

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA390/05
CA391/05**

THE QUEEN

v

**TESSA JEAN EDWARDS
JOSEPH JUNIOR SIPA**

Hearing: 1 December, 2005

Court: Hammond, John Hansen and Doogue JJ

Counsel: F E Guy Kidd and M J Inwood for Crown
S F Bailey for Respondent Edwards
M Starling for Respondent Sipa

Judgment: 7 December 2005

JUDGMENT OF THE COURT

- 1 The applications for leave to appeal, by the Solicitor-General, are allowed.**
 - 2 The appeals by the Solicitor-General against the sentences imposed on both the respondents in the District Court are allowed. The sentences imposed in that Court are quashed. We substitute, in the case of both respondents, sentences of three and a half years imprisonment.**
-

REASONS

(Given by Hammond J)

Table of Contents

	Para No
Introduction	[1]
The facts	[5]
The sentence indication process in this case	[15]
The District Court sentencing	[27]
The grounds of appeal	[39]
Discussion	[40]

Introduction

[1] The respondents, Tessa Edwards and Joseph Sipa, each pleaded guilty to one count of injuring with intent to cause grievous bodily harm (s 189(1) of the Crimes Act 1961). The maximum penalty for that offence is ten years imprisonment.

[2] These pleas were entered after a deposition hearing in the District Court at Christchurch at which the complainant, M, gave evidence, but before any scheduled jury trial.

[3] On 9 September 2005, the respondents were sentenced in that Court by Judge Saunders, as follows:

- Sipa - two and a half years imprisonment;
- Edwards - 21 months imprisonment, with leave to apply for home detention.

[4] The Solicitor-General seeks leave to appeal under s 383(2) of the Crimes Act 1961, on the basis that the sentences so imposed are wrong in principle and manifestly inadequate.

The facts

[5] In the early hours of the morning of 7 September 2004, Ms Edwards, her boyfriend (Mr Sipa) and a friend (Hunia) were sitting in a parked car in Christchurch city. The trio were heavily intoxicated.

[6] Sipa and Edwards got into an argument. This culminated in Sipa yelling at Edwards and actually punching her in the face.

[7] M saw this assault occurring as he was walking past the car. M approached the car and said words to the effect of, "Don't punch your missus like that."

[8] Thereupon Sipa and Hunia got out of the car and approached M. Both threw punches at him. When he retreated, the pair followed him. Sipa tackled M to the ground. This assault continued once M was on the ground, with both Sipa and Hunia punching him about his head and body. Sipa sat on M and repeatedly punched him in the head.

[9] Edwards by now had also got out of the car. She encouraged the assault, yelling threats including, "I'm going to kill you, you white cunt."

[10] Hunia was pulled off M by M's brother. However five unknown bystanders then chose to join in the assault, punching and kicking M.

[11] It was at this point that Edwards also joined the assault on M, who had endeavoured to be a Good Samaritan on her behalf. She kicked M about ten times and stomped on his face, breaking his cheekbone. Eventually, Edwards was pulled away from the assault. She was twice told to leave the area. But each time she returned to her assault on M, who by now lay prone on the ground.

[12] Eventually M was able to crawl away from his attackers to a nearby kerb. Sipa then ran over and punched him in the head with enough force to knock him out.

[13] This entire assault lasted about 15 minutes. It was recorded on a crime camera in the vicinity.

[14] This was a very bad assault indeed. M suffered a broken orbital rim bone under his left eye, extensive facial bruising (which was still evident several weeks later), four cracked teeth, a dislocated shoulder, bruising to his body, and scraped knees and elbows. He was in hospital for five days and subsequently required reconstructive operations to his face, which included the insertion of a titanium plate under the left eye. The assault had an ongoing impact on him psychologically.

The sentence indication process in this case

[15] It is necessary to sketch the manner in which this sentencing proceeded, in order to appreciate the Crown's concerns.

[16] On 12 January 2005 the respondents were both charged with wounding with intent to cause grievous bodily harm. This offence carries a maximum penalty of 14 years imprisonment.

[17] Initially, Hunia was also included in this charge. However he had desisted in his attack before the most serious injuries were inflicted. Subsequently the charge against him was withdrawn and replaced with one count of common assault. That charge carries a maximum penalty of 12 months imprisonment. Subsequently Hunia pleaded guilty to this lesser charge prior to depositions. He was sentenced to 150 hours community service.

