IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

AP 44/98

BETWEEN **ROY ALLAN MATTOCK**

Appellant

AND **NEW ZEALAND POLICE**

Respondent

Hearing: 5 February 1999

Counsel: Ms K A Lummis for appellant
Ms R Mann for respondent

Judgment: 5 February 1999

ORAL JUDGMENT OF NICHOLSON J

Solicitors:
Govett Quilliam, DX NP90056, New Plymouth for Appellant
Auld Brewer Mazengarb McEwen, DX CP31031, New Plymouth for Respondent

Copy:
Judge Hole, Napier District Court

Mr Mattock has appealed against a sentence of one year nine months imprisonment imposed on 9 November last year by a District Court Judge on a charge of indecent assault on a female to which Mr Mattock had pleaded guilty.

The grounds of appeal as stated and argued today by Ms Lummis for Mr Mattock are first that the sentence was wrong in principle and second that the sentence was manifestly excessive. Ms Lummis submitted that the learned District Court Judge acted wrongly principally in finding that the provisions of s 5 of the Criminal Justice Act 1985 applied and sentencing Mr Mattock upon that basis. The learned District Court Judge said that he had no hesitation in finding that there was serious danger to the complainant in the incident and that therefore s 5 did apply. Although saying that in his view the incident was "*a very violent struggle*", the learned District Court Judge did not specifically state whether he found it constituted serious violence within the meaning of s 5. He said:

> "In my view this was a very violent struggle. Perhaps more importantly, the victim was placed in a very dangerous situation. I have no hesitation in finding that serious danger to her was involved in this incident."

Ms Lummis submitted that in finding that there was serious danger the learned District Court Judge placed too much emphasis on what could have occurred and did not concentrate upon what actually occurred. She submitted that having regard to the rather public nature of the place where the incident occurred, it was very likely that there would be intervention by passers-by and therefore the incident did not have the serious danger which would have been present if it occurred in a more isolated place. Ms Lummis also submitted that, because of the relatively slight build of Mr Mattock, it was unlikely that he could have carried his attack any further than what actually happened.

Ms Mann for the respondent submitted that the acts did constitute serious danger because of the nature of the attack, the persistence of the attack, the time that the attack occurred and that the location which was not actually on a road or pathway but on a verge.

Even though it happened within sight of a main road, nevertheless had it not been for the fortuitous passing of third parties, the consequences to the victim could have been much more serious.

Ms Lummis referred to previous cases involving serious danger and submitted that they involved the use of weapons or the invasion of a home, neither element being involved in the present case. She pointed out that the provisions of s 5 required that there be not just danger but serious danger. This is so because s 5 states:

> "Where -
>
> (a) An offender is convicted of an offence punishable by imprisonment for a term of 2 years or more; and
>
> (b) The Court is satisfied that, in the course of committing the offence, the offender used serious violence against, or caused serious danger to the safety of, any other person, -
>
> the Court shall impose a full-time custodial sentence . . ."

Ms Lummis referred to the decision of Court of Appeal in ***Queen v Morris*** CA 89/94 25 May 1994 where, in delivering the judgment of the Court, Thorp J said at p 3:

> "From that point it becomes necessary to consider whether the other actions proven against the appellant could properly be classified as '*serious violence*'.
>
> On this Mr Stevens referred us to two unreported decisions in the High Court which have expressed the view that the word '*serious*' must be given real meaning, and that the mere occurrence of violence in connection with an offence carrying a term of imprisonment of two years or more is insufficient to raise the s 5 presumption. That view must be correct. But equally, as Mr Stevens properly acknowledged, the classification of violence as serious in terms of s 5 must depend upon the circumstances of each particular case."

Whether there was serious danger to the safety of another person, must depend upon the circumstances of each particular case. However, the danger must not be minor or moderate but must be in the category of serious.

