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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY AP.267/97

NOT RECOMMENDED

BETWEEN PAUL MICHAEL LAWLER

Appellant

A N D NZ POLICE

Respondent

Hearing: 26 November 1997

Counsel: B Hart for Appellant
S Bonner for Respondent

Judgment: 26 November 1997

(ORAL) JUDGMENT OF MORRIS J.

Solicitors:
B Hart, PO Box 47228, Ponsonby, for Appellant;
Crown Solicitor, DX CP24063, Auckland, for Respondent.

The appellant pleaded guilty in the District Court at Otahuhu to charges of assault using a glass as a weapon, and with intent to injure one Carpenter.

On 13 October, Judge Clapham sentenced the appellant to 2 years 3 months imprisonment on both charges. He now appeals these sentences. It is submitted the sentences are manifestly excessive and the learned Judge should have imposed a suspended sentence pursuant to s 521A of the Criminal Justice Act.

The facts as set out in the summary of facts presented to the District Court were:

> "At about 12.45 am on Sunday 29 June 1997 the Defendant Paul Michael LAWLER was at No.4 Embling Place, Bucklands Beach. He had consumed a quantity of beer at the above address and was moderately intoxicated.
>
> The two victims in this matter Webb and Carpenter, started to walk along the concrete driveway towards the road to leave the address.
>
> The defendant followed Webb while holding a glass jug in his right hand, causing Webb to back away and plead with him to leave him alone. The defendant swung the jug at Webb's head, striking him with it on his chest, shoulder and arms four times before Webb managed to escape. The defendant's associate had punched the other victim Carpenter in the face causing him to lose consciousness and fall on the concrete driveway. At this point Carpenter was lying motionless with the left side of his head resting on the concrete. The defendant then ran over to him and smashed the jug into his head, causing severe lacerations and his head to impact on the concrete.
>
> As a result of the assault the victim Webb received a bruised and grazed chest, large lump to his head and a grazed shoulder.
>
> The victim Carpenter received a 3cm cut above his left eye requiring stitches, a swollen and bloodshot left eye, a bloodied and swollen upper lip and left cheek and 21 stitches to extensive lacerations to the top right hand portion of his head.

> Reparation of $225 to Carpenter is sought for three days he has been absent from work as a result of the assault.
>
> When spoken to by the police the defendant admitted the facts as outlined. In explanation he said he hated this guy (meaning Carpenter) and he had just lost it.
>
> The defendant is a single 19 year old male who has previously appeared before the Court."

A pre-sentence report submitted by the appellant showed he was a good worker. It identified such factors as his youthfulness, the commencement of an anger management course and his good future work prospects and his sporting prospects. The author of the report recommended a suspended term of imprisonment plus reparation and 6 months supervision with various special conditions relating to anger management and the consumption of alcohol.

References from his employer, his school and many others were before the District Court Judge. It appears there was also before that Court a statement from the appellant's girlfriend detailing an incident in which she was involved with Carpenter. Judge Clapham considered the nature of the assault and the matters leading up to that. He referred to the judgment of the Court of Appeal in ***The Queen v. Lepupa***, CA.129/97, 18 August 1997 which stated:

> "This was mindless and unprovoked violence; a weapon was used, anyone who strikes another in the face with an object whether it be a large stone or a battery (as it was in that case) cannot be heard to say that serious injuries are merely fortuitous."

Judge Clapham considered this was "an unprovoked assault on a motionless victim which is the worst aspect of that assault". He is therefore referring to the

assault upon Mr Carpenter. He considered it a case of serious violence which it no doubt was. He referred to the provisions of the Criminal Justice Act which provides unless there is something in the defendant's characteristics or some special circumstance relating to the offending, imprisonment should follow in such case. He concluded there was nothing in the circumstances of the offending or the offender which could call within the provisions of the Act and he could find no reason to comply with the provisions of s 21A.

I am completely satisfied on the material before him Judge Clapham was absolutely correct in coming to the conclusion he did. Having reached the findings which he set out in his judgment, his sentence of 2 years 3 months imprisonment cannot be said to be excessive. Such a term of imprisonment having been imposed, there was then of course no jurisdiction for him to impose a suspended sentence as provided by s 21A.

Mr Hart in support of the appeal has placed before me a detailed report from a consultant psychiatrist. The report was not before the District Court Judge although it seems plain as I listen to counsel some of the material which forms the basis of the report was put before him.

The report is detailed and the expertise of the psychiatrist is not challenged. It details the history and upbringing of the appellant and refers to matters of significance during these periods of his life. It includes the following statement:

> "All of the above symptoms indicate that Mr Paul Lawler suffers some form of a post traumatic stress disorder".

And then:

> "Mr Paul Lawler is a victim of traumatic events and currently presents with features suggestive of a post traumatic stress disorder and substance abuse disorder".

It is Mr Hart's submission the material in the psychiatrist's report substantiated a claim that there was in fact at the time of these assaults a special characteristic existing in the appellant: ***R v. Rusbatch*** (1996) 13 CRNZ 476. Mr Bonner does not challenge my right to consider the report but submits even if I accept its contents, it does not reveal a characteristic of the nature, when taken with the others, such as to justify a reduction of the sentence imposed.

The other factors to be considered in this regard are:

1. The appellant's good behaviour - he can in fact be regarded as a first offender;

2. The appellant's contriteness;

3. His plea of guilty at an early stage;

4. His good work record;

5. His good sports record.

Such characteristics as I have listed above are not generally of themselves regarded as being characteristic of a nature sufficient to bring them within the provisions of the Criminal Justice Act to which I have just referred. In ***R v. Donaldson*** (1977) 14 CRNZ 537, the concept of a special circumstance was examined by the Court of Appeal. At p 546 Thomas J said:

> "It cannot be given an artificial or stained construction so as to avoid the impact of the section".

A sentencer can only depart from a full-time custodial sentence where there are "genuine special circumstances ... which justify a departure from that course."

Mr Bonner is perfectly correct when he submits many people suffer such symptoms as described by the psychiatrist and he draws my attention to the carefully worded findings and opinion of the psychiatrist to which I have just referred. He also asks me to consider the submissions and the psychiatrist's report in the light of what the appellant said to the police when interviewed:

> "I then confronted them on the driveway. I said to my mate, 'this is no good, I am going to deal with this tonight'".

I have carefully considered counsel's submissions. This was indeed a vicious attack. It was very deliberate and it was sudden. Two persons were assaulted, the second one seriously. Even accepting the report of the psychiatrist at its most favourable to the appellant, it does not in my view, taken with the other matters to which I have referred, constitute a special characteristic such as to justify my concluding a prison sentence should not be imposed. I am satisfied it should be. I am also satisfied a term of 2 years 3 months was in the circumstances as lenient a sentence as could possibly be imposed for an attack of this nature. I am satisfied, as I say, even taking into account the psychiatrist's report at its most favourable, the sentence cannot be said to be excessive. It follows therefore there is no availability for the provisions of s 21 in this case and the appeal is accordingly dismissed.