparently prepared his own Notice of Appeal. Paragraph 4 of the appeal form reads as follows:-

"The grounds of my Appeal are:

Severity of sentence
I was wrongfully associated with other circumstances relating to the incident.
The Judge got visibly angry at me.
The Judge called me names
He, the Judge, likened another past offence to the present charge."

THE HEARING OF THE APPEAL

Mr Forbes on his own behalf, made it clear that he thought he had received a severe sentence because the Judge thought he had been involved in some molestation of a young girl in the back of the truck and because the Judge thought he was involved with a tough mob. He said that it seemed to him that the Judge got more and more angry with him as the case proceeded. Mr Forbes submitted on his own behalf that for what he contended was merely a light tap on the cheek, six months Periodic Detention was too severe.

Miss Gordon of Counsel for the Police, submitted at first that the grounds of appeal advanced by Mr Forbes did not fall within Section 121(3) of The Summary Proceedings Act 1957. Paragraph (b) of sub-section 3 reads in part as follows:

> "If the sentence (either in whole or in part) is one which the Court imposing it had no jurisdiction to impose, or is one which is clearly excessive or inadequate or inappropriate, or if the High Court is satisfied that substantial facts relating to the offence or to the offenders character or personal history were not before the Court imposing sentence, or that those facts were not substantially as placed before or found by that Court, either - ".

There then follow options to quash in whole or in part or to vary.

In the Decision of Wells v The Police (Auckland Registry AP.206/86 Judgement 6/3/87), I held as follows when considering a similar argument:

> "Despite the wording of S. 121 (3)(b) of the Summary Proceedings Act 1957, I am prepared to hold, as a matter of principle, that if the judicial process is shown to have gone wrong in areas other than those specifically referred to in the section, then the High Court has jurisdiction to interfere and reconsider. It cannot possibly have been the intention of Parliament when enacting S.121 that in a case where .....the sentencing Judge's conduct has been such that either justice has not been done, or has not been seen to be done, that the Appellant is to have no remedy in this Court.

In the second edition of "Principles of Sentencing" by Thomas at page 220 et seq, there is a discussion under the heading "Grievances arising in the course of Proceedings". The first sentence under that heading reads:

"A final group of cases illustrate the practise of mitigating a sentence to alleviate a legitimate grievance which the offender suffers as a result of the way the case against him has been conducted, or to remove the appearance of injustice which has arisen as a result of an incident in the course of the proceedings."

The text then recites cases of "unjustified disparity" as common examples and goes on to refer to other instances such as "unguarded or inapprorpiate comments made by the sentencer when passing sentence, apparent failure to listen to counsel's speech.....or other departues from proper standards of judicial behaviour."

A New Zealand example of the application of that approach is to be found in the decision of the Court of Appeal in The Queen v Safia (CA.273/85 judgment 18 July 1986). In that case the Court of Appeal criticised statements in the sentencing remarks which gave the impression that the wrong principles may have been applied or which were otherwise "out of place in the sentencing process". The Court in that case considered that these out of place remarks could justifiably be seen as having affected the severity of the sentence imposed. On that ground the sentence was set aside and the matter reconsidered afresh by the Appellate Court. It was held as a matter of law that if the sentence was wrong in principle in the sense that I have just discussed, then it could be set aside."

Miss Gordon, (having had the Wells decision drawn to her attention) as I understood her, was not prepared to argue that the approach adopted by me in that case was wrong. I indicated to Miss Gordon that I was prepared to adjourn the hearing to allow her to take precise instructions if she wished. In doing so I stated that at

that stage of the hearing it seemed to me that there was substance in the complaints that Mr Forbes had made. I observed that the record suggested that the Judge did get angry with the Appellant and that was one of the matters upon which I would be prepared to give Counsel time to investigate. Mr Gordon indicated however, a preference to proceed with the case and have it disposed of on the 3rd of July.

I also indicated to Counsel that I was concerned that the record generally, and in particular, the passage in the last paragraph referring to "cracking this young fellow in a way.....which was quite brutal and unnecessary" appeared to indicate that the Learned District Court Judge had accepted the prosecution version of the assault and the degree of injury suffered. That meant that His Honour had either rejected or ignored the specific submissions made on Mr Forbes' behalf that he had only touched the complainant "lightly on the face" and that he disagreed with the Police Summary.

In R. v Bryant [1980] 1 N.Z.L.R. 264 the Court of Appeal laid it down clearly that the prosecution carries the burden of establishing by proper legal proof any matter of fact which it contends the Court should take into account when fixing the level of penalty. In particular, the Court emphasised that pleading guilty to the charge does not amount to pleading guilty to what the prosecution has to say about the charge. On page 270 of the Report on line 15 in the Judgment of the Court delivered by Richmond P. the following is found:

> "In our view the statement in the Police Summary had no evidential value against Bryant unless he admitted it, which of course he did not."

Miss Gordon conceded a difficulty in this area of the case. She accepted that it was well open to me as the Appellate Tribunal to reach the conclusion that the Police Summary had been received as evidence against Mr Forbes despite disagreement with it. On that basis it appears that matter was taken into account in the Lower Court which ought not to have been.

CONCLUSION

I am conscious that criticism of a Judge's handling of a case should be approached with anxious care. Nonetheless it seems to me all but inescapable that the Learned District Court Judge in the Court below took an adverse view of the Defendant right from the start He appears to have decided even before he had heard any submissions on behalf of Mr Forbes that the punishment would be at least Periodic detention. Furthermore, the Judge apparently accepted the Police version of the facts and the severity of the assault without taking any steps to have that information verified. So the Police Summary was regarded as evidence against Mr Forbes, which on the authority of Bryant in the circumstances of this case, ought not to have happened.

