IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

29/8

AP.11/90

MEDIUM PRIORITY

BETWEEN GILLY KIRA JACOBS

Appellant

1597

AND THE POLICE

Respondent

Hearing: 21 May 1990

Counsel: Mr Bidois for the Appellant
Mr Cathcart for the Respondent

(ORAL) JUDGMENT OF FISHER J

This is an appeal against a sentence imposed in the District Court at Rotorua on 13 December 1989. The appellant had pleaded guilty to a charge of assault with intent to rob in association with a co-offender named Pirama. He was sentenced to imprisonment for two years.

Facts

At about 9.45 pm on the evening of 30 September 1989, in the well-known and prominent street of Courtenay Place, Wellington, the complainant was going about his innocent daily business. He was approached by the appellant and his associate Pirama and was asked to exchange leather jackets with Pirama. The complainant was a complete stranger to

these two men. It appears that the initial question was posed by Pirama. When the complainant declined the invitation this appellant led the physical attack which followed from the two offenders. Following the attack the complainant fell to the ground where he was kicked by the appellant. The result of the violence was that the complainant received a small cut to his left ear, bruising to the left shoulder and bruising to the face. Fortuitously a police patrol was able to intervene before the injuries became more serious and the robbery consumated.

District Court

The learned District Court Judge referred to the seriousness of the crime charged and the facts of the incident itself. He pointed out that the incident had occurred in a prominent part of the city at a relatively early hour of the evening when honest citizens could reasonably expect to carry out their business with impunity. He inferred that the complainant would have suffered serious injury but for the intervention of the police. He drew attention to the well-known principles relating to custodial sentences for serious violence. He pointed out that the appellant had amassed a long list of previous convictions and had been released from prison only a matter of weeks before this incident. Even within those weeks the appellant had managed to commit another offence.

In those circumstances the Judge considered that 2 1/2 years imprisonment would be appropriate. The Judge was, however, faced with a difficulty. The co-offender, Pirama, had already been sentenced by a different Judge to a mere 6 months imprisonment. The present Judge was at a loss to explain such a short sentence and I interpolate that I share his reaction. In recognition of the disparity of sentence principle, the present Judge reduced his preferred 2 1/2 years to a sentence of 2 years' imprisonment.

Manifestly Excessive

In some excellently prepared submissions, Mr Bidois advances as his first ground of appeal the submission that even in isolation this sentence of 2 years was manifestly excessive. He drew attention to the absence of serious injury, the early plea of guilty, the relative lack of a violent history and the contention that Pirama had instigated the incident.

I think it is common ground that there are no grounds for preferring either the appellant or Pirama with respect to this matter. It seems that while Pirama was the one who initially asked for the jacket, the appellant led the physical attack. I am not particularly impressed by the contention that the appellant should receive credit for lack of a violent history. He has a lengthy list of serious

convictions over the past 5 years, these including three convictions for common assault, two involving possession of weapons and countless convictions for burglary, theft and similar crimes.

Undoubtedly the significant mitigating factor was the early plea of guilty. I see little else in mitigation. For example, the absence of serious injury seems attributable solely to the intervention of the police. Mr Bidois and Mr Cathcart referred me to comparable cases in the fields of aggravated robbery and assault with intent to rob. I think it sufficient to say that while a starting point of 2 1/2 years would certainly be towards the upper end of the normal range, it could not be said to be manifestly excessive, bearing in mind the violence, the need for intervention by the police to prevent further violence and completion of the robbery, the central safe area in which the unprovoked attack occurred, the serious criminal history of the appellant and the defiant conduct within 3 weeks of release from prison. The 2 1/2 years was, of course, in fact reduced to 2 years in recognition of the disparity problem. In my view, 2 years imprisonment was not in itself manifestly excessive.

Disparity principle

The second major ground advanced by Mr Bidois was that the sentence of 2 years could not stand having regard to the sentence of only 6 months' imprisonment imposed upon the co-offender Pirama. Counsel have helpfully referred to the principles involved in this area. The two leading Court of Appeal decisions in New Zealand appear to be R v Rameka [1973] 2 NZLR 592 and R v Lawson [1982] 2 NZLR 219. The effect of those decisions and many others is helpfully discussed in Hall: Sentencing in New Zealand at 237, 372-376. I understand the principles to be as follows :

(a) Where co-offenders participate in one crime, unequal sentences will always be warranted if based upon differences in personal circumstances, personal history or individual involvement in the offence itself.

(b) Where no distinctions can be drawn on one of those grounds, a marked disparity in sentence is generally to be avoided in order to maintain public confidence in the even-handed administration of justice.

(c) Because of the principle in (b) the Court may in some cases be justified in reducing a sentence which, although not itself manifestly excessive, would otherwise produce a marked disparity compared with the treatment of a co-offender.

(d) The mere presence of an unjustified disparity does not in itself mean that the higher sentence must be reduced. Some balance must be achieved between confidence in the administration of justice and the desirability of compounding the injustice of one manifestly inadequate sentence by adding to it another.

(e) For that reason, disparity in the treatment of co-offenders as a ground of appeal against sentence will normally be upheld only where the disparity is unjustifiable and gross. Another reason for this is that to reduce a reasonable sentence solely because of disparity with an inadequate sentence may in the long run compound the problem by creating a further disparity with sentences imposed on other occasions in like circumstances.

(f) The test as to whether there is a disparity is an objective one. A sense of grievance by the individual offender is not relevant unless the independent observer would share the concern as to disparity.

(g) Where there are co-offenders, the Courts should normally seek a practical approach to avoid or overcome disparities. For example, it will usually

> be preferable that co-offenders be sentenced by one Judge. Where disparate sentences have already been imposed, consideration may need to be given to a Crown appeal against the co-offender's sentence, perhaps heard concurrently
> with the appeal of the offender with the higher sentence.

Applying those principles in the present case, the Crown concedes that no distinction can responsibly be drawn between these two offenders, whether by reference to the facts of the incident itself or to the offenders' personal circumstances and history. In my view, the sentence of 6 months was manifestly inadequate. However, it would be too late for any Crown appeal in that regard, Pirama's sentence having by this stage expired. I must therefore decide whether to reduce an inherently appropriate sentence solely because of disparity with an inadequate one. On the above principles I must balance confidence in the administration of justice against the desirability of upholding a reasonable sentence.

For the Crown Mr Cathcart points out that the learned District Court Judge has already conducted that exercise himself. It was solely in recognition of the disparity principle that he reduced the 2 1/2 years to 2 years. However, I am reluctantly driven to the view that that

reduction was insufficient, bearing in mind that the 2 1/2 years starting point was at the top of the range of normal sentences following an early guilty plea. Some degree of compromise is called for. I do not propose to reduce the sentence to anywhere near the level of the sentence imposed upon Pirama. I do, however, make the reduction to a sentence of 15 months imprisonment.

The appeal is allowed. The original sentence is quashed. A sentence of 15 months imprisonment is substituted.

R L Fisher J

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