COURT OF APPEAL

DAVIES JA
WILLIAMS J
MACKENZIE J

CA No 27 of 1997

THE QUEEN

v.

ANDREW NEVILLE RADKE

BRISBANE

..DATE 18/04/97

JUDGMENT

WILLIAMS J: The applicant pleaded guilty in the District Court to assault occasioning bodily harm in company and stealing from the person. He seeks leave to appeal against the sentence that was imposed.

He was sentenced to three months' imprisonment to be followed by three years probation with respect to the assault occasioning bodily harm in company and given one months' imprisonment concurrent with respect to the stealing. The applicant is now aged 19 years; he was aged 18 at the time of the offence. He had no prior criminal history.

The offence occurred on 17 September 1996. It would appear that on that night the applicant, with a group of at least four other young people, went to a hotel and there met the complainant who previously had been a stranger to those in the group. The complainant was playing pool and apparently there was some conversation between he and members of the group about, firstly, betting on a game of pool, and then betting on a beer sculling competition.

Though words were used which appeared to indicate that a bet had been made the complainant had no money to support the bet and, apparently, left the hotel in an endeavour to find an automatic teller machine from which he could withdraw some cash. He was apparently unsuccessful in doing so.

The applicant and three of his companions had followed the complainant when he went to the ATM machine. When the complainant was unsuccessful in obtaining money, that apparently

led to the applicant, and others in the group, ridiculing the complainant. There were various verbal exchanges as the group walked along the street in Toowoomba.

The basis upon which the sentencing Court proceeded was that arising out of that verbal interchange the complainant struck the applicant a blow to the back of his head. That was followed by an assault by a person named Scott Grant on the complainant. There were two independent witnesses to the events which occurred but because of their distance from the scene and because of the fact that there were some five men, in all, involved in the melee it was rather difficult for them to be certain as to who delivered what blow. Certainly, those independent witnesses saw punching and kicking, including kicking of a person lying on the roadway.

The applicant was interviewed by police and in the course of that interview he said, and I quote from different parts thereof:

"We started walking back and I was just mouthing off at him and saying that you can't back up your bets and stuff like that and then the other boys came up and they were walking with us and we were just giving him a bit of a hard time and then he just hit me in the back of the head so I just got right into him."

"Scott" - that is Scott Grant - "just ran across and he started hitting him, you know."

And then a little later on:

"They were out in the middle of the road and, like, Scott knocked him down and then I came across and kicked him in the head."

In answer to a question, "How many times did he kick him near

the left ear?" he answered, "Twice." He also indicated, quite categorically, that the complainant was conscious when initially knocked to the roadway by Scott Grant and it was his kicks which knocked him out. He then said that he rolled the complainant over and took his wallet.

They were the clear facts on which the Court was called upon to pass sentence. It should be noted that the person Scott Grant pleaded guilty in the Magistrates Court to a charge of bodily harm and was fined $750. What makes the offence committed by this applicant particularly serious is that it did involve kicking a man, who had been previously knocked to the ground, in the head with, at least, sufficient force to render him unconscious.

It is an aggravating circumstance that it occurred whilst the complainant was in company and it is also an aggravating circumstance that upon rendering the person unconscious the applicant then stole the wallet.

However, it has to be said that there are mitigating circumstances in favour of the applicant. He was a young man with no previous convictions and therefore the sentencing Court was called upon to determine whether or not there was any other sentence than imprisonment which was appropriate in all the circumstances.

As I have already said the applicant was aged 18, had no criminal history, cooperated fully with the police and made full admissions. It was the admissions which enabled the charge

against him to be defined with precision. There was an early plea of guilty.

I should also record that the applicant served 13 days in custody before being released on bail on 4 February 1997.
Taking everything into account I am of the view the learned sentencing Judge erred in considering that there was no other sentence that was appropriate in the circumstances than one involving custody.

It was, as I have said, a vicious and cowardly attack, but bearing in mind the sentence imposed on Scott Grant, and bearing in mind the matters personal to the applicant to which I have referred, I am of the view that there was little, or no point, in requiring this applicant to serve a period of actual custody in a prison.

In my view, all relevant sentencing principles would be satisfied if, with respect, to the offence of assault occasioning bodily harm in company the applicant was sentenced to three months' imprisonment to be served by way of an intensive correction order; that is the way in which this matter should be dealt with.

So far as the offence of stealing from the person is concerned I am of the view that the appropriate order would be two years probation. As the applicant has consented to the three years probation which is a part of the existing sentence I would assume that consent thereto applies to the two years probation that I would impose.

I therefore grant the application for leave to appeal against sentence, allow the appeal and in lieu of the sentences imposed in the District Court order that the applicant, on the charge of assault occasioning bodily harm in company, be sentenced to three months' imprisonment to be served by way of an intensive correction order and that three months intensive correction order should date from today. On the charge of stealing from the person I would place him on probation on the usual terms for a period of two years.

DAVIES JA: I agree.

MACKENZIE J: I agree.

DAVIES JA: The orders are as indicated.

WILLIAMS J: Is there something, Mr Martin?

MR MARTIN: There are formalities that flow from an intensive correction order, Your Honour. Section 116 requires the Court to explain it to the offender. Section 117 requires him to agree to it. I do not know that my friend has instructions.

DAVIES JA: Well, we cannot make those orders at this stage. We can agree upon those reasons subject to his agreement and you could obtain that agreement for us and we would then make the orders when that agreement is obtained.

MR HAMLYN-HARRIS: Yes, and I could undertake to explain what is necessary for the Court to explain on behalf of the Court.

DAVIES JA: Does it say the Court has to explain it or it just say explain to him?

MR MARTIN: No. It says the Court must explain or cause to be explained. So, I can explain it.

DAVIES JA: Well, that is all right. We direct you to explain that to him and then you can let us know of his consent and we can then make orders in terms of the reasons we have------

WILLIAMS J: Seeing you have got to do that, Mr Hamlyn-Harris, it might also be worthwhile getting his formal consent to the two years probation although, as I said, I think if that was the only point we could have assumed that it applied-----

MR HAMLYN-HARRIS: I did have instructions on that but I will get formal instructions on it. Can that all be conveyed to the Registrar of the Court?

DAVIES JA: Yes, that is right and the Court will then make an order in those terms.
