IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

28/6

A.P. No.118/91

NOT RECOMMENDED

1076

BETWEEN RAYMOND DEAN HARDAKER

Appellant

A N D POLICE

Respondent

Hearing: 3 May 1991

Counsel: Ms J.A. Farish for Appellant
J.C.S. Sandston for Respondent

Judgment: 3 May 1991

ORAL JUDGMENT OF TIPPING, J.

This is an appeal against sentence by Raymond Dean Hardaker. The Appellant who is aged only 17, was sentenced to corrective training by the learned Judge in the Court below on a charge that he being a male did assault a female. The assault was in fact on his de facto wife who was only 16 years of age.

They had been living together for about a year without prior incident and I agree with Ms Farish's submission that against the very turbulent and difficult backgrounds from which they each came they have done extraordinarily well to have established what appears to have been up until now a very happy family unit, as counsel put it, against all the odds. Unhappily things broke down on the instant occasion and there can be no doubt whatever

that the Appellant substantially assaulted his 16 year old companion. They have a child of their union who is now aged about 1 year.

The learned Judge came to the view that this case involved serious violence and thus under s.5 he was obliged to sentence the Appellant to imprisonment unless there was some special reason to the contrary. Mr Sandston has submitted that it was a case in which the learned Judge was entitled to come to the view that the circumstances amounted to serious violence. That may be correct but if it is correct it was a case in my judgment very much on the borderline between serious violence and not.

However, assuming for the moment that it was serious violence, and there has been some dispute as to what actually happened, Ms Farish has submitted that one can find here special circumstances. She points out that the previous offences upon which the learned Judge appeared to have placed considerable emphasis were all matters coming within the jurisdiction of the Young Persons Court and attracted in the first instance a suspended sentence and in the second instance a guardianship order placing the Appellant under the Guardianship of the Director-General.

The first matter which arose in February 1989, or at least that was the date of sentence, was assault on a female. That involved the Appellant's mother. Similarly on 26 May there was a charge of assault with intent to use a weapon and threatening to kill and to do bodily harm. Those matters also related to the

Appellant's mother. Ms Farish made the valid point, it seems to me, that it is most unusual for a case to go straight from virtually no penalty at all to imprisonment. Obviously if the case is serious enough then that must be done.

This Appellant was aged only 17 at the time of the sentence. He had, as Ms Farish pointed out, arranged of his own volition to attend an anger management course for men. I have a letter confirming that in front of me. That was not done through the offices of the Probation Service or the Justice Department. It was arranged voluntarily and independently by the Appellant at a likely cost to him of $250.00. I am told he did this of his own volition on seeing the result of his attack, if I may put it that way, on his de facto companion.

The complainant never wanted to complain in the first place. Indeed her injuries were not particularly severe. That does not mean for a moment that the police acted wrongly in prosecuting the Appellant. As I have said and other Judges have said on many occasions, there is the public interest involved, but on the other hand the complainant's attitude after the event does have some relevance. Indeed in an earlier case of a like kind in my list today I had occasion to mention the distinguishing point, namely that in the case that had been referred to me the learned Judge had been particularly concerned to try and keep the family together if he reasonably could without doing violence to the public interest.

This Appellant is a first offender in the District Court jurisdiction. Obviously what he has done before must be regarded as relevant but here he is appearing for the first time in the adult jurisdiction and going to corrective training. I am bound to say that the nature of this offence, although serious enough, does not strike me as being so serious as to justify taking that draconian step against a 17 year old, particularly a 17 year old who has battled quite successfully against the odds and apart from this unhappy business has established what appears to be a very stable relationship. The probation officer makes certain observations in that respect which I think should be noted.

The recommendation in the pre-sentence report was supervision with certain conditions. The learned Judge obviously thought, and I can have some sympathy with this point of view, that the fact that this had happened before, albeit not against this complainant, mandated a sentence of imprisonment, or its equivalent corrective training. One point that has troubled me is that the Judge said the Court was faced with the problem that it was the fourth occasion on which the Appellant had come to notice on matters of violence. It may be that the learned Judge meant the fourth charge but it seems that the two matters that occurred or were sentenced in May may have related to the same occasion. One is not sure about that, but it may be that the number of occasions, as opposed to the number of charges, is not as great as the learned Judge may have understood.

I have come to the view, after considering the submissions made by the Crown and those made by Ms Farish, that in the particular circumstances of this case (1) it was on the borderline as to serious violence; and (2) if it was just over the line into serious violence there were particular and unusual special circumstances pertaining both to the offence and to the offender to justify the Court considering stopping short of imprisonment. That being the case it seems to me overall that the Court was entitled to take perhaps a slight risk and stop short of imprisonment in the hope of keeping this relationship together and keeping this Appellant's feet on a productive path. The public interest obviously had to be weighed but I do not think that a fair minded member of the public appraised of all the circumstances would think that this was a case which required a sentence of imprisonment.

The appeal is accordingly allowed. The sentence of corrective training is quashed. In lieu thereof the Appellant is sentenced to supervision for a term of fifteen months on the statutory conditions and on the further special conditions that the Appellant take such treatment for alcohol abuse and anger management as may be directed by his probation officer. The recommendation in the report also suggests because of the serious nature of the offending a term of periodic detention. Against that Ms Farish has pointed out to me that because the learned Judge refused bail he, the Appellant, has been in custody for about two weeks, an effective sentence of one month on the normal basis. Had it not been for that I think I would

have added to supervision a term of periodic detention but no doubt the period in custody has been something of a salutory lesson for this Appellant and I think it would not be appropriate to add periodic detention on top of supervision in that light.

I wish before I part with this appeal to say one more thing. Counsel has drawn to my attention that this Appellant was refused legal aid ostensibly, so I am informed, on the ground that he was possessed of a car worth $700.00. It was a case in which he was clearly facing loss of liberty - witness what happened below. I think it has cost the Justice Department a great deal more in time, money and effort to see justice done in the end in this case, it having been carried properly to appeal, than if this man had been granted legal aid in the first place. If he had, then no doubt proper examination of the circumstances could have taken place and the matters that were so ably put before me by Ms Farish could have been put before the learned sentencing Judge. I rather suspect that he would then have stopped short of corrective training.

For completeness sake I should add that the Appellant was represented by a duty solicitor at one stage and then by another duty solicitor on sentencing. He was apparently given the chance of representation, so I am not for one moment criticising the sentencing Judge in this respect. He could not take that chance because apparently he could not afford it and I am not surprised at that.

While this Court quite understands the wish of those in charge of granting legal aid to keep costs

within reasonable bounds there may well be occasions, and this seems to me to have been one of them, when the refusal of a grant is false economy. The appeal is allowed in the sense already indicated whereby the sentence of corrective training is quashed and the sentence of supervision already outlined is substituted therefor.