

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

457

BETWEEN ALEXIS KENNEDY
Appellant

AND THE POLICE
Respondent

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Hearing: 5 March 1991

Counsel: D.C. McCaskill for the Appellant
Anna Tutton for the Respondent

Date of Judgment: 5 March 1991

ORAL JUDGMENT OF HERON J.

This is an appeal against a sentence of nine months imprisonment imposed in the District Court at Wellington on 20 February 1991. The circumstances were that the complainant, a tourist from Europe, ended up in the company of the appellant after they had spent some time together drinking at a local nightclub. In the company of others she left the nightclub, accompanying the appellant to her address. At approximately 8 a.m. the complainant decided to leave the address, but the appellant refused to let him go. There was an argument and the complainant elected to make his escape through a plate glass window. In doing so he received severe lacerations to his hands. A stranger to the area, and disoriented, he walked down the street bleeding profusely. The appellant followed him in the company of another and on seeing the complainant tackled him, punched him and in the course of that assault he lost three teeth and had his wallet removed. He apparently was holding his wallet in his hand. Fortunately members of the public discovered the complainant in his distressed state and he was taken to hospital. He has now fully recovered after his lacerated hands were repaired but he requires dental work to restore his lost teeth.

The appellant gave an explanation that she thought the complainant was attempting to steal property from her home and on challenging him she says he panicked and escaped in the way I have described. Why she should want to contain this man whom she had suspicions about rather than let him go remains unanswered. What is clear, and in respect of which this appeal is lodged, is that he was the subject of an assault and robbery in circumstances where it must have been obvious to the appellant that he was severely disabled, unable to defend himself in light of the serious injuries to his hands.

A number of points are raised in this appeal. Firstly there is an attempt to put the best face on the appellant's actions in her reaction to the complainant when he was still in her house. The Judge in the Court below was not impressed with that explanation and neither am I. In essence the appeal comes down to a question as to whether s.5 applies, and if it does whether there are special circumstances relevant to the offence or the offender which could result in a sentence other than a custodial one. To my mind there is no doubt that this was a case of serious violence in the terms of s.5 Criminal Justice Act 1985, here set out:

"5. Violent offenders to be imprisoned except in special circumstances - (1) Where -
(a) An offender is convicted of an offence punishable by imprisonment for a term of 2 years or more; and
(b) The court is satisfied that, in the course of committing the offence, the offender used serious violence against, or caused serious danger to the safety of, any other person,-
the court shall impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced.

(2) Where -

(a) An offender is convicted of an offence punishable by imprisonment for a term of 2 years or more; and
(b) The offender has previously been convicted on at least 1 occasion within the preceding 2 years of such an offence; and

(c) The Court is satisfied that, in the course of committing the offence, and in the course of committing the previous offence, the offender used violence against, or caused danger to the safety of, any other person,-

the court shall impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced.

(3) In determining the length of any sentence of imprisonment to be imposed in any case to which subsection (1) or subsection (2) of this section applies, the court shall have regard, among other matters, to the need to protect the public.

(4) This section shall be read subject to section 8 of this Act."

I do not accept that there are any special circumstances relating to the offence. Whatever had gone between these two at the house, and I consider the appellant's version of events unlikely, there could be no justification for the assault and subsequent robbery, including the breaking of the teeth. This was an assault in daylight, in the street, and of a serious kind. It goes without saying that in this case some deterrent element emerges. Whilst Mr McCaskill has said that the stealing of the wallet was something of an impulsive and opportunist action it is also consistent with a pattern of events which might well have started in the house of the appellant and realised later when the robbery was completed.

There is more weight to the second submission, that the circumstances of the offender might be sufficient to enable the Court to impose a non custodial sentence. She pleaded guilty immediately and that enabled the complainant to leave New Zealand and return to his homeland.

Her personal circumstances are that she is a trans-sexual and earns her living as a prostitute. In the course of that however, she has undertaken sensible community work in the area of Aids counselling and for the Wellington Information for Drug Education organisation. People in those organisations speak

well of her. Clearly she is an intelligent person capable of understanding what is acceptable conduct and what is not. Her history, and she is now 23, discloses two minor dishonesty offences and a conviction for common assault in July 1989. The Probation Service in their report recommended supervision with perhaps a concurrent sentence of periodic detention. Undoubtedly she has a problem with anger management, and the Service describe her as anti-authority and defensive, particularly so far as her sexuality is concerned.

Having regard to her obvious intelligence and the lifestyle she leads, a robbery involving somebody whom she had befriended the earlier evening must have been known to her to be a serious incident indeed, and one for which she could expect to receive a sentence of imprisonment. That she allowed herself to get into this situation is somewhat surprising, having regard to her other qualities.

Finally the Judge in this matter took account of what appear to be identical submissions to those that I have received. He said:

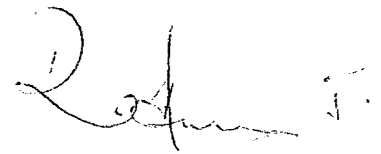
"In my view this is not a case where there are sufficient special circumstances disclosed by the facts or the submissions of counsel to persuade me that a sentence other than imprisonment should be imposed. In reduction of the term of that imprisonment I have taken into account the matters raised by Mr McCaskill, including of course the defendant's plea of guilty, and I also take into account on the defendant's behalf that he is a trans-sexual and that a term of imprisonment might be a greater punishment in this instance than might otherwise have been the case."

As I said earlier, a deterrent sentence is necessary in assaults upon visitors to this country in daylight on the streets. In my view the Judge was correct in imposing a sentence of imprisonment.

Clearly this appellant needs psychological counselling. That is available in the prison and I intend to send a copy of this

judgment to the prison where the appellant is detained in order that the psychological services which are available there can be availed of if she is willing to cooperate with them. That is a matter for her, but the facility exists and she should take advantage of it.

Everything that could be said for this appellant in her favour has been advanced by Mr McCaskill. She has been fortunate in having counsel who has explored every factor that can be advanced for her. It seems to me he has done that in the Court below and in this Court. However there can be no other result and the appeal is dismissed.

A handwritten signature in dark ink, appearing to be 'D. C. McCaskill', is written in a cursive style on the right side of the page.

Solicitors

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