17/5

IN THE COURT OF APPEAL OF NEW ZEALAND CA 421/90

NOT RECOMMENDED

RICHARD JOHN CRESER

800

v

POLICE

Coram	Casey J Hardie Boys J Gault J
Hearing	3 May 1991
Counsel	Applicant in person G J Burston for Crown
Judgment	13 May 1991

JUDGMENT OF THE COURT DELIVERED BY HARDIE BOYS J

Mr Creser applies under s 144 of the Summary Proceedings Act for special leave to appeal to this Court against the dismissal by a High Court Judge of his appeal against a sentence of 3 months periodic detention imposed on him in the Wellington District Court for non-payment of outstanding fines and other sums totalling $1,907.

The fines date back to 5 August 1987 when in the District Court at Kaikohe Mr Creser was fined $250 and costs for reckless driving. By 3 December 1987 he had paid $80. Enforcement action was commenced, resulting in further

costs. On 28 June 1988 Mr Creser paid $5. He has paid no more. At some stage, he informed us, he approached the Registrar and it was arranged that he could pay by instalments. Then he found that he could not manage the instalments, as he was out of work and was being threatened with bankruptcy. He told the Registrar, but the latter made it clear that he would still have to pay. However nothing more happened and eventually, he told us, he forgot all about it.

Then on 12 April 1990 in the District Court at Wellington Mr Creser was fined a total of $305 and ordered to pay reparation of $1,207 on two charges under s 29 of the Summary Offences Act 1981 of being found on premises without reasonable excuse. He had originally been charged with burglary and entering with intent, but the charges were amended. He has paid nothing on account of these penalties. His reason, at least initially, was, he told us, that the formal notification sent to him by the Court showed the wrong date of conviction, and the wrong charges: the amendments had not been carried through. He filed an appeal, to have the record put in order. But on 14 May the Registrar returned his notice of appeal as unnecessary and stated that the Court's records had been amended, that the computer record was being amended, and that a copy would be sent to him when it was. He was told that enforcement action would be stopped until 31 May. That day came and

went and Mr Creser paid nothing. The Court however did not inform him that the corrections had been made until 8 August.

At this point it is pertinent to record, as we were informed by Mr Burston, that a small staff at the Wellington District Court's fines office was responsible for collecting a huge sum in outstanding fines and so some error and delay is understandable. And perhaps to help remedy this situation a 1987 amendment to the Summary Proceedings Act inserted a new s 84 which, while requiring notice of fine to be given, states that failure to comply shall not of itself invalidate any further proceeding; and imposes on a defendant an obligation to ascertain the Court's decision and his responsibilities under it. Thus the Court's error and delay did not excuse Mr Creser from paying the fines and reparation.

Consequently, on 2 July Mr Creser was advised that a warrant for his arrest had been issued. He went to see the Registrar. He offered $10 a week. He was too late: s 86(2) requires an application for extension of time for payment to be made within 28 days. In any event, the Registrar could not accept such a low offer, for s 86(4) requires a fine to be paid in full within a year. In consequence, on 18 September the matter was referred to a District Court Judge pursuant to s 88. Mr Creser completed the prescribed statement of means showing that he had very

little surplus money with which to pay what was outstanding, even over a considerable period.

Section 88(3) gives the Judge the choice of a variety of sanctions ranging from imprisonment to remission of the fine. The Judge considered periodic detention appropriate. This was the penalty imposed on the majority of the 40 or so persons who appeared before him that day. It appears that a number requested a community service sentence and Mr Creser informed us that some, but by no means all, were accommodated. Mr Creser, in response he told us to an invitation from the Judge, requested such a sentence himself. The Judge declined. In a memorandum the Judge prepared later, he gave several reasons. He did not form a favourable impression of Mr Creser, and of his request for community service. And he was much influenced by the attitude Mr Creser had shown to his responsibilities, and the nature of the offences for which he had been convicted earlier that year.

In appealing to the High Court against the sentence, Mr Creser advanced four grounds: that the Court refused to hear him on his reason for nonpayment; that periodic detention is an appropriate punishment for a wilful refusal rather than an inability to pay; that the Judge refused a request for a community service assessment and "clearly showed his bias towards the appellant because of his standard of dress" (apparently better than the Judge was

accustomed to seeing); and that the Justice Department was responsible for incorrectly recording the convictions and notice of fines that had led to the delay and had further embarrassed him by negligently misrepresenting that he had a conviction for burglary. By way of explanation of the first, Mr Creser told us that when he began to produce the correspondence from the Registrar about the errors in the record, the Judge declined to hear him further.

The appeal came before a High Court Judge on 24 October 1990, when it was adjourned to 21 November so that a community service assessment could be obtained. The report was favourable and a placement was arranged.

On 21 November the appeal came before a different High Court Judge. His oral judgment dealt as well with two other similar appeals. He disposed of Mr Creser's appeal in one paragraph. He made no reference to the community service assessment. He simply noted the memorandum provided by the District Court Judge, and observed that it covered all the matters raised by Mr Creser in his submissions. He further noted the District Court Judge's observation that "a defaulting citizen is not in any way permitted to choose what penalties he should suffer for failing to take a responsible attitude to his obligations". He went on to say that he had no difficulty in reaching the conclusion "that the tariff was appropriate under the circumstances and that it could not be said that the penalties imposed were

inconsistent, nor could it be said that they were excessive or inappropriate".

In a case such as the present, an appeal to this Court lies only where what is involved is a question of law which by reason of its general or public importance or for any other reason ought to be submitted to this Court for decision. The questions of law Mr Creser formulated were directed to two matters: that periodic detention may be imposed where there is a clear refusal to pay a fine, not where the defendant is unable to pay it; and that the District Court Judge, and the second High Court Judge, did not give him a full and fair hearing.

As to the first of these matters, the statute does not define or limit the circumstances in which the various courses open to a District Court Judge are to be adopted. In any event, this is not a case where there was a true inability to pay. Mr Creser really made very little effort at all. Moreover, he chose to rely on an obvious error to avoid his clear responsibilities. In those circumstances, and having regard to the nature of the original offences, we have no doubt that the sentence was entirely appropriate.

As to the second matter, every person appearing before a Court must of course be given proper opportunity to state his case. But the Court is entitled to intervene so that the right does not become a licence to waste time. We

think it likely that the District Court Judge saw no need to read the correspondence, as Mr Creser had explained what it was about, and it was really irrelevant; for as we have pointed out, the error provided no excuse for non-payment. So far as the second hearing in the High Court is concerned, we have no reason to think that the Judge did not consider all the material that was before him. He might perhaps have explained his reasons in fuller detail; and it is no doubt the case that the District Court Judge's memorandum did not cover all the matters Mr Creser raised on his appeal. However that may be, we are satisfied that the only proper course was for the appeal to be dismissed, for the District Court Judge was plainly right in the course he took. Thus if there were shortcomings in the way in which the matter was dealt with - and we are far from saying there were - no injustice has been done.

In these circumstances leave to appeal is refused. In the normal course we would make an order for costs against Mr Creser, but on this occasion that seems pointless in his particular circumstances.

Mr Creser is to make his first report to the Periodic Detention Centre at 6 pm on Friday 17 May 1991.

Solicitors

Crown Solicitor, Wellington