IN THE SUPREME COURT OF NEW ZEALAND

SC 4/2006
SC 5/2006
[2006] NZSC 52

JOSEPH JUNIOR SIPA
TESSA JEAN EDWARDS

v

THE QUEEN

Hearing: 14 June 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: M Starling for Appellants
F E Guy Kidd and M J Inwood for Crown

Judgment: 19 July 2006

JUDGMENT OF THE COURT

The appeals are dismissed.

REASONS

(Given by Blanchard J)

[1] Mr Sipa and Ms Edwards pleaded guilty in the District Court to injuring with intent to cause grievous bodily harm.[1] There had been a sentence indication hearing earlier that day attended by both of them where Ms Edwards, but not Mr Sipa, had sought and been given an indication by Judge Saunders of a likely sentence of two

[1] Crimes Act 1961, s 189(1).

years imprisonment or less which would enable her to seek home detention. If successful in obtaining it, she could look after their young children.

[2] Counsel for the Crown had been present at the sentence indication hearing but had not been invited to participate. The relevant Court of Appeal guideline judgment, in *R v Taueki*,[2] had been released almost two months before that hearing but was not considered by Judge Saunders until the sentencing hearing, and then on the mistaken assumption that *Taueki* was roughly contemporaneous with his sentence indication. Unfortunately the Judge did not reconsider the indication that he had given to Ms Edwards. The sentences imposed by Judge Saunders were, for Mr Sipa, imprisonment for two years six months and, for Ms Edwards, imprisonment for 21 months with leave for her to apply for home detention.

[3] The Solicitor-General applied to the Court of Appeal for leave to appeal against both sentences on the ground that they were manifestly inadequate. Being of the view that the sentences were indeed inadequate, the Court inquired of counsel then acting for Ms Edwards what course she considered it should take. This inquiry reflected the suggestion by both parties in their written submissions that, as the Crown put it, if the Court accepted that Ms Edwards' sentence required reconsideration, it might wish to offer Ms Edwards "the opportunity to treat her opposition to this appeal as an appeal against conviction, thereby allowing the Court to set her conviction aside and remit the matter to the District Court to allow Ms Edwards the chance to replead." However, at the hearing Ms Edwards' counsel told the Court that, despite raising the matter with her client, she had not been able to obtain instructions.

[4] The Court of Appeal granted the Solicitor-General leave to appeal, allowed his appeals and substituted sentences of three and a half years imprisonment.[3]

[5] The ground approved for the appeals to this Court, in terms of r 29 of the Supreme Court Rules 2004, was whether, before allowing the Solicitor-General's appeals, the Court of Appeal should, in the circumstances of the present cases, have

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2 [2005] 3 NZLR 372.
3 CA 390 and 391/05 7 December 2005.

expressly offered the appellants the opportunity to appeal against their convictions and thereby to seek their setting aside and the remission of the cases to the District Court for reconsideration of their pleas. This Court anticipated that Mr Starling, appearing for both appellants, would have definite instructions from his clients on the question of whether they would indeed wish to change their pleas. The Court was therefore surprised to be told at the opening of the hearing on 14 June that counsel had no instructions on the question.

[6] The Court was concerned that it might be a pointless exercise to hear the appeals and determine them as sought by the appellants, only to find that the appellants again pleaded guilty when the matter was returned to the District Court. We therefore indicated that we would not proceed to hear the appeals unless and until the Court received affidavits from the appellants indicating that, if successful, they would enter pleas of not guilty to the charges.

[7] Affidavits have now been received from both appellants. Having received further advice, they do not wish to proceed with their appeals. They are accordingly dismissed.

[8] A Court hearing an appeal by the Solicitor-General against a sentence given after a sentence indication should in future be provided with an affidavit from the respondent (a) attesting to his or her reliance upon the sentence indication in electing to enter a plea of guilty and (b) confirming that, if the Court considers the sentence should be increased, he or she would seek to have the conviction quashed and the matter remitted to the sentencing Court for the guilty plea to be vacated and a plea of not guilty entered.

[9] Upon a successful appeal by the Solicitor-General a sentence is adjusted by no more than the minimum extent necessary to remove the element of manifest inadequacy. Those advising a respondent should appreciate that this practice will not influence the level of sentence imposed if, after a conviction is set aside and the matter remitted to the sentencing Court, there is a further change of mind and a plea of guilty is again entered. That could have had significance in the present case where the Court of Appeal was of the view that the starting point for sentencing was

properly in the region of five years and that it was difficult to see how a discount of more than 20% could have been appropriate for a guilty plea.

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