IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A113/97

BETWEEN **CARLO RAWIRI MIHAERE**

Appellant

AND **THE POLICE**

Respondent

Hearing: 19 November 1997

Counsel: Mr PF Gorringe for appellant
Mr CQM Almao for respondent

Judgment: 19 November 1997

JUDGMENT OF HAMMOND J

Solicitors: PF Gorringe, Barrister, Hamilton
Crown Solicitor, Hamilton

This is an appeal against sentence.

On 7 May last, the appellant travelled to Hamilton from Tokoroa with a group of friends, to go night-clubbing. At that time he was on bail from drug and theft charges in Whangarei. In the early hours of the morning, this group left a particular night club, and walked along a city street. Some sort of physical contact of an accidental character occurred between the appellant and the complainant, and subsequently words were exchanged. The appellant says that he was provoked, insofar as it was suggested to him that he was a "faggot".

In any event, the appellant then struck the complainant in the head with his fist. The complainant fell to the ground, and the appellant kicked him twice in the face, and stomped on him. The appellant had to be pulled off the complainant by his group, and other persons in the vicinity. The complainant was found to be unconscious, and indeed, had to be admitted to the intensive therapy unit at Waikato Hospital. Meanwhile the appellant had continued to challenge and taunt those assisting the fallen man, and he then stalked off with his friends.

On admission to hospital, the complainant was found to have an acute brain injury; he remained concussed with brain swelling for several weeks after this event. It is possible that he may suffer in the future from epilepsy, and at least at the time of sentencing, he was unable to return to work.

The appellant was charged with intent to injure, causing grievous bodily harm, under s.188(2) of the Crimes Act 1961. He pleaded guilty in the District Court, and was sentenced to two and a half years imprisonment.

The sentencing Judge took a starting point of three years imprisonment, and allowed six months deduction for the guilty plea.

The appeal is put on four bases.

First, and I agree with Mr Almao that this is the heart of the appeal, it was said that the starting point taken by the Judge was too high. Mr Gorringe relies in particular on a recent decision of the Court of Appeal in ***Queen v Smith***, CA261/97, 27 August 1997. He suggested, on the basis of that authority, that a more appropriate starting point would have been two years imprisonment.

With respect, that was a Solicitor-General appeal; in the result, the Court raised the sentence of eight months which had actually been imposed, to twelve months, having regard to the familiar ***Christie*** principle, ***R v Christie***, 25 July 1996, CA95/96. That is, that the Court of Appeal, on a Solicitor-General's appeal, should impose the shortest term which could have been imposed. In ***Smith***, the Court of Appeal also recognised that two years imprisonment would have been "unassailable" on appeal. In my view, ***Smith*** cannot be taken to have established a new benchmark for sentencing in cases of this kind.

Further, on the facts, I accept Mr Almao's submission that in this particular case, the consequences to this complainant were very serious. A severe blow to the head, sufficient to render a person unconscious is always a critical matter, because of the consequences which can flow from brain damage. That is precisely what occurred in this case : this complainant had to be admitted to intensive care for some weeks, with brain swelling.

Under this head, it was also said that there was a single provoked assault, and that the concussion could have been the result of the fall. There is nothing in those points either. As the Judge rightly observed, whatever had

occurred between the complainant and the appellant, nothing justified the subsequent assault. The appellant must take the consequences which flowed from his actions. And, the claim that there was a single assault is quite wrong. There was a heavy blow, and then kicks and stomping were involved. Each, in law, amounts to an assault, so that this was a case of multiple assaults.

Secondly, it is said that the credit for the guilty plea was insufficient, and that nine months, or around 25% should have been afforded the appellant. The quantum of a discount is in the discretion of a sentencing Judge. Conventionally it ranges from about 15% to 25%. A discount is not an arithmetical exercise; it involves the exercise of a discretion. It must be shown on appeal that the Judge was plainly wrong in the allowance actually made. In this case, on the arithmetic, the Judge effectively allowed a 16½% discount. In my view, it cannot be said that he was plainly wrong in this particular case. The discount was within an acceptable range.

Thirdly, the sentence is said to be too severe, having regard to the appellant's background, and personal circumstances. There is nothing in this point either. The appellant is 22; he began offending at the age of 15 when he managed to kill somebody, and was charged with careless use, causing death, and he was admonished. He got on with fighting, property offences, and failing to obey Court orders, including breaches of bail, escaping from Police custody, and he then progressed to drug offences. It has to be said that in all of these offences, the appellant was treated relatively leniently, which may explain why he now feels aggrieved that a sentencing Judge has taken a resolute line with him. The claim that the appellant now realises that he is a violent man, may be true. But so long as he does not address this phenomenon, it seems clear that he will continue to get into very serious confrontations, and subsequent difficulties with the law. The remedy lies in the appellant addressing his own ongoing problems.

Fourthly, it is said that in all the circumstances, this sentence was manifestly excessive. This was a savage attack of its kind, by a man who was gratuitously "throwing his weight around". He lost control of himself, and had to be pulled off the fallen victim. I agree with the Crown's submissions that the matter must be looked at in the round. The sentence is within the range which could properly be imposed by the Judge. The sentence actually imposed was required to punish the appellant, and to demonstrate, for there is far to much of this kind of gratuitous violence on the streets of this city, that this kind of behaviour will be emphatically rejected. The sentence was a stern, but not inappropriate or excessive one.

Mr Gorringe has very ably said all that could be possibly said on this appellant's part, but the appeal must be dismissed.

R Hammond J.