In my view also, there was no justification for calling the Appellant a "thug" and inferring that he was an "animal". Whether the Judge in fact got progressively angrier with the Appellant during the hearing is something which I cannot properly decide. But viewed objectively there are clear indications in the record that that may have happened. That Mr Forbes feels that it did is, in my view, entirely understandable and even to be expected. Intemperate conduct which appears to influence the outcome of the proceedings must be a "departure from proper standards of judicial behaviour".

For all the reasons that I have set out above I am satisfied that the sentencing process went wrong in this case and that Mr Forbes was justified in arguing, in effect, that for him justice appeared not to have been done.

As earlier indicated when allowing the Appeal, I quashed the sentence of Periodic Detention and imposed a fine of $500 payable by instalments.

Had this assault been the Appellant's first conviction, the fine would have been considerably lower than $500. The Appellant's criminal record shows however, that this is his third conviction for common assault. The first was in June 1985 when he received nine months Periodic Detention. The second was five months later when he was fined $1,000. Whilst neither of those assaults was

sufficiently serious apparently to justify imprisonment, nonetheless, the level of punishment indicates they must have been significant and deserving of good deal more than nominal penalties.

Mr Forbes, on his own behalf, argued for a lower monetary penalty. But in all the circumstances this being his third conviction for assault, I take the view that $500 payable at the rate of $100 per month, is appropriate and that is the penalty I imposed in place of the earlier sentence of six months Periodic Detention.

Robert Smellie J

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SCHEDULE

IN THE DISTRICT COURT
HELD AT OTAHUHU

CRN 7048006060

P O L I C E

INFORMANT

MORGEN IAN NGAWARI FORBES
1 Lyon Street
HAMILTON

DEFENDANT

Hearing: 16 March 1987

Sentence: 16 March 1987

Counsel: Miss Johns for Defendnat (as Duty solicitor)

NOTES OF EVIDENCE TAKEN BEFORE JUDGE J R CALLANDER

On the 16th day of March the defendant appeared before me charged with -

> "On or about the 15th day of March 1987 at Mangere did commit an offence against Summary Offences Act 1981 Section 9 in that he did assault Tony Richard Bradley."

The defendnat pleaded guilty to the charge and the Prosector told the Court that -

> "On the evening of Saturday 14 March 1987, the complainant in this matter, Tony Richard Bradley aged 21 years, and his younger sister attended a rock concert at the Western Springs Stadium in Auckland.
>
> After the concert, the complainant and his sister asked a group of men for a ride in their truck back to South Auckland. The DEFENDANT FORBES was one of the group of men in the truck.
>
> On the way back to South Auckland, an incident occurred in the back of the truck which involved the complainant's younger sister.
>
> Upon arrival at an address in Mangere, the complainant was made to clean up some vomit in the back of the truck with his own jacket. He was then told to leave. Upon being told to leave, the DEFENDANT walked up to the complainant and struck him several times on the side of the head. The complainant suffered a small lump behind his hear but was otherwise uninjured.

When interviewed by Police, the DEFENDANT admitted his actions as outlined and in explanation said that he had struck the complainant in the manner often seen used by the British comedian Benny HILL on television. The DEFENDNAT described a rapid open handed striking movement.

The DEFENDNAT is a 23 year old man living in a de facto relationship. He has previously appeared before the Courts."

Counsel for the defendant made a plea in mitigation as follows -

THE COURT.- $1000 fine the last time you gave someone the Benny Hill.

DEFENDANT.- I was found guilty of that one Your Honour.

THE COURT.- On the earlier one nine months periodic detention. Yes Miss Johns, I will look at periodic detention.

MISS JOHNS.- My instructions differ somewhat from the summary of facts Sir. The defendant instructs that there was a woman and her brother in the back of the van, the girl had been sick and the defendant asked him to clean it up and he refused to do so. The defendant instructs that he touched the complainant lightly on the face to show him that he was serious about him cleaning it up and he denies hitting him as described in the summary Sir. He was a shearer and is of a transient nature in the Waikato. He is not married but does have one child which he is helping to support. He has a job seven days a week and would create some difficulties for him if he undertook periodic detention. He earns approximately $200 per week and he would be in a position to pay a fine.

THE COURT._ You really wouldn't do periodic detention, the alternative is prison of course.

DEFENDANT.- There isn't that much work around at the moment.

THE COURT.- Having regard to your previous convictions you probably are being treated lightly in being sent off to more periodic detention. You are obviously a tough guy, you are in a tough mob of thugs. What happened in the back of that truck is obviously subject to intensive police inquiries at the moment regarding the sexual violation of the girl who was foolish enough to hitch hike with animals and then you do this to the young man involved. Six months periodic detention will commence this Friday and you will report to the Warden for the rules to be explained to you once again. You will not work for more than nine hours on any one occasion. A copy of the order will be served on you before you leave here this afternoon and you are to remain in custody in the meanwhile.

DEFENDANT.- Could I ask for a transfer to Hamilton?

THE COURT.- Yes I can do that.

DEFENDANT.- I had already been cleared of anything to do with that girl.

THE COURT.- You are not charged with that but this sort of heavy stunt with the young man, you don't expect to be dealt with in any other way do you. You are not charged with anything else you are charged with cracking this young fellow in a way you thought must have been smart but I think it was quite brutal and unnecessary. I have transferred you now to Hamilton, you better leave now before I change my mind and give you jail.

J R Callander
DISTRICT COURT JUDGE

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Robert Smellie J.

Appellent in Person

Crown Solicitor's Office for Police