IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

502.

NOT RECOMMENDED

AP.26/98

BETWEEN JULIAN

Appellant

AND NZ POLICE

Respondent

Hearing: 3 September 1998

Counsel: *P M K Keegan* for Appellant
Miss R L Mann for Respondent

Judgment: 3 September 1998

ORAL JUDGMENT OF GILES J

Solicitors:
Reeves Novak, P O Box 706, New Plymouth, for Appellant
Auld Brewer Mazengarb & McEwen, P O Box 738, New Plymouth, for Respondent

The appellant was convicted on guilty pleas on charges of assault, assault with a weapon (both Crimes Act 1961 offences) and wilfully attempting to pervert the course of justice. He was sentenced to three months imprisonment on count 1, 9 months imprisonment on count 2 and 18 months imprisonment cumulative in respect of count 3. He appeals against the severity of the sentence although, wisely, he has not pursued any challenge to the sentences of imprisonment imposed in relation to the assault charges. Having regard to the circumstances, the sentences imposed by the Learned District Court Judge on those counts could not, by any stretch of the imagination, be regarded as manifestly excessive. It is the length of the cumulative sentence which is the focus of the appeal.

The facts do not make pleasant reading. It appears that the victim, who was known to the appellant, is intellectually handicapped. In the company of a co-offender the three went upon a drinking binge in Opunake and, in the course of the afternoon, the complainant was subjected to a number of assaults involving the throwing of beer bottles and general humiliation by two people who claimed to be his friends of long-standing. The complainant suffered injuries. In due course the appellant and his co-offender were arrested and charged.

The appellant was granted bail and I am advised by Miss Mann that one of the terms thereof included a non-association clause with the complainant. Notwithstanding that Court Order the appellant confronted the complainant and advised him not to turn up to Court. The summary of facts carries some suggestion that the threat may have been accompanied by an indication that if the complainant were to do so there might be some "heavies" ready and waiting for him. That was challenged at sentencing and the Learned District Court Judge put that completely to one side and proceeded on the basis most favourable to the appellant, namely, an approach to the complainant seeking to dissuade him from appearing in Court to give evidence on the assault counts.

The Learned District Court Judge received comprehensive submissions from counsel, as have I. His Honour considered that **R v Hillman** (CA.14/92, 14 May 1992) was the most appropriate of the more recent Court of Appeal decisions to apply on the facts of this case in determining the appropriate level of sentence. A number of authorities referred to in **Hillman**, and noted by the Learned District Court Judge, are indicative of a three year term of imprisonment as being more often appropriate in respect of this kind of offending, which the Court of Appeal has rightly described as striking at the very heart of the administration of justice and the roots of an orderly society, deserving of stern response from the Courts with an element of condign and deterrent sentence.

Mr Keegan urges upon the Court that there are distinguishing features in **Hillman** which make the present case of a less serious level of intensity than was present in that case. In particular, counsel focuses on the fact that in **Hillman** there were gang related overtones which were considered to be of some moment by the Court of Appeal; there was the use of violence, albeit to someone other than the complainant; there was the absence of a guilty plea (Hillman was convicted by a jury after a defended hearing) and having regard to the relationship feature of the case and the obvious intimidation that the complainant in **Hillman** felt, Mr Keegan submitted that the present case was quite different.

On the other hand, Miss Mann, for the Crown, submits that there were a number of aggravating features in the present case. First, the appellant was on bail and acted in breach of a non-association clause in even approaching the complainant. Secondly, one has to have regard to the circumstances. After all, the complainant had been the victim of a relatively prolonged and cowardly attack, he was a person of limited intelligence and little wonder that when told it might be in his best interests not to appear to give

evidence, he so obliged. The fact of the matter is that, in the initial stages, the complainant did not attend at Court.

For myself I do not consider there to be any significant difference between the facts of **Hillman** and the facts of this case. True, the present appellant does not have previous convictions for assault and violence in contrast to **Hillman**, but I consider that the distinction Mr Keegan urges in relation to the presence of violence in **Hillman** (not on the complainant but on someone else present, notwithstanding that on the second occasion the complainant felt threatened and had to retreat) is not of great moment - especially having regard to the fact that this complainant had already been the victim of quite serious violence which resulted in Crimes Act 1961 assault charges. In **Hillman** the relationship was a domestic one; here the victim and the appellant were known to each other - as friends. There was no particular planning, the aid of others was not enlisted, so those features are consistent with **Hillman**. When one views the facts overall, the extent of the "leaning" which was visited upon this complainant is not terribly dissimilar from that which was visited upon the complainant in **Hillman**.

The real issue, therefore, is whether the early entry of a guilty plea, and the absence of previous convictions for violence, takes this sentence of 18 months into the realm of being manifestly excessive. I am not persuaded that is so. It may be, having regard to the particular circumstances, the sentence is moving to the top end of the scale for this kind of offending - it might be described as "harsh" - but that does not mean it is manifestly excessive. There is some substance in the fact that the threat was made whilst on, and in breach of a bail term and, as I have said in many earlier decisions relating to bail applications, bail terms are Court Orders which are to be complied with. They are not orders which those obliged to adhere to them are free to vary for whatever circumstances they consider appropriate whenever it suits them. It matters not, therefore, that the appellant considered himself to be a friend (about which the complainant no doubt has

different views) and that their contact was unavoidable. It simply ought not to have taken place. The absence of previous convictions no doubt enabled the Judge below to follow **Hillman** and avoid the 3 year threshold.

At the end of the day the decision in **Hillman** is one where an indulgence was extended to reduce a sentence that the Court stresses in a number of cases to be otherwise entirely acceptable, namely, three years imprisonment, to one of 18 months imprisonment. For my part I share the view entertained by the Court of Appeal, and followed by the Learned District Court Judge, that there must be a real and serious element of deterrence in this kind of offending. The maximum penalty is a term of imprisonment of 7 years. It does strike at the very heart of our criminal justice system when persons who make complaints to the authorities are threatened with a view to dissuading them from proceeding to give evidence in a court of law. Unless the Courts make it clear that that kind of conduct is unacceptable in our society and will be met with severe sentences, the rule of law and the right to public safety begins to have somewhat of a hollow ring.

In those circumstances I conclude that the Learned District Court Judge was fully entitled to reflect the abhorrence of our society to this kind of conduct in his sentence. The appellant is no doubt fortunate that, for whatever reason, the Police did not seek to clarify the issue as to the presence of "heavies" because, if that had been established, there would have been grave difficulty in avoiding anything other than a three year sentence.

I am of the view that the sentence was one which was within range, albeit moving towards the top of the range. It is not manifestly excessive. It is, accordingly, sustained and the appeal will be dismissed.

B H GILES J