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Special
Consideration

BETWEEN THE POLICE

Appellant

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A N D HARRY BRIN SWEPSON

Respondent

Hearing: February 11, 1981

Counsel: Mr Haines for Appellant
No appearance for Respondent

Judgment: 19 FEB 1981

JUDGMENT OF HOLLAND, J.

Harry Brin Swepson appeared in the District Court at Otahuhu on 6 November, 1980 for sentence on 44 charges of false pretences, 3 charges of obtaining credit by fraud, 4 charges of using a document for pecuniary advantage and one of theft by failing to account. This was his sixteenth appearance before Courts for offences of which he had either pleaded guilty or had been convicted, over a period of 26 years. His last conviction, however, was on 8 December, 1972 when he was sentenced to three years imprisonment for burglary.

On the matters before the District Court

he was sentenced to a term of non-residential periodic detention of nine months.

On 28 November, 1980 the Solicitor General gave his consent to an appeal by the Police against the sentence and notice of appeal to that effect was filed in the District Court at Otahuhu on 3 December