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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP.272/88

**NOT
RECOMMENDED**

BETWEEN

FISK

Appellant

AND

POLICE

Respondent

Hearing: 17 February, 1989
Counsel: Appellant in Person
P. Phillips for respondent
Judgment: 17 February, 1989

(ORAL) JUDGMENT OF BARKER J

This is an appeal against sentence. The appellant pleaded guilty in the District Court at North Shore on 3 October, 1988 to a charge of assault and intimidation and was fined.

The facts in the police summary and in what Mr Fisk told me today are not markedly different. He is a lawnmowing contractor. On 30 September, 1988 he went to an address in East Coast Road, Browns Bay. He wanted to find out where the former householder had gone because that person owed him money for lawnmowing and gardening work. He was approached by the neighbour's wife who wanted to know what he was doing there; they had some harsh words. The husband of this lady wrote down particulars of the

appellant's vehicle registration on a piece of paper. The appellant asked the complainant to give him this piece of paper. The complainant refused and a struggle ensued.

The appellant claims that the complainant threatened to assault him. The appellant grabbed hold of the complainant's shoulders, pulled him to the ground; the complainant landed heavily on the concrete driveway. The victim impact report states that the complainant is aged 75. He suffered bruising to the left shoulder, graze to the elbow and lump and a broken right leg. A struggle then ensued in which the complainant's wife hit the appellant with her shoe.

As he eventually left the premises, the appellant made an intimidating statement.

There is some confusion as to the amount of the fine. The District Court Judge's note looks as if it was \$800 for the assault but it could be interpreted as \$500. It was apparently so interpreted by the clerk in the District Court who sent a notice to the appellant to say it was \$500 and also by officials of this Court; their notice said \$500.

The appellant has one previous conviction for assault for which he was ordered to come up for sentence if called upon.

There are no notes of evidence or any record of what transpired at the sentencing. However, it is clear that the District Court Judge regarded this as quite a serious assault in that the complainant was elderly and suffered a broken leg.

The appellant, who has presented his submissions today with sincerity, clearly feels under some sense of injustice. He feels that the consequences of his trying to collect a lawful debt were somewhat out of all proportion. However, he acknowledges that he should not have attempted to take the paper off the elderly complainant. He also acknowledges he should not have assaulted him.

I explained to Mr Fisk that the function of this Court is merely to enquire whether the penalty was manifestly excessive or inappropriate. I think that he was treated reasonably leniently by the imposition of a fine and also from the fact that he was ordered to pay at the rate of \$50 per week rather than in one lump sum.

Mr Fisk explained his financial position. He apparently works very hard at the lawnmowing activities; but he does not net very much. He has the care of an elderly father who is almost blind. He lives with his father; he is not married and has no dependents, other than his father.

In view of the consequences to the complainant, I have

difficulty in saying that the fine was manifestly excess. Therefore I have no option but to dismiss the appeal. Even if the fine were \$800 for the assault I would have difficulty in saying that it was excessive. The matter must be referred to the District Court for clarification as to whether it was a \$800 or \$500 fine as there has clearly been some confusion in this matter. I should have thought, although I cannot find \$800 manifestly excessive, that \$500 was not inappropriate.

The appeal against sentence must therefore be dismissed.

R. D. Sullivan