[18] Depositions were held in respect of Ms Edwards and Mr Sipa's offending on 18 and 19 May 2005. M, and four witnesses gave evidence. The respondents were committed for trial.

[19] The Crown Solicitor then lodged an indictment containing two counts. The first was against Sipa. It was a charge of male assaults female. That related to the assault which M had observed on Edwards. The second count was jointly against Sipa and Edwards. It alleged that they caused grievous bodily harm to M, with intent to cause him grievous bodily harm.

[20] On 26 August 2005 Judge Saunders convened a sentencing indication hearing. At that hearing the Crown elected to amend the indictment to the lesser charge of injuring with intent to cause grievous bodily harm (s 189(1)). That carries a maximum penalty of ten years imprisonment. We are bound to say that we found this course by the Crown to be surprising, and difficult to justify. This was always a very serious assault, with particularly bad consequences for M.

[21] The Judge did not have the victim impact statement or pre-sentence/probation reports before him at the time of his sentencing indication. The Crown was not invited to make submissions on the appropriate sentence. Accordingly, counsel for the Crown could not remind the Judge of the guide-line judgement of this Court in *R v Taueki* [2005] 3 NZLR 372 which had been released some two months before, on 30 June 2005.

[22] On the basis of that authority - to which we will refer again later in this judgment - there was no way in which the Judge could reasonably have contemplated a sentence which would afford Ms Edwards the possibility of a sentence of home detention.

[23] The Judge gave the following sentence indication:

... subject to submissions from the Crown I would endeavour to see that the sentence was within the range that where she could apply to the Board to be able to serve the sentence, as you know there is a statutory release for two years and under, and that it would be something where she would have to, I think initially expect that there would be some loss of liberty while the Board assess the risk factors, but that I would certainly leave the door open if she is seen by everybody as somebody who is a capable mother and has family responsibilities in that regard.

[24] This indication has distinct significance on the appeal, because Ms Guy Kidd has felt obliged, as we think correctly, to submit that right from the outset Judge Saunders tailored the sentence in this case to try and produce an outcome of home detention for Ms Edwards. This is quite contrary to all the authorities in this Court (see, as only one instance, *Solicitor-General v Lam* [1997] 15 CRNZ 18).

[25] No sentencing indication was given with respect to Mr Sipa.

[26] Subsequently, the respondents pleaded guilty to the amended charge of injuring with intent to cause grievous bodily harm and the sentencing followed.

The District Court sentencing

[27] When the Judge did sentence the respondents, he prefaced his remarks by referred to the sentencing indication we have noted, given in respect of Ms Edwards. He then said:

So I think that really the sentencing submissions today have to take place in light of the fact that there was a sentencing indication in this matter.

[28] The Prosecutor, quite correctly, reminded the Judge that the Crown had not played any part in that indication.

[29] The Judge thereupon further commented to the Crown Prosecutor:

Certainly I have received your submissions, I am well aware of [*Taueki*] and I accept that they [that is, this Court] have banded the offending based around the different levels of violence and the injuries whether it was premeditated, matters of that kind, but I think that really it would not now be fair to retract on an indication given to the accused at that earlier point in time.

[30] The Judge then commenced the sentencing by (incorrectly) stating that the respondents had pleaded guilty to a charge of injuring with intent to injure. That was quite the wrong offence - such an offence is pursuant to s 189(2), which carries a maximum penalty of five years imprisonment. In fact, the respondents were facing a maximum penalty of ten years imprisonment, under s 189(1).

[31] In [11] of the sentencing notes the Judge said:

I gave a sentencing indication at an earlier point in time and at about the time that the Court of Appeal came out with a case which is referred to as *Taueki*. I accept that in giving that earlier sentencing indication, I had not, at that stage, read the detailed analysis that the Court of Appeal have given in terms of dealing with cases of serious violence. It has been made clear that sentencing judges should be quite transparent in the way that they approach matters of this kind, that they should look at incidents where there is serious violence, decide which band of offending that the offence falls within, then apply the sentencing principles under the Sentencing Act, giving such weight as they can to either the mitigating or aggravating factors.

