IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

5/11

AP 143/93

NOT RECOMMENDED

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1846

BETWEEN **FATU**

Appellant

AND **NEW ZEALAND POLICE**

Respondent

Hearing: 26 October 1993

Counsel: D L Bates for the Appellant
P J Morgan for the Respondent

Judgment: 26 October 1993

ORAL JUDGMENT OF HAMMOND J

This is an appeal against sentence by Fatu. He was charged with assaulting Dean Tasker on the 19th day of December 1992. After a defended hearing in the District Court on the 22nd July 1993 he was convicted, fined $300, Court costs $95, and witnesses expenses of $68.

He appeals to this Court on the grounds that the sentence imposed was manifestly excessive. Mr Bates, his counsel in the Court below and again here before me today, has urged in both Courts that this is a case in which the appellant

ought to have received a discharge without conviction under s 19 of the Criminal Justice Act 1985.

I take first the circumstances of the offence. Mr Fatu was working as a bouncer on the front doors of the Down Under Bar in Victoria Street, Hamilton. Some time after midnight on that date Mr Tasker went with an associate to this bar. He was stopped at the door by Mr Fatu and refused entry on account of the black denim jeans he was wearing. Apparently it was the complainant's position that he had seen other persons going into this bar in black denim jeans. In any event, something of an altercation developed and it is not disputed before me - and I gather it was not before the District Court Judge - that Mr Fatu struck a blow to the face of this complainant.

I have had produced to me from the Bar further medical evidence from Dr Ryan. Mr Morgan took formal objection, as he is properly entitled to, to what would in effect be new evidence being introduced before me after a defended hearing in the lower Court. However, by the time both experienced counsel had finished their submissions to me, it appears to me to have been common ground that in this particular incident the complainant received a broken nose but not a broken jaw.

Having heard the witnesses concerned, the learned District Court Judge, in short sentencing notes, said at p 2 of his notes: "I will consider s 19 but this is really, as I see it, an abuse of power by a bouncer, even though the circumstances were to some extent exasperating and Tasker not going when asked, but one can understand the reasoning there too."

In careful submissions before me this morning, Mr Bates argued that the triviality of the offence can be seen from the fact that the Police took six months to proceed on the matter. I do not think that much, if anything, can be made of that. I think I can properly take notice of the amount of Police business to be attended to and, as I have said, I do not think that factor should be accorded any real weight in what I have to deal with here today.

Before me this morning Mr Bates took issue with the seriousness of the injuries suffered by the complainant. I have already touched on this to some extent, and I simply observe that the Summary of Facts, to the extent that it refers to a minor fracture to the jaw, appears not to have been the correct position; although Mr Bates properly and helpfully has just reminded me that that Summary of Facts would not have been relied upon by the District Court Judge, who had heard the evidence on a defended hearing. But the fact of the matter is, under this particular head, as Mr Morgan has reminded me, that this was a blow to the face of the complainant, and it certainly had sufficient force to require medical treatment.

The third point taken was that this was not really an abuse of power by a bouncer, as the District Court Judge put it, and that all of the circumstances leading to this particular blow needed properly to be weighed.

As to that, I agree with Mr Morgan that this particular incident cannot be considered to be trivial. There is no doubt that this appellant was in a position of authority and responsibility, and although that may be a very difficult position to occupy in face of these kinds of incidents, the onus really is upon the person in the position of authority - difficult though it may be - to restrain himself or herself, and to use such ever means as may be available, short of something like striking

a blow. As I said during the course of argument, one has to ask whether the bouncer on the occasion in question could simply have put his arms around the person in question, or restrained by the sleeve or some other means.

The fourth general head which I noted, and this is not in contention, is that it clearly is the case that this appellant has no previous convictions and is a person of generally good and worthy character. However, that as such does not go to the question of whether a conviction should be entered, although it is one of the factors to consider and to properly weigh in the exercise of the discretion under s 19. But all in all under this particular head, before proceeding to consider s 19 directly, I agree with Mr Morgan's general submission that this offence could not really have been considered as *de minimus*.

As to the application of s 19, Mr Bates helpfully cited to me ***Police v Roberts*** (1990) 7 CRNZ 197 (CA). Mr Morgan also properly reminded me of the decision of McGregor J in ***Halligan v Police*** [1955] NZLR 1185, and in particular the passage from lines 5 to 20 at p 1188.

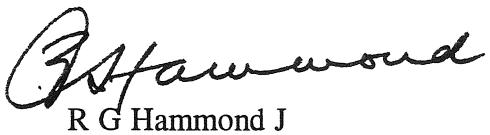
The difficulty facing the appellant in a case of this kind, particularly where there has been a defended hearing, is that the learned District Court Judge has seen and heard the witnesses, and is apprised of the general circumstances in which the offence occurred. It is a matter for that District Court Judge, having weighed all of those factors, to consider whether to apply s 19 of the Criminal Justice Act.

Whilst it might be going a little far to describe what happened here as an abuse of power, that language was doubtless used in the course of a crowded Court list and without the benefit of the more measured course which events take place in

this particular Court. It is quite apparent that the District Court Judge was well aware of the circumstances in which the complainant came to the bar; of the circumstances in which the blow was struck; of the fact that there was a blow to the face of sufficient force to break a nose; and in my view, to interfere in the exercise of the District Court Judge's exercise of the discretion against that background would be quite contrary to principle on the part of this Court.

Section 19 appeals, by their very nature, will always be extremely difficult; and the burden on an appellant, although it should not be any higher than in any other criminal appeal, in practical terms faces very real difficulties.

In all the circumstances, the appeal must be dismissed.



R G Hammond J

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