IN THE HIGH COURT OF NEW ZEALAND 28/10
AUCKLAND REGISTRY

AP.178/94

1646

BETWEEN POLICE

Appellant

AND S

Respondent

Hearing: 14 October 1994

Counsel: M. A. Woolford for Appellant
P. Le'Au'Anae for Respondent

Judgment: 14 October 1994

ORAL JUDGMENT OF BLANCHARD, J.

Solicitors: Crown Solicitor, Auckland for Appellant

P. Le'Au'Anae, Otahuhu for Respondent

This is an appeal by the Crown with the leave of the Solicitor-General against a sentence of eight months' periodic detention and 12 months' supervision imposed on the respondent in the District Court on a charge of injuring with intent to injure.

The learned District Court Judge called the assault "vicious and cowardly", which one can only describe as apt. An apparently blameless man was set upon by Mr S who punched the victim causing him to fall to the ground in a semi dazed state. He then kicked the victim in the head and the face. He was wearing thick rubber-soled basketball shoes. No weapon was involved.

The injuries suffered by the victim were horrific. They included a fractured nose, two blackened and swollen eyes, various cuts to his head and face, cuts and swelling to his lip. His face and jaw were extremely swollen for several days afterwards. Worst of all, he had a fractured skull behind his eye socket and the fluid which surrounds the brain would leak out of his nose through the fracture to his skull. He has not been able to return to work. He has lost his job. He suffers from serious headaches and blurred vision.

The Sentencing Notes record that some months after the injuries the victim was still receiving physiotherapy. That was necessary because he also suffered a damaged nerve in his back which causes permanent stiffness in his neck and soreness to his shoulders. He also suffers continual ear ache and his nose is closed up.

The Judge commented that it was lucky that the respondent was not facing a charge of murder or manslaughter but he went on to say this:

> *"I am told, and I accept, that since this incident and probably as a result of it, you have come to an awareness of the need to readdress your life and reassess your attitudes to various things and as a consequence I am bound to say it is nothing short of impressive to see the steps that you have taken to get yourself back on track with your life and also, I imagine, to indicate both to me and to the community at large and certainly the victim in this case, a sincere regret for what happened and the genuine willingness to change your ways."*

The Judge also referred to his belief that if he sent the respondent to prison it would seem almost inevitable that he would leave prison worse than he was when he entered and all the good work of the last few months would come to absolutely nothing. He added that one thing that could be said with certainty about imprisonment is that it provides people with basic training in criminality. He thought that there was a very strong possibility that, if he imprisoned the respondent, that might set him on the path to further criminal activities of this nature in the future.

It is undoubtedly true that as violence levels have increased in society generally, regrettably they also seem to have increased in the prison environments. Nevertheless, I accept the submission made by Mr Woolford, appearing for the Crown this morning, that there are many examples where sentenced prisoners have left prison with the benefit of an education, training and employment and have successfully completed courses and counselling programmes.

Section 5 of the Criminal Justice Act says that where an offender is convicted of an offence punishable by imprisonment for a term of two years

or more (here the maximum term is five years) and 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 (here he did both) the Court "*shall impose*" a full-time custodial sentence unless satisfied that, because of the special circumstances either of the offence or of the offender, the offender should not be so sentenced. Subsection (3) provides that in determining the length of the sentence the Court has to have regard to the need to protect the public. The sentencing Judge must look at the degree of force, the emotions which gave rise to it and the injury which has been caused.

I have no doubt at all that here there was serious violence involved. There were no special circumstances in the offending. The question is whether the learned District Court Judge could properly find that there were special circumstances relating to the offender.

The fact that an accused is sorry for what he has done and pleads guilty at an early stage is not a special circumstance, though like other fairly common factors it can be taken into account in looking at whether cumulatively there are special circumstances. The same applies, with perhaps a little more strength, to the fact that this is a first offence and even more so to the fact that the accused was only 17 at the time of offending. Here there are also the matters stressed by the Judge and mentioned in the Pre-Sentence Report and by the respondent's counsel today. In particular, there are the efforts which have subsequently been made by the respondent to rehabilitate himself and his change of attitude to his lifestyle. These are gone into in considerable detail in the Pre-Sentence Report and obviously impressed the learned District Court Judge. It is also to be remarked that the respondent's efforts to obtain appropriate counselling and to redirect

himself have continued since sentence was imposed and I am told that this has occurred without any knowledge, until very recently, on the part of the respondent that the Crown was appealing the sentence. He has also been serving a term of periodic detention for the last three months.

Mention was also made of the support of the respondent's family in these efforts. Furthermore, he has broken off his association with certain former friends who appear to have a bad influence on him. He has emerging leadership qualities. The Probation Officer summed up an extremely favourable Pre-Sentence Report in the following way:

> *"In my opinion the offender was genuine when he said that this is his first and last offence. If the Court shows leniency on this occasion, the offender would benefit from a Community Programme where he would have the opportunity to perform community voluntary work, undertake anger and substance abuse counselling and treatment and complete his TOPS training programme with the objective of finding full time employment thereafter. The Court is invited to consider the attached Community Programme designed to address the offender's needs in this instance."*

The Judge thought that sentencing this offender to a community programme would be unduly lenient and rejected that in favour of a lengthy term of periodic detention coupled with supervision, with the usual statutory conditions and an additional condition that counselling be undertaken as directed by the probation service.

Another factor which has had a mention today is the influence of alcohol in the offending. But that has to be disregarded: s.12A of the Criminal Justice Act so directs.

My conclusion is that, even looked at cumulatively or in combination, the matters to which I have referred do not reach the point of amounting to special circumstances, even allowing for the fact that it would seem that imprisonment is not needed for the protection of the public. Therefore, the sentence did not meet the requirements of s.5 and can be described as manifestly inadequate.

However, I think that this is one of those cases where the cumulative circumstances are such that I can properly find, and the learned District Court Judge could properly have found, special circumstances which make a suspended sentence of imprisonment appropriate. I refer to the remarks of the Court of Appeal in ***R v Petersen*** [1994] 2 NZLR 533 about the way in which s.21A and s.5 should be read together. At page 538 the Court of Appeal referred to "cases coming within s.5 where the special circumstances are such as to justify avoiding a full-time custodial sentence only by the exercise of a s.21A power and by no other sentencing option."

The factors upon which I lay stress in coming to this conclusion are the youth of the respondent, the lack of any previous record at all and, most importantly, the very real prospect that by means of the non-custodial sentences imposed by the Judge and the respondent's own continuing efforts he will turn his life around and be a useful member of society. I also take into account the time which has passed since sentencing and the offender's excellent response to it.

As I have indicated, while I would not positively say that at his age a jail term will set back his rehabilitation, I must recognise, as the learned District Court Judge did, that possibility. A suspended sentence will also act as a deterrent to the respondent, though I think deterrence may not

actually be a necessary ingredient in this case, judging by what has occurred since sentencing.

I therefore allow the Crown's appeal only to the following extent. In addition to the sentences imposed in the District Court there will concurrently be a sentence of imprisonment for six months, but that sentence will be suspended for 12 months from today's date.

Although the respondent has been continuing with the periodic detention and must receive credit for the time served, in terms of the Criminal Justice Act I believe it will have been technically suspended after the Crown's appeal and I therefore make a formal order for the recommencement of the sentence of periodic detention. The respondent is to report at the Mangere Periodic Detention Centre tomorrow morning at 8.00 a.m. and thereafter as directed.