[32] The Judge was incorrect in his statement that the sentencing indication was “at about the time” of *Taueki*. *Taueki* was in fact delivered some two months earlier, on 30 June 2005.

[33] The Judge summarised the approach in that case as first deciding which band of offending the offence falls within; a Court is then to apply the sentencing principles under the Sentencing Act “giving such weight as they can to either the mitigating or aggravating factors”.

[34] The Judge then made several observations in relation to the offending: that this was a street attack; that there were a number of people involved; there was no great planning about it; the bad injuries to the victim’s head; that the attack was a concerted attack lasting 15 minutes.

[35] The Judge then observed that “there may be some merit to” the Crown’s submission that this offending might well come within band 2 of *Taueki*. But he then said, “For present purposes, however, I am prepared to content myself with saying that it comes within band 1 (with an appropriate starting point between three and six years).

[36] The Judge recorded that he considered Mr Sipa and Ms Edwards to be equally culpable for this assault.

[37] Having selected a starting point in the order of three and a half to four years (later amended in the sentencing notes to “a starting point in that region of three and a half years”), and after discussing what he saw to be the mitigating factors, and in particular the guilty plea, the Judge took the view that the appropriate final sentence for Mr Sipa was two and a half years imprisonment.

[38] In relation to Ms Edwards, the Judge said quite distinctly that he was prepared “to extend a little further leniency” to her, on the basis that there was some prospect that she might get home detention.

The grounds of appeal

[39] In support of the application that the sentences imposed are wrong in principle and manifestly inadequate, the Crown made three principal submissions:

- the Judge failed to correctly identify the offence (and hence the maximum penalty) involved;
- he failed to correctly apply *R v Taueki* to assess the appropriate starting point for the offending, and in so doing incorrectly assessed the starting point at three and a half years; and
- he fixed Ms Edwards' sentence so as to enable her to apply for home detention, in accordance with an earlier (incorrect) sentencing indication.

Discussion

[40] In our view, these sentences cannot be supported.

[41] Firstly, the sentencing indication, even if that problematical exercise was to be undertaken, did not comply with the relevant District Court Benchbook standards. The District Court Benchbook provides:

Sentence Indication

Sentence indication at Status Hearings is given under the following structured guidelines:

- A sentence indication will be given only if asked for by the Defendant.
- An indication will not be given unless the Judge has the Police summary of facts and the list of previous convictions and, where appropriate, a Victim Impact Statement, along with any other information necessary to enable the Judge to assess the proper sentence, having regard to the provisions of the Sentencing Act 2002.
- The Defence cannot be compelled to disclose anything, but can give the Judge such material as it wishes.
- The Judge is bound by the indication unless, after it is given, fresh evidence shows that the indication is inappropriate. However, should that arise, the Judge must inform the Defendant of the now intended type of sentence. He or she must allow the Defendant to reconsider his or her plea and, if he or she wishes, vacate it, plead not guilty and proceed to a defended hearing.

- A Judge who considers he or she lacks sufficient information should decline to give a sentence indication.
- Any sentence indicated must accord with the principles and aims of the Sentencing Act 2002.
- The indication will be limited to the type of sentence that the Judge thinks appropriate, that is, imprisonment or a community-based sentence.
- When a sentence indication is accepted but sentencing is delayed and comes before another Judge, that Judge must follow the indication already given or indicate the sentence he or she intends to impose and afford the Defendant an opportunity to reconsider his or her position and withdraw or confirm the guilty plea. See *R v Gemmell* [2000] 1 NZLR 695; *R v Edwards* (2000) 17 CRNZ 604; *Deighton v Police*, unreported, HC Whangarei, 20 May 2005, per Baragwanath J.
- When the indication is not accepted, no record of it will be put on the file. If the Defendant is later convicted of that offence, any indication given at Status Hearing shall have no bearing on the sentence. Sentencing Judges will not be told by Counsel of the Judge's indication and, if told, will ignore the indication.

Consultation with all parties, Police, victims and the Defendant is essential.

[42] Secondly, the only sentencing indication the Judge could have given, following the decision of this Court in *Taueki*, was in accordance with that case. It is correct, as Mrs Bailey said, that the Judge would have had to have regard to [9] of *Taueki* that some modification would have been required, given the particular offence, but there was no doubt that this guideline decision was by then the governing authority in this area of the law. It should not be necessary for this Court to remind sentencing Judges that they have the responsibility to locate and immediately observe important sentencing guideline judgments.

