IN THE COURT OF APPEAL OF NEW ZEALAND 13/9 CA 220/91

HIGH PRIORITY

1744

BETWEEN ALLAN JAMES PARKHILL

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Coram Cooke P
Hardie Boys J
Holland J

Hearing 27 August 1991

Counsel J G Fogarty, Q.C. and W Rosenberg for Applicant
J C Pike for Crown

Judgment 12 September 1991

JUDGMENT OF THE COURT DELIVERED BY HARDIE BOYS J

On charges of driving while disqualified and driving with excess breath alcohol, Allan James Parkhill was sentenced in the District Court at Christchurch on 8 May 1991 to concurrent terms of 6 and 3 months imprisonment respectively; terms of disqualification were also imposed. It was his fifth offence of driving while disqualified, and his fifth drink-driving offence. Nonetheless he appealed to the High Court against the sentence, and two grounds were advanced on his behalf. The first was that imprisonment was inappropriate: there should have been a

non-custodial sentence. The High Court Judge very properly rejected that contention, holding the sentence to be entirely appropriate. That aspect of the matter is not before this Court. Indeed Parkhill has now served the sentence.

The second ground of appeal was that by reason of s 10 of the Criminal Justice Act 1954 the District Court Judge did not have jurisdiction to impose a sentence of imprisonment. The High Court Judge rejected this ground too, and so the appeal was dismissed. Parkhill then sought leave to appeal to this Court under s 144 of the Summary Proceedings Act 1957 in respect of the second ground, but the High Court Judge refused to grant leave. Application for special leave was therefore made to this Court. Having heard the application, we reserved decision upon it, and received submissions on the question of law which the applicant would have us consider, namely:

> For the purposes of the Criminal Justice Act 1985, s 10(3)(b) must a Defendant be deemed capable of engaging Counsel privately following the refusal of legal aid, whatever the reality of the matter may be.

A difficulty in the case is that the relevant factual material is not fully before us. What is clear is that when Parkhill appeared in the District Court on 20 March 1991 on an unrelated assault charge the two driving charges were also called; there had earlier been problems with

serving the summonses. Parkhill was represented by a solicitor on the assault charge but the solicitor had no prior instructions on the driving charges and Parkhill did not then give him any. He pleaded not guilty to those charges, and was remanded to 23 April. He applied for offenders' legal aid. The Registrar of the District Court refused a grant. In the meantime the solicitor had discussed the charges with Parkhill and had recommended guilty pleas. Parkhill accepted the advice and the solicitor on two occasions spoke to officers of the Ministry of Transport to inform them. The solicitor however did not appear in Court on 23 April. The reason, according to Mr Parkhill's instructions to Mr Rosenberg, who was counsel in the High Court, was that Parkhill could not afford to pay the solicitor. Parkhill therefore appeared without counsel. He pleaded guilty, was remanded for sentence, and on 8 May was sentenced by another Judge. There is no record of what inquiries, if any, either Judge made before dealing with the case.

Section 10 of the Summary Proceedings Act is as follows:

> 10. <u>No full-time custodial sentence to be imposed without opportunity for legal representation</u> -
>
> (1) No court shall impose a full-time custodial sentence on an offender who has not been legally represented at the stage of the proceedings at which the offender was at risk of conviction, unless the court is satisfied that the offender, -

(a) Having been informed of his or her rights relating to legal representation, including, where appropriate, the right to apply for legal aid under the Offenders Legal Aid Act 1954; and

(b) Having fully understood those rights; and

(c) Having had the opportunity to exercise those rights, -

has refused or failed to do so, or engaged counsel but subsequently dismissed him or her.

(2) Where, on any appeal against sentence, a court finds that any sentence was imposed in contravention of subsection (1) of this section, the court shall either -

(a) Quash the sentence imposed and impose in substitution for it such other lawful sentence as the court thinks ought to have been imposed; or

(b) Quash the conviction and direct a new hearing or trial, or make such other order as justice requires.

(3) For the purposes of this section, an offender refuses or fails to exercise his or her rights relating to legal representation where the offender -

(a) Refuses or fails to apply for legal aid under the Offenders Legal Aid Act 1954 or applies for such aid unsuccessfully; and

(b) Refuses or fails to engage counsel by other means.

Essentially what it is desired to put in issue in this Court is the meaning of the word "fails" in subs (3)(b). It is a word which may connote default: a blameworthy omission to take an available opportunity; or it may be used in a neutral sense: "does not succeed" (see Air New Zealand v Johnston [1989] 3 NZLR 641,645).

The High Court Judge adopted the latter meaning. He said:

> ... in terms of s 10(3) the Appellant must be deemed to have refused or failed to exercise his rights relating to legal representation because he applied for legal aid unsuccessfully and failed to engage counsel by other means. There can be no doubt that the Appellant applied for legal aid unsuccessfully. Mr Rosenberg submitted that he had neither refused nor failed to engage counsel by other means. I accept that it is not a case of refusal to engage counsel by other means but in my view it must be regarded as a case where the Appellant failed to engage counsel by other means.

Mr Fogarty submitted that the first of the meanings is the proper one, so that a defendant who is unable to obtain counsel cannot be said to have failed to engage one. This construction, he argued, is in accordance with the principle that legislation protecting defendants in criminal proceedings should not be restrictively construed (see for example R v Long 1 NZLR 169, 174). He also referred to the provisions of s 6 of the New Zealand Bill of Rights Act 1990, and New Zealand's international obligations under article 14(3)(a) of the International Covenant on Civil and Political Rights (1978), which in virtually identical terms provide for a person charged with an offence to receive legal assistance without cost if he has insufficient means to pay for it himself and if the interests of justice so require. However the argument was not based on these provisions, although counsel suggested that s 10, being a legislative response to the Covenant, should on that account too be construed liberally.

