IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CRI-2012-425-000013
[2012] NZHC 667

PANNI TURIA WAIHIERE
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 4 April 2012

Appearances: S Vidal for Appellant
M Mika for Respondent

Judgment: 4 April 2012

JUDGMENT OF CHISHOLM J

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[1] Having pleaded guilty to injuring with intent to injure and breach of supervision the appellant was sentenced to 13 months imprisonment. Her appeal is on the basis that that sentence was manifestly excessive.

The offending

[2] Following a dispute at a party at around 3 a.m. the victim and a friend left the party accompanied by abuse and threats by others, including the appellant. The appellant and two others pursued and caught the victim, forced her to the ground, and repeatedly kicked and punched her. After managing to escape the victim was chased by a group (which by this time had built to 15 or 16 males and females). This

group included the appellant. Again the victim was caught. She was knocked to the ground by the appellant's co-offender, then dragged across the street by the appellant and her co-offender. On the way she was kicked and punched about the head and body.

[3] The summary indicates that after the appellant and others returned to the party they bragged about what they had done.

[4] Photographs of the victim were before the sentencing Judge and are before me. One of the photographs was taken at the hospital and another by the police. It is plain from the photographs that the victim suffered extensive bruising and swelling to her face.

[5] According to the victim impact statement the victim thought that she was going to die. She stated that she could only drink and eat through straws for two weeks. Apart from the physical consequences, she mentions emotional issues.

The appellant

[6] At the time of the offending she was 18 years of age. Although she has previous convictions, she does not have any for violence. She has not been sentenced to imprisonment.

[7] The probation officer's report was unfavourable. It reported that the appellant had missed numerous appointments and had told the probation officer that she did not report because she could not be bothered. Alcohol was considered to be a problem. A short term of imprisonment was recommended.

Sentencing in the District Court

[8] Although a home detention appendix had been requested prior to sentencing, no address was available on sentencing day. Ms Vidal asked the sentencing Judge to adjourn sentencing in the hope that a suitable address would be found. Having received the Judge's response that if there was an adjournment the appellant would

be in custody, Ms Vidal and the appellant decided to proceed with the sentencing in the hope that at a later stage a sentence of home detention might be substituted pursuant to s 80I of the Sentencing Act 2002.

[9] The sentencing Judge expressed concern about the increased violence by young women. He noted that there were aggravating features: attack to the head; extreme violence; multiple attackers. He considered that the offending came within the top of Band 2 or the bottom of Band 3 in *R v Harris.*[1] A starting point of 20 months imprisonment was adopted.

[10] In relation to mitigating factors the Judge took into account the appellant's guilty plea and her age. He reduced the sentence by seven months to 13 months imprisonment (which represented a discount of something in excess of 25%). Any prospect of an application pursuant to s 80I of the Sentencing Act was ruled out. It was the Judge's view that the requirements of denunciation, deterrence and the need to protect the community from group violence were such that the only penalty was a custodial sentence.

This appeal

[11] I have been assisted by the submissions from Ms Vidal and Mr Mika.

[12] For the appellant, Ms Vidal submitted that the Judge's starting point was too high. She submitted that the injuries suffered by the victim did not justify Band 3 of *Harris*. She noted that the victim had not been hospitalised and there were no permanent injuries. Hospital notes have been provided.

[13] According to Ms Vidal, the Judge should have adopted the approach signalled by the Court of Appeal in *R v McEewen.*[2] In that case the Court of Appeal considered that insufficient weight had been given by the sentencing Judge to the injuries actually sustained. She also claimed that the appellant was being directed by others and was not a lead offender.

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[1] *R v Harris* [2008] NZCA 528
[2] *R v McEwen* [2009] NZCA 533

[14] Ms Vidal also submitted that the sentence was out of step with *R v Ferguson.*[3] Her submission was that the starting point should have been in the vicinity of 12 months and the end sentence in the vicinity of seven months.

[15] In response Mr Mika submitted that the end sentence was not manifestly excessive. He argued that the injuries effectively straddled Bands 2 and 3 in H*arris* and that there was no error in the approach adopted by the Judge.

Conclusions

[16] When Band 2 of *Harris* applies, the injuries having been categorised as moderate, a sentence of up to two years imprisonment can be justified. Beyond that, however, as the Court recorded at [11], the appropriate starting point will depend upon the effect of any additional aggravating and mitigating features on the seriousness of the conduct and the criminality involved. In this case the Judge was clearly entitled to categorise the injuries as moderate. When considering the appropriate starting point he was entitled to take into account aggravating features, particularly that this was group violence. It follows that a starting point that was four months below the ceiling for Band 2 of *Harris* was well within range.

[17] Despite Ms Vidal's submissions I am not persuaded that *McEwen* assists the appellant's cause. In that case the injuries were described as relatively minor and the Court of Appeal formed the conclusion that the victim had overstated his injuries. Those features do not arise here. Judging from the photographs the injuries suffered by the victim could not possibly be categorised as minor, nor is there any suggestion that the victim had exaggerated her injuries or the events. This was a very nasty episode of group violence.

[18] Ms Vidal also made reference to *R v Ferguson.* That was an appeal against a sentence of two and a half years imprisonment for injuring with intent to injure. It involved more significant injuries than in this case. When dismissing that appeal I observed that a starting point of three years would have been within range. In my view that decision does not avail the appellant.

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[3] *R v Ferguson,* HC Invercargill, 12 February 2010, CRI-2010-412-3

Result

[19] I have not been persuaded that the sentence was manifestly excessive. The starting point was available to the Judge who made due allowance for the appellant's guilty plea and youth. The appeal is dismissed.

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