[43] Thirdly, that said, even under the earlier guideline laid down in *R v Hereora* [1986] 2 NZLR 164 (CA) this was a very serious case, which could well have justified a starting point of up to five years.

[44] Fourthly, it does appear that the Judge misinformed himself, at the outset, as to what the maximum sentence was for this offence. This must be taken to have clouded his view of matters.

[45] Fifthly, as the law stood after the delivery of *Taueki*, we entirely agree with the Crown that this offending had to be in the second category of *Taueki*, even allowing for some adjustment for the fact that this was a s 189(1) offence. This Court was at some pains in [42] of *Taueki* to point out that the features of the offending in each case must be carefully assessed in order to establish a starting point which properly reflects the *culpability* inherent in the offending. The culpability here was of a high order and a number of the aggravating features set out in *Taueki* were present: the prolonged violence; the very serious injuries; and the attacking of M's head, in addition to the features noted by the Judge.

[46] Sixthly, the Crown is correct that the sentence was patently tailored to achieve home detention for Ms Edwards, notwithstanding that both respondents were in our (and the Judge's) view, equally culpable.

[47] However this matter was approached - whether on the basis of a *Hereora* type approach, or under *Taueki* - it is difficult to see how the offending in this case could not have attracted a sentence in the five year region.

[48] Further, given the course which events took to sentencing, and which we have already detailed, it is difficult to see how a discount of more than 20 percent could have been appropriate in these particular instances.

[49] Given that this is a Solicitor-General appeal, and in accordance with the authorities, we think the minimum sentence that could have been imposed in the case of both of these respondents, was three and a half years imprisonment.

[50] This is, of course, unless it can *properly* be said that the events which occurred in the District Court attendant on sentencing should preclude substitution of sentences of that order, now.

[51] We take first the case of Mr Sipa. No sentencing indication was given to him; and there was no evidence placed before him of any reliance on his part as to what had been said in Ms Edwards' case. Before us, his counsel very responsibly

accepted that in Mr Sipa's case he could not raise any concern under this head of "unfairness".

[52] As to Ms Edwards, the Crown played no part - it was not even invited to - in what the Judge had to say to Mrs Edwards' counsel on the so-called sentence indication. This was an entirely unilateral and unadorned statement by the Judge, without any analysis of the sentencing authorities. He said it was subject to submissions from the Crown, but ultimately gave them no proper application. And there was no evidence brought forward before us by way of affidavit as to any "reliance" by Ms Edwards.

[53] Cases of this kind have been troublesome. We refer, in particular, to *R v Gemmell* [2000] 1 NZLR 695. In light of that authority, we pressed Mrs Bailey as to what course she considered this Court should now take with respect to Ms Edwards. She was not able to say any more than that, despite raising that matter with her client, she had not been able to obtain instructions.

[54] In all the circumstances of this case, we are unable to take the view that the Crown should be precluded from raising, on its application to appeal, a submission that Ms Edwards had not received a proper sentence for this very serious assault. Even assuming, solely for the purposes of argument, that a pre-sentencing process of the variety which attended this case is otherwise lawful, it cannot be correct to entirely exclude the Crown from that process, or to prevent the Crown from appealing a sentence which is in fact inadequate (see *R v Tipene* [2000] 2 NZLR 577 (CA)).

[55] We have not overlooked the factor, properly drawn to our attention by Mrs Bailey, that in a spirit of generosity which had not been matched by his assailants, at a restorative justice conference on Friday 21 October 2005 M said he now felt "guilt about breaking up the family", and that "his anger had 'dropped' a little bit and that he doesn't want to see them get a longer sentence". What happened on that occasion was of course not known to the sentencing Judge in the District Court. But whilst the views of the victim are relevant, and are to be respected, in

accordance with well established principle it is for the Court to determine, according to the level of culpability of the offender, what the appropriate sentences should be.

[56] In the result, both applications by the Solicitor-General for leave to appeal are allowed. The appeals are allowed and the sentences imposed in the District Court are set aside. We substitute therefore sentences of three and a half years imprisonment with respect to both the respondents.

Solicitors:
Crown Law Office, Wellington
F S Legal, Christchurch for Respondent Edwards