IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.100/81

BETWEEN RONALD LEWIS GAY

APPELLANT

A N D POLICE

RESPONDENT

Hearing : 16 February 1981

Counsel : Satyanand for Appellant
Ruffin for Respondent

Judgment: 17 February 1981

JUDGMENT OF PRICHARD, J.

On 12 January 1981, in the District Court at Auckland, the appellant pleaded guilty to two charges of unlawful possession under the Arms Act, 1958 - one charge related to a Biretta pistol (s.7A) and one to ammunition (s.16). He was fined $200 on the first charge, $40 on the second and he was ordered to pay costs of $10 on each.

The maximum penalties provided by s.7A of the Arms Act, 1958, are 3 years imprisonment or a fine of $1,000 or both: and by s.16, 3 months imprisonment or a fine of $200 or both.

It was accepted by the learned District Court Judge that the pistol had simply been "tucked away in a drawer" for years and that the appellant had no "ominous" purpose in having it in his possession. There was no evidence that he had ever fired the pistol, which had no magazine. But it could be fired without the magazine and the ammunition was apparently an assortment, some of which could be used in the pistol.

The appellant is the elected Chairman of the Waiheke County Council, a position to which he was elected as recently as November 1980. Section 97 of the Local Government Act, 1974, as amended by the Local Government Amendment (No.3) Act, 1977, provides that if a person is convicted of any offence punishable by imprisonment for a term of two years or more while holding office as a member of a territorial authority - which includes a County Council his office shall be deemed to be vacated.

A conviction under s.7A of the Crimes Act, 1958, therefore means that the appellant's office as Chairman of the Waiheke County Council is vacated.

It was submitted in the Court below - and it is now submitted in this Court - that in the circumstances it would be appropriate to invoke s.42 of the Criminal Justice Act and so to avoid the consequences of s.97 of the Local Government Act, 1974.

I have no doubt that, notwithstanding a plea of guilty, the Court has jurisdiction to review the exercise of the discretion to discharge without conviction, as was held in Cotter v. Gilmour (1958) N.Z.L.R. 80. The consequences of entering a conviction are matters to be taken into account in determining whether the discretion ought to be exercised.

In Fisheries Inspector v. Turner (1978) 2 N.Z.L.R. 233, Richardson, J. said (at p.241 of the report):-

> "It would be a contradiction in terms for a Court to state that it was imposing what in the exercise of its discretion it determined was the appropriate sentence in all the circumstances, if it refused to take into account a certain penalty which was a statutory consequence of conviction. If it did so its

> sentence would be inappropriate or excessive, depending on the nature and significance of the non-judicial penalty."

The compulsory vacation of a public office may not, in a strict sense, be a penalty so much as a protection for the public - but it clearly is a fact to be taken into account when considering sentencing.

In the present case, the District Court Judge gave full recognition to the need to consider the consequences of conviction. When referring to the effect of s.97 of the Local Government Act, he said:-

> "That is, of course, a serious consequence which I must take into account and which I do consider in your favour."

Nevertheless, he concluded that in view of the serious light in which the offence created by s.7A is regarded by the legislature and the higher duty of a person of responsibility in the community to observe the provisions of the law, he should not exercise the discretion under s.42 of the Criminal Justice Act in favour of the appellant.

The manner in which an appellate Court should approach the review of a discretion which has been judicially exercised is well established. Roper, J. in Witte v. Noxious Weeds Inspector (1974) 2 N.Z.L.R. 367 (at pp.370, 371) said:-

> "Section 42 gives the Court a discretion to discharge a defendant without conviction after enquiry into the circumstances of a case, unles of course a minimum penalty is expressly provided for, which is not the case here. Such a discharge is deemed to be an acquittal. The discretion must be exercised judicially and is open to review but that does not mean that I am at liberty merely to substitute my own exercise of discretion for that already exercis ed by the learned Magistrate. I can only interfere if I reach the clear conclusion that

> there has been a wrongful exercise of the discretion - for example by giving insufficient weight to relevant considerations or by giving weight to considerations which are irrelevant."

The dictum was, of course, based on the well known observation of Viscount Simon in Charles Osenton & Co. v. Johnston (1942) A.C. 130; (1941) 2 All.E.R. 245 cited by McGregor, J. in Halligan v. Police (1955) N.Z.L.R. 1185 and reading as follows:-

> "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the Judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant consideratio such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

In Halligan v. Police (supra cit.), McGregor, J. felt "more free" to consider the matter de novo as it appeare that the Court below had not been asked to consider dismissal under s.42. That is not the case here. The question of dismissal under s.42 was fully canvassed, as was the effect of a conviction on the appellant's office. And these matters were given careful consideration by the District Court Judge.

Mr Satyanand, for the appellant, urged upon me that there was at least one relevant matter which was not given sufficient weight by the District Court Judge. That is that the offence, being in essence a failure to register the pistol, was a sin of omission rather than commission. He referred in this context to the fact that the District Court Judge had apparently regarded as a parallel another case in

which a local Government officer had committed the offence of trespass. What the District Court Judge said about this was as follows:-

> "I know of two other cases involving members of City Councils who were charged with offences carrying a term of imprisonment of two years or more and which were less serious breaches of the law."

It must be remembered that this pistol was a dangerous weapon, was capable of being used and there was in the appellant's possession ammunition which could be fired from it. I am not satisfied that its illegal possession ought to be regarded as a mere omission.

The other matter (referred to by the District Court Judge as relevant) was the fact that, although a conviction would result in vacation of office, it would not preclude the appellant from re-election at an ensuing by-election. He said, in this regard:-

> "... but the public under that Act are entitled to have their say and to determine the matter afresh as to the holding of public office."

Mr Satyanand referred to the possible attitude of the public towards the appellant's offences in the event of a by-election as probably irrelevant to the question of sentence - and this must be correct if the District Court Judge meant to imply that the Court would abdicate its responsibility to determine the ultimate penalty by leaving it to a decision to be made by the electors of the Waiheke County Council. But the District Court Judge was, I think, merely pointing out that, from the appellant's point of view, the right to seek re-election does go to ameliorate somewhat the consequences of a conviction.

I have given earnest consideration to the submissions advanced by Mr Satyanand but I am not persuaded to the clear conclusion that the District Court Judge wrongly exercised his judicial discretion by either giving no weight or insufficient weight to relevant considerations or, conversely, by giving weight to irrelevant considerations If I were to interfere, I would merely be substituting one exercise of discretion for that already exercised by the learned District Court Judge - and this I am not at liberty to do.

The appeal is accordingly dismissed.

17 February 1981.

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JUDGMENT OF PRICHARD, J.
