IN THE COURT OF APPEAL OF NEW ZEALAND

CA 43/85

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THE QUEEN

v

GARRY GRANT McCONNOCHIE

Coram: Richardson J
McMullin J
Sir Clifford Richmond

Hearing: 11 September 1985

Counsel: J R Billington for applicant
R B Squire for Crown

Judgment: 11 September 1985

ORAL JUDGMENT OF THE COURT DELIVERED BY RICHARDSON J

This is an application for leave to appeal against a sentence of 8 months' P.D. imprisonment imposed in the District Court at Timaru on a charge of unlawful assembly.

The circumstances of the offence are conveniently summarised in the opening remarks of the trial Judge when imposing sentence:

> " On the night of the 6th May 1984, a party was held at a house in Hobbs Street, Timaru. During the course of the evening a group of people set fire to a motor car in an adjoining car park. It appears that the owner either

> took part, or at any rate did not object and made no complaint to the Police. A Fire Service unit went to the scene and put out the fire. There was a large number of people, probably about 40-50 in the back yard of the adjoining property where the party was being held. Shortly afterwards the car was set alight again, and when Fire Service and Police personnel arrived, they were met with a barrage of verbal abuse from persons at the adjoining house, and on some occasions bottles and other missiles were thrown.
>
> Eventually the Police Officer in charge, concerned at the potential for further destruction and violence, took a Police party in and arrested all persons remaining on the property, they then at that stage apparently numbering 33. "

All 33 were charged with unlawful assembly. Twenty-nine were discharged under s 347 of the Crimes Act, there being no adequate evidence of individual participation sufficient to require them to stand trial. Of the remaining 4, one absconded, 2 were acquitted by the jury, and the applicant alone was found guilty. The sentencing Judge concluded that in finding him guilty the jury must have accepted that the applicant was one of the persons verbally abusing the Police and Fire Officers; that he was the person on the roof of a shed when the Police entered the property who invited others to resist; but that there was no evidence connecting him with the activities involving the motorcar itself; and that there was no evidence that he threw any of the bottles or other missiles at the Police and Fire Officers. Accordingly the Judge approached sentencing on the basis that the applicant's offending consisted of the verbal abuse referred to and his endeavours to stir up resistance when the Police began making arrests.

McConnochie was 23 years old at the time of the offending. He had a considerable record of previous offending, all of which had been dealt with by way of fine. He was described in the probation report as a reliable and capable worker whose leisure time appeared to be spent constructively in sporting and other activities, and the report concluded "notwithstanding his occupation he states that he would be available for periodic detention should the Court be considering that; though at his age he cannot expect the same degree of leniency that might more readily be given to youthful offenders".

The sentencing Judge considered it was marginal whether McConnochie ought to be imprisoned or whether periodic detention was appropriate, but on balance considered that periodic detention would be adequate and sentenced the applicant to 8 months' detention.

Mr Billington advanced 2 matters in support of the appeal. First that the sentence itself was manifestly excessive having regard to the nature of the offending, the culpability of the offender, and his personal circumstances. It was, he submitted, not significantly worse than a bad case of disorderly behaviour and resisting arrest and for anti-social behaviour of that kind it could be and should have been dealt with by way of a substantial fine. The second matter related to McConnochie's personal circumstances. The applicant is a seasonal worker and Mr Billington submitted that the sentence imposed would have unusually and unacceptably severe effects on his employment

opportunities as a blade shearer for part of each year, and while a short term of periodic detention would not have adversely affected that employment an 8 months' sentence would have precluded engagement in blade shearing for a large part of the then coming season. There is, too, a further complication. It transpires, but was not brought it seems to the notice of the sentencing Judge, that the applicant had arranged employment on a fishing boat beginning a few days after sentencing and which he could not take up if subject to periodic detention. The filing of the application for leave to appeal against sentence resulted in the suspension of periodic detention and the applicant is now, and has for some time been engaged in blade shearing in a remote country district, that season continuing there until January or February next.

Mr Squire for the Crown submitted that the offending was perhaps more serious than reflected in the Judge's remarks on sentencing and that in any event a sentence of periodic detention was appropriate and the term imposed not excessive.

We are not prepared to differ from the sentencing Judge's assessment as trial Judge of the circumstances of the offending and the culpability of the offender and we approach consideration of the sentence imposed in the District Court on that basis. In the circumstances which existed at the time sentence was imposed we are satisfied that the Judge was entitled to regard periodic detention as an appropriate sentence but we consider that the term actually imposed was manifestly excessive.

Eight months' periodic detention is a severe continuing restraint. It must be regarded as a very substantial sentence of its kind and it was in our view unreasonably severe interference with the seasonal employment opportunities available to McConnochie. In all the circumstances we consider it was manifestly excessive. Since then the blade shearing season has started and while in a sense McConnochie can be said to be the author of his own misfortune, looking at the position afresh today, as we must, we consider that the interests of justice will be met by the imposition of a substantial fine.

The application for leave to appeal against sentence is granted, the sentence of periodic detention is quashed and in lieu a fine of $1,000 is imposed.

Solicitors:

Clark & Mill, Timaru, for applicant.
Crown Law Office, Wellington.