Rather, it was on the principle illustrated by R v Long that he primarily relied, but he found support in the words of subs (1)(c) "having had the opportunity to exercise those rights"; which meant, he submitted, a real opportunity.

The argument of course means that a person who cannot afford to engage a solicitor must be granted legal aid before he can be sentenced to imprisonment, even where, as perhaps was the case here, aid was refused on the merits of the case. Subsection (1) of s 10 by the words "at the stage of the proceedings at which the offender was at risk of conviction" makes it clear that the time at which the offender must be represented is when he pleads guilty or stands trial, not when he is sentenced. Thus, Mr Fogarty submitted, a Judge must always, at that earlier time, inquire into the reasons why a defendant is not represented, and if it is because he has been refused legal aid and either has been unable to afford counsel, or for some other reason, not his fault, has been unable to obtain counsel, then the Judge must either grant aid or accept that a sentence of imprisonment cannot later be imposed.

Mr Fogarty did not accept that his argument involved any inconsistency with the scheme of the Offenders Legal Aid Act 1954, which provides for a single consideration of an application, subject only to review by a Judge when the decision is made by a Registrar (s 2A) or by the High Court

if it is made by a District Court Judge (as in Wahrlich v Bate (1989) 5 CRNZ 346). He pointed to s 2(1), which authorises a grant if in the opinion of the Registrar or Judge it is desirable in the interests of justice. This he submitted would entitle a Judge to grant aid previously refused in order to satisfy s 10 of the Criminal Justice Act. Further, he contended that as a matter of principle the availability of representation for the purpose of s 10 must be the responsibility of the Judge hearing the case and cannot rest with a Registrar acting administratively on a legal aid application.

The application for special leave is thus brought as a matter of principle. Indeed, Mr Fogarty acknowledged that it is of no practical significance for the applicant himself, now that he has served his sentence. Rather, he and Mr Rosenberg are pursuing the matter in a de bono capacity. While the point may be of importance, this Court does not undertake an advisory role, and an application for special leave must be justified on the circumstances of the particular case. This application must fail for three reasons. The first is that the issue has now become academic. The second is the insufficiency of the factual material before us as to matters such as to such matters as the reason for the refusal of legal aid, the steps the applicant took to obtain counsel, the inquiries the District Court Judge made before accepting his guilty plea: all matters that may be relevant to

whether there was compliance with s 10. The third reason is one that was dealt with at some length by the High Court Judge, and upon which we are unable to agree with him. This is as to whether the applicant was in fact "legally represented at the stage of the proceedings at which [he] was at risk of conviction".

The philosophy expressed in s 10 first appeared as s 13A of the Criminal Justice Act 1954, when inserted by s 13 of the Amendment Act of 1975. The wording was rather different, the relevant difference for present purposes being that the general prohibition contained in subs (1) applied to "any person who has not been legally represented in the Court"; and subs (2) gave a definition of "legal representation" ("to be legally represented" having a corresponding meaning) which referred again to assistance "in Court". It was this provision that was the subject of the appeal in R v Long, where it was held that what was required was an appearance in the proceedings by counsel or a solicitor, and that it was not enough for the defendant to be seen by a duty solicitor who then acted only as an intermediary between him and the Court, but did not purport to represent him.

Section 10 does not define "legally represented" and the earlier references to representation and assistance in Court have been omitted. We cannot with respect agree with Tipping J that these changes simply reflect a more

economical drafting style. The omission in subs (1) of the words "in the Court" must be treated as recognition that there may be representation, extending beyond mere advice or assistance, out of Court. It may well be, as Mr Pike suggested, that the intention was to allow for the duty solicitor situation. Certainly it may properly be assumed that the change was prompted by the attention drawn to the wide effect of s 13A demonstrated by the decision in R v Long.

Legal representation is not limited to appearances by counsel or a solicitor in Court. In the present case, the applicant was not only advised by his solicitor in relation to the driving charges, but his solicitor represented him in his communications with the Ministry of Transport. Thus the requirements of s 10(1) were in fact fulfilled.

For these reasons we decline to grant special leave to appeal. However out of deference to the forceful argument advanced by Mr Fogarty, we add some observations as to the meaning and effect of s 10. We accept that the section requires a Judge at the appropriate time to make inquiry of an unrepresented defendant who may be liable to imprisonment in order to be satisfied of the matters referred to in subs (1). If as a result he considers that legal aid ought to be granted, then he clearly has the power to grant it, and where there has been a plea of guilty without legal representation it may be necessary to

vacate the plea and have the defendant re-charged. However we do not accept that he is obliged to grant aid as a pre-condition of a later sentence of imprisonment. The granting or refusal of aid is a distinct matter, to be dealt with in accordance with the criteria in the Offenders Legal Aid Act. Once that is recognised, the word "fails" must necessarily be understood in its objective sense of "does not succeed". If the defendant does not obtain legal aid, and does not obtain the services of counsel, then he may be dealt with notwithstanding that he is unrepresented in Court. Of course he must have had a reasonable opportunity to obtain counsel, as Mr Pike readily acknowledged, but in assessing that his financial circumstances will not be relevant: they will already have been taken into account on his legal aid application.

While this approach leads to the same conclusion that Tipping J reached on this part of the case, we cannot with respect accept his summation of s 10(3) contained in the passage from his judgment quoted earlier. It is not that the subsection deems a person to be capable of engaging counsel when the reality is otherwise. Rather it enables the Court to impose a sentence of imprisonment on an unrepresented person where after due opportunity he has not succeeded in obtaining either legal aid or the services of counsel.

The application is dismissed.

Solicitors

W Rosenberg, Christchurch, for Appellant
Crown Law Office, Wellington