IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA469/2018
[2018] NZCA 439

BETWEEN	JOHN GARRY DAVIDOFF Appellant
AND	THE QUEEN Respondent

Hearing: 11 October 2018

Court: Kós P, Woolford and Dunningham JJ

Counsel: R L Thomson for the Appellant
M A Corlett QC for the Respondent

Judgment: 18 October 2018 at 10 am

JUDGMENT OF THE COURT

A The application to adduce fresh evidence is granted.

B The appeal against conviction is dismissed.

C The appeal against sentence is allowed. The sentence of six months' imprisonment on the charge of assault with intent to injure is quashed and a sentence of five months' imprisonment is substituted on that charge.

REASONS OF THE COURT

(Given by Woolford J)

[1] Following a trial by jury, John Garry Davidoff was found guilty of assault with intent to injure, threatening to kill and possessing a knife in a public place without reasonable excuse. On 1 August 2018, he was sentenced by Judge K J Glubb to

six months' imprisonment on the assault charge with concurrent sentences of one month's imprisonment on each of the other two charges.[1] He now appeals against conviction and sentence.

Factual background

[2] Mr Davidoff and the complainant were residents at The Station Backpackers in Auckland. Both were in the common area at around 4.00 pm on 31 May 2017. A fight erupted between the two of them. The Crown alleged that Mr Davidoff shoulder barged the complainant without warning. When the complainant confronted him, Mr Davidoff struck the complainant several times in the face. Mr Davidoff maintained that the complainant initiated the attack and that he was at all times acting in self-defence.

[3] Mr Davidoff had, in addition to the three charges on which he was found guilty, been charged with another three charges in relation to the same incident — injuring with intent to injure, assault with intent to injure and assault with a weapon. The jury, however, found him not guilty of these three charges. Those charges related to allegations Mr Davidoff punched the complainant in the face and thereby broke his jaw, gouged his eyes to break a choke hold and threw a chair at the complainant.

[4] The Judge was of the view that the jury by its verdict was either unsure who initiated the attack or, having determined that one or other of them did, concluded that Mr Davidoff's actions in relation to the charges on which he was acquitted were taken in self-defence and the force he used was reasonable.[2]

[5] The three charges of which Mr Davidoff was found guilty all occurred subsequently. Towards the end of the fight the complainant was on the ground and Mr Davidoff was standing above him. Mr Davidoff was effectively being pulled away by others and it was at that time that Mr Davidoff deliberately kicked the complainant to the back of the head. Later, having been separated from the complainant,

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1 *R v Davidoff* [2018] NZDC 15763.
2 At [3].

Mr Davidoff explicitly threatened to kill him, saying that he would eat his heart raw and how he would cut his throat and bleed him in the sink.

[6] Subsequently, Mr Davidoff was spoken to by the police, who found him to be in possession of a folding knife, which he said he had for his protection in case he got into a fight. Mr Davidoff had possession of, but did not use, the knife during the fight with the complainant.

Conviction appeal

[7] Two grounds are advanced in support of Mr Davidoff's conviction appeal. The first is inconsistency of verdicts on the basis the jury acquitted him of three charges on the basis of self-defence, but found him guilty of three other charges. The second ground relates to the admissibility of propensity evidence.

[8] As to the first ground, we are of the view that the jury could reasonably have determined that the appellant was acting in self-defence in relation to the charges upon which he was acquitted, but was no longer acting in self-defence in relation to the charges upon which he was convicted. The offending involved a physical fight between the two men, which took several turns. The verdicts are not inconsistent.

[9] The second ground of appeal against conviction arises from a ruling of the trial Judge at the outset of the trial that, while the complainant could be cross-examined about his drug use, the medical notes of a nurse who had seen the complainant two days after the assault, were not admissible on the basis of confidentiality.[3]

[10] The Judge was plainly correct that the medical notes were confidential. Mr Davidoff was, however, not disadvantaged by their non-production. His trial counsel asked the complainant about his previous convictions and drug use. The complainant acknowledged he had convictions for injuring with intent to injure and resisting police. He also acknowledged using methamphetamine previously and said that it was possible he had taken it earlier that day. This could be seen as

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3 *R v Davidoff* [2018] NZDC 4091.

supportive of Mr Davidoff's submission to the jury that the complainant initiated the fight.

[11] In all the circumstances, the two grounds of appeal against conviction are without merit. Mr Davidoff's appeal against conviction is accordingly dismissed.

Sentence appeal

[12] Mr Davidoff says that the sentence of six months' imprisonment is manifestly excessive. In support of his appeal against sentence, Mr Davidoff sought to adduce fresh evidence in the form of a report from a psychiatrist, Dr Karl Jansen. The Crown did not object and we accordingly grant the application.

[13] Although the Judge did not have Dr Jansen's report before him on sentencing, he did have a letter from a forensic court liaison nurse dated 9 January 2018. That letter stated that Mr Davidoff appeared to be fit to stand trial, but also recommended that should Mr Davidoff plead or be found guilty, a formal psychiatric pre-sentence report under ss 38(1)(c) and (d) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 be obtained to aid with sentencing suggestions. No such report was obtained.

[14] The psychiatric report from Dr Jansen is detailed and discloses myriad issues. He suggests Mr Davidoff possibly suffers from a psychotic illness such as schizophrenia or a bipolar disorder, or alternatively a mixed personality disorder with paranoid, schizotypal and narcissistic "vulnerabilities" or possibly a mild form of autistic spectrum disorder. It is clear Mr Davidoff's mental health issues are a mitigating factor relevant to the offender in terms of s 9(4) of the Sentencing Act 2002. Although the Judge said he factored into the sentencing process that Mr Davidoff displayed strong personality traits that at times made it difficult for him to liaise with others,[4] he did not know of the range of problems Mr Davidoff faces.

[15] This Court in *E (CA689/10) v R* recognised discounts between 12 and 30 per cent have been given for mental health issues operating as a mitigating factor

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4 *R v Davidoff*, above n 1, at [18].

relevant to the offender.[5] In all the circumstances, Mr Davidoff is entitled to such a discount which recognises his difficulties. The sentence of six months' imprisonment is therefore quashed and replaced by a sentence of five months' imprisonment.

Result

[16] The application to adduce fresh evidence is granted.

[17] The appeal against conviction is dismissed.

[18] The appeal against sentence is allowed. The sentence of six months' imprisonment on the charge of assault with intent to injure is quashed and a sentence of five months' imprisonment is substituted on that charge.

Solicitors:
Crown Law Office, Wellington for Respondent

5 *E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [68]–[71].