Ms Lummis referred me to the passage in *Halls Sentencing* para 5.7A:

> "Serious danger to the safety of other persons was found to have been caused in ***R v M*** (HC, Auckland S 28/87, 10 March 1987, Eichelbaum J) where, after making a demand for money from a post office employee, M had produced a knife from a bag he was holding and held the knife in front of his body. There was said to be a risk, regardless of whether the offender intended to use the knife, that through the intervention of some person present there may be some movement by the offender, whether deliberate or accidental, involving use of the weapon. A consideration of the nature of the weapon (a kitchen knife in this case) and the proximity and involvement of other persons was necessary.
>
> After being disarmed of an axe, the subsequent obtaining and loading of a shotgun and returning therewith to a party in a drunken state, has been held to be '*serious danger*': ***Browne v Police*** (HC, Wellington AP 357/96, 5 February 1997) (the firearm discharged hitting the person who was attempting to disarm the appellant in the foot - the submission that the particular economic and social problems of the Chatham Islands, where the offending had occurred, should be considered was rejected, Gendall J stating that this was not a frontier society modelled on that of the '*wild west*' - sentence of 18 months' imprisonment for an offence under s 45 of the Arms Act 1983 of carrying a firearm except for some lawful, proper and sufficient purpose was not manifestly excessive.)
>
> The deliberate ramming by the offender's vehicle of a Police car from which a constable was alighting has been held to constitute serious danger to the safety of that person: ***Manfredos v Police*** [1988] 2 NZLR 376 (CA).
>
> Driving while attempting at the same time to restrain a person who had been abducted has been held to constitute serious danger: ***R v Tana*** (CA 149/91, 7 October 1991, Richardson, Gault and Holland JJ) 14 TCL 43/10 [KIDNAP - 1.2 002] (loss of control of vehicle, and subsequent minor accident, illustrated the serious danger in this case); as has the spraying of a canister of CS gas in the face of a Constable who was attempting an arrest, and which had the effect of temporarily disabling him: ***Best v Police*** (HC, Auckland AP 29/94, 18 March 1994, Hammond J)."

Ms Lummis referred to these cases as indicating that to be serious danger there must be the presence of some weapon or article other than just a use of body.

At my request, counsel obtained the dictionary meaning of "*danger*" as stated in the Shorter Oxford Dictionary. It is clear that the sense in which the word is used in s 5 is the main sense as stated in that dictionary "*liability or exposure to harm or injury; risk, peril.*" It is noted that in one of the cases referred to the term "*risk*" was used. Reference by counsel to *Butterworths Words and Phrases Legally Defined* Vol 2

showed that the term "*danger*" had been considered in the context of its use in the Civil Aviation Act 1964 in the case of ***Fowler v Police*** [1983] NZLR 701 at 702 where McMullin J said:

> "The primary meaning of danger given in the Shorter Oxford English Dictionary is '*Liability or exposure to harm or injury; risk, peril*'. Liability is there defined as, inter alia, '*exposed or open to; prone to or liable to suffer from something damaging, deleterious or disadvantageous.*' These definitions make no distinction between potential and actual danger. We accept that there may be degrees of danger and that a danger may range from something that is no more than possible to something that is probable and that in some contexts danger will be so speculative or unreal as to be insufficient to be regarded as a danger in any real sense. In the end whether an allegedly dangerous situation is caught by a statutory provision which is aimed at its prevention must be considered in the light of the statutory context in which it is used."

I consider that a similar construction applies here. To be serious the danger must be not so speculative or unreal as to be insufficient to be regarded as danger in any real sense. It must be more than minor or moderate.

Each situation must be judged on its particular facts to gauge the peril and risk caused to the safety of another person. If that is minor or moderate peril and risk then it would not constitute serious danger within the meaning of s 5.

In describing the situation in this case, the learned District Court Judge stated:

> "The facts are disturbing. This lady had been to a function. She left the function. She met up with you. She enquired if another function was still continuing and whether people with whom her husband was were still present. You answered those enquiries and each of you went your own way. You then turned round and followed her. You came up behind her. You grabbed her around the head and face. You pulled her up on to a grass verge, where a struggle ensued. During this time you continually tried to uplift her skirt and grab underneath it.
>
> She bit your hand at one stage, forcing you to let go of her and at that point you lashed out at her, punching her on the back of the head several times. At one stage during the struggle both you and the victim fell to the grass and you landed on top of her. The struggle continued. She was trying to get away. You were trying to grab at her clothing and lift up her skirt.

> Fortunately for both of you, members of the public arrived. You discontinued your efforts and ran off. At the time you were very drunk."

