IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

4/3

A.P. No. 3/94

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NOT RECOMMENDED

BETWEEN PAUL BARRY WILLIAM MCKAY

Appellant

A N D POLICE

Respondent

Hearing: 21 February 1994

Counsel: W.N. Dawkins for the Appellant
J.N.P. Young for the Respondent

Judgment: 21 February 1994

ORAL JUDGMENT OF TIPPING, J.

This appeal against sentence raises issues which are not altogether easy to determine. The Appellant was sentenced to twelve months imprisonment on a charge that he was in possession of a restricted weapon, namely Molotov cocktails. This was a charge laid under s.45(1) of the Arms Act. Under that section the maximum sentence, if the case is proceeded with by indictment, is four years. However this Appellant was not charged indictably; he was charged summarily. He was also not charged with using in some manner the Molotov cocktails, but simply with possession.

The circumstances are rather unusual. The Appellant has a brother who is a Skinhead. The Appellant is not a Skinhead. He lives in a

house with his mother and a younger brother. Apparently this house is visited from time to time by Skinheads, no doubt because of the adherence of the Appellant's brother to that group. At about midnight or shortly after on the night in question the house in which the Appellant, his mother and younger brother were residing came under some form of attack. The Police were called and then went again and apparently this repeated itself three times. The occupants, including the Appellant, did not directly seek the assistance of the Police.

Apparently the reason for the attack was that earlier in the evening there had been an attack on another property and the occupants of that property seems to have thought that the attackers came from the Appellant's property. It may well be that the Skinheads who were visiting the Appellant's property at the time could have been involved in the attack earlier in the evening, although that is not known and no decision needs to be made. Clearly the Appellant was not in any way involved in that earlier attack.

As I say the house he was in came under attack and what happened was this. He did not have the Molotov cocktails on hand already prepared because he had no inkling that the house was going to come under attack. While the attack was in progress he apparently went and made these Molotov cocktails by using stubbie bottles, petrol and some material to act as a wick. He then attempted to throw them at the attackers. One of the two failed altogether because of his inept way of throwing it. The other apparently ignited but fizzled out on the front lawn without having done any damage to anyone.

The Appellant has previous convictions but nothing involving violence. The learned Judge in his sentencing remarks recognised that the Appellant was not in any way involved in the earlier events, that he did not belong to any Skinhead organisation and that the house where he was at the

time came under some form of attack. The Judge also said: "Now I accept that in a sense you were defending yourself and your mother from attack". He added that the Appellant was not associated with any factions, as he put it, in the city of Invercargill. He went on to say that in the light of the decision of the Court of Appeal in Goodwin C.A. 426/93 judgment 13/10/93 people in possession of dangerous high risk weapons could ordinarily expect to go to jail unless they had some particularly compelling case for a sentence short of imprisonment.

The case of Goodwin involved a military style semi automatic firearm. In that case the District Court Judge had imposed a relatively small fine of $300.00. The Police appealed and this Court increased the sentence to six weeks imprisonment. The Court of Appeal, although saying that there was really no point of law to justify the case being carried to that Court, in passing indicated that the sentence, the increased sentence, could not really be criticised. Reference was made in the judgment of the Court delivered by Richardson, J. to the earlier decision of the Court of Appeal in Corner C.A. 291/87 judgment 17/3/88 where the decision was given by Gallen, J. At page 7 of Corner His Honour said:-

> "The possession and use of such weapons is utterly unacceptable and must be discouraged by the Courts. In the absence of special circumstances, it should be appreciated that the possession of such weapons will normally lead to the imposition of a prison sentence, and the more so if there is evidence to suggest that their use might have been contemplated in a criminal connection."

It should be noted that the Court talked there of the possession and use of such weapons. It would be rather narrow to focus solely on possession in this case, in spite of the fact that is all the Appellant is charged with. One cannot really ignore what he did with the Molotov cocktail. On the other hand it is clearly a case where the weapons were brought into being under the pressure of an attack on the Appellant's house. That I see

as a rather different situation from where someone is simply in possession on a contingent basis so that they have the weapon available to use if circumstances dictate.

Mr Dawkins' first submission was that there should have been no sentence of imprisonment. I regret that I cannot accept that submission. It seems to me that the Courts have given a very clear indication that firm action will be taken against people who have these sort of weapons in their possession. It was not a case, in my view, which showed such substantial circumstances as to justify a sentence short of the norm. The point in this case which troubles me is the length of the sentence.

This Appellant is aged 23. He is obviously, from the pre-sentence report, genuinely remorseful for his actions. He did not belong to any warring faction. The circumstances in which he made and then used the Molotov cocktails are distinctly out of the ordinary so far as the normal sort of possession case is concerned. Although the point must not be pressed too far, there is some relevance in my view in the fact that the weapons were made and used for a defensive purpose. I am not to be thought to be encouraging their use for that purpose at all. It is simply something which must be weighed in the balance along with all the other factors.

The Crown has drawn to my attention the fact that the possession and use of weapons like this has been a problem in this city for some six to eight months and no doubt that was in the learned Judge's mind, as indeed is evident from some of his remarks. Obviously there is a considerable need in the pubic interest for deterrence. The question is whetner the learned Judge went further than was necessary against the particular and somewhat unusual circumstances of this case.

I have canvassed with counsel, particularly Mr Young for the Crown, the question whether or not this might have been a case for a sentence of imprisonment followed by a period of supervision. Mr Young

was inclined to submit that this was not so because of the Appellant's age, 23, and the seriousness of the offence. Although I agree entirely that the probation officer's recommendation for simply supervision was hardly appropriate, I think the Court could and should have taken note of the fact that the probation officer took the view that the Appellant would benefit from a period of supervision. Under the section headed "Assessment" in the report various matters are mentioned in support of that proposition.

The Court now has the power under recent amendments to the Criminal Justice Act to sentence to imprisonment followed by supervision provided that the length of the sentence of imprisonment does not exceed twelve months and the term of supervision does not exceed twelve months. This Court is also obliged to take into account s.7 of the Criminal Justice Act which talks of sentences of imprisonment being kept as short as is consistent with the safety of the community. I am very mindful of the public concern about the possession and use of Molotov cocktails, but when one understands the full compass of this case I think one can see that it is different from more conventional cases of its kind and, with respect to the Judge below, I am of the view that twelve months imprisonment went further than was necessary in the public interest.

In my judgment an appropriate sentence would have been imprisonment followed by supervision; the imprisonment to act as a deterrence and a punishment and the supervision, following the recommendation of the probation officer, in an attempt to assist this Appellant and avoid any further difficulties from him. That in itself would be in the public interest. The question becomes what should the length of imprisonment and supervision be. In my judgment in the particular and unusual circumstances of this case six months imprisonment would have been sufficient to be followed by a period of twelve months, the maximum permitted in the circumstances, of supervision.

Accordingly the appeal is allowed. The sentence of twelve months is quashed. In lieu the Appellant is sentenced to imprisonment for six months to be followed by twelve months supervision with the special condition that he take medical treatment and/or counselling as directed by his probation officer.

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