

NOT
RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

20/9

AP 19/91

1801

IN THE MATTER of Section 123 Summary
Proceedings Act 1957

A N D

IN THE MATTER of an application by an
intending Appellant for an
order extending the time for
filing notice of appeal

BETWEEN

FRANCIS LUKE HOBSON

Appellant

A N D

THE NEW ZEALAND POLICE

Respondent

Hearing 11 September 1991

Counsel: M.B. Dodds for Appellant
H.J. Drummond for Respondent

Judgment: 11 September 1991

ORAL JUDGMENT OF ANDERSON J

The appellant appeals against a sentence of nine months imprisonment imposed on him in the District Court at Kaitaia on 28 May 1991 in respect of a charge of injuring with intent to injure to which he had pleaded guilty. At the time he was sentenced so also were three of his brothers, all men in their 20's.

The present appeal is brought out of time and leave is sought for an extension of time. An affidavit and memorandum filed in support of that application, together with all the circumstances of the case, persuade me that leave to appeal out of time ought be granted, and it is.

In extensive and careful sentencing notes the learned District Court Judge recorded that the background to the offence was that on Friday 18 January 1991 one of the brothers, Victor, was at a party with a lady friend when there was an altercation resulting in the woman and Victor being subjected to an assault because the woman had stolen some music tapes. The philosophy of the family seems to be such that an insult to one is regarded as an insult to all, and the four brothers met and determined to exact summary justice for the perceived insult of the remonstrations at the woman companion's thieving ways.

At about 8 a.m. the next morning the four brothers, variously equipped with a steel pipe, a wooden softball bat, a shovel handle, and a piece of wood, burst into the complainant's house and set about him with these weapons. There had been no suggestion that he had been involved in the assault on Victor or his woman friend, but the offenders were not to be deterred by such niceties of justice. Serious physical injury was caused to the complainant in this outrageous episode.

As the offenders were leaving some, not the particular appellant, wilfully destroyed stereo equipment belonging to the complainant and a friend. To add to this story of violence to person and property, one mentions some minor damage to the complainant's premises as the offenders were leaving.

The learned District Court Judge plainly took an hollistic view of the incident from the time of intrusion to the time of completion, which period included the acts of damage to the private property. Three of the brothers, excluding the appellant, were charged with and pleaded guilty to wilful damage. Each offender had spent seven weeks in custody at the time of sentencing. The learned District Court Judge, in a careful analysis of the facts and the authorities, determined that a starting point of 12 months imprisonment was appropriate for the serious violence which had occurred. On this appeal it is not contended that such a starting point was generally inappropriate. In the result, each offender was sentenced to nine months imprisonment on the charge of injuring with intent to injure, and the three brothers who had been concerned with the property damage received concurrent sentences of nine months imprisonment therefor.

It is submitted that the appellant's sentence was clearly excessive and inappropriate in that no distinction was drawn by the Court, when he was sentenced, between the single count of injuring which this appellant faced and the additional counts of wilful damage which the other offenders were sentenced upon.

The learned District Court Judge stated in his sentencing remarks that he could not appropriately distinguish between the four offenders in terms of seriousness. He does not specifically state in his sentencing remarks why sentences of nine months imprisonment, concurrent, were imposed in relation to the property damage.

Disparity lies, submits counsel for the appellant, in the facts that:-

1. This appellant did not actually himself set about the complainant in the course of the violence.
2. This appellant had some restraining influence on his brothers, urging them to curb their violence at a point when this appellant was apprehensive that additional violence might ensue.
3. This appellant was not to be sentenced for wilful damage.

There are other subsidiary matters raised in careful submissions in writing advanced on behalf of the appellant. They are mainly directed to showing, I think, that there were no features in the background or the general involvement of this appellant which would counter-balance, on overall assessment, features which are said to justify a clear disparity in relation to sentencing.


The learned District Court Judge was perfectly entitled to take an overall view of the incident from the time of intrusion to the time of exit, so as to indicate the appropriateness of concurrent sentencing in respect of the property offences. Such an approach, however, required a distinction to be drawn between the conduct which spanned the whole of the relevant period and the conduct which, in terms of offending, was plainly not as co-extensive. That is, although no submission could properly lie, nor has been advanced, against the sentencing approach in relation to the other offenders, nevertheless fairness required a distinction to be drawn where there was plainly a lesser degree of offending or plainly other factors of distinction.

I do not find there to be a basis for disparity in the restraint exercised by this appellant for the reason, seemingly paradoxical but in fact logical, that no further violence ensued, so that all offenders

subscribed to the violence which did actually ensue and none went further except in relation to property. Nor do I see a basis for distinction in the withholding by this appellant of actual physical violence to the person of the complainant. The learned District Court Judge unavoidably perceived the threatening presence of the appellant in the company of his brothers, and similarly invested with a weapon, as part of the overall picture of violence. I do, however, see a clearly defined basis of distinction in relation to the additional offending concerning property perpetrated by the other offenders. The learned District Court Judge plainly regarded such offending as of more than passing moment, as witness the firm sentences imposed albeit concurrently.

In general sentencing terms, submits learned counsel for the respondent, any clear basis for disparity would not justifiably lead to a significantly lesser sentence for the appellant, because of the different weighting in punitive terms given to offences of serious violence to the person and property offences ~~in terms of the Criminal Justice Act 1985.~~ I accept that submission. There is a clear division between a perception of a basis for disparity, or perception of relevantly comparative sentencing.

In the event I allow the appeal and substitute a sentence of seven months imprisonment for the nine months which was imposed.



N.C. Anderson, J.

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