Factors not mentioned by the learned District Court Judge were that the incident occurred about 7.30 pm on a Thursday evening, 30 July. Bearing in mind that it was winter, the inference is that it was dark at the time. The victim was a 26 year old woman. Mr Mattock was a 20 year old trainee fisherman. The summary also stated that Mr Mattock followed the victim for approximately 100 metres after telling her that her husband had left the social function and gone to the hotel. The summary states that, while being followed, the victim:

> "attempted to walk faster to get away but could not do so before Mattock grabbed her around the head and face using his left arm.
>
> The victim was pulled from the roadside where she was walking onto a grass verge where a struggle ensued between the two.
>
> During this Mattock continually tried to lift the victim's skirt and grab her underneath it.
>
> The victim was continually shouting at him to stop his actions and offered him her handbag hoping that he wanted to rob her.
>
> Mattock showed no interest in the handbag and continued trying to grab at the bottom of the victim's skirt and pull it upwards.
>
> The victim then bit his hand, forcing him to let go.
>
> Upon being bitten Mattock pulled away and then lashed out at her, punching the victim to the back of the head several times.
>
> At one stage the struggle caused both persons to fall onto the grass with the defendant landing on top of her.
>
> The struggle continued with the victim trying to get away from the defendant while he again made repeated attempts at trying to grab at her clothing and lift her skirt.
>
> At that point a member of the public who was driving down Centennial Drive witnessed what was happening and stopped next to the pair.
>
> This person repeatedly sounded their vehicle's horn which caused Mattock to run off down Centennial Drive towards the city.
>
> A separate member of the public came out of a nearby address and chased Mattock down Centennial Drive before he entered a nearby hotel.

> The Police were called and the defendant located after he had been identified by the victim.
>
> Initially Mattock was found to be intoxicated and did not respond to any questions.
>
> When later spoken to he stated in explanation that he could not recall what had happened other than he went to the Port View Club and was drinking there."

In her victim impact statement the victim stated:

> "During this attack he hit me on the head, punching me with a closed fist repeatedly. I cannot remember exactly how many times he hit me but this left me with soreness to the back of my head.
>
> I also suffered a sore leg during the events. I cannot really say when this happened but possibly from when we fell over."

She described it as "*a really horrible thing to go through and one that's made me very reluctant to ever go out like that again*".

Having regard to the circumstances, that the attack occurred at night, that it occurred after the appellant had followed the victim for a considerable distance, that it involved taking her from the footpath on to a grass verge and that there was a physical attack involving punching and a physical struggle which persisted even after the victim shouted and bit the appellant, I consider that real peril and risk of serious harm was caused to the victim, even though no weapon was involved. It is clear that the appellant was out of control and that he had sufficient superior physical strength to overpower the victim and prevent her escaping.

I consider that in the circumstances the offender caused serious danger to the safety of the victim and accordingly I am of the view that the learned District Court Judge was right in so holding.

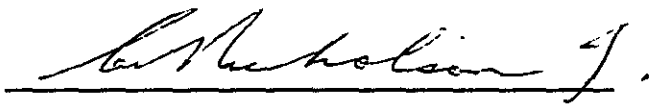
Ms Mann for the Crown submitted that in addition to serious danger there was serious violence within the meaning of s 5. The learned District Court Judge did not explicitly find this. I consider that it is borderline whether the violence used actually constituted serious violence. In my view the violence used was just over the border into the realm of serious violence involving punching and persistent physical application of force.

I consider that the provisions of s 5 did apply and accordingly, as there were no special circumstances relating to the offence or to the offender, a sentence of imprisonment was mandatory.

Ms Lummis submitted that even if that were the case, nevertheless the sentence of one year nine months was manifestly excessive. She referred to the factors of the appellant's age and that he had been out of serious trouble for a period of three years and was showing real signs of rehabilitation, being in a job which he was good at and in which he was achieving success. She pointed out that he had had no previous conviction of assault of this nature and the probation officer's comment that it seems that there was no predilection for sexual offending. It would seem that the prime cause of this incident was the fact that the appellant was drunk. This reflected a very serious alcohol problem which he has. In those circumstances Ms Lummis submitted that the term of one year nine months imprisonment was manifestly excessive even if s 5 applied. She submitted that, if s 5 did not apply, supervision would have been the appropriate sentence.

In my view, having regard to the nature of the attack, the persistence of the attack, the degree of violence used and the undoubted concern of the public about an attack of this sort on a woman walking alone on a street and the necessity for a deterrent element in sentence, the sentence of one year nine months was not manifestly excessive, even taking into account the plea of guilty and the mitigating factors which I have just outlined.

Accordingly I dismiss the appeal.



C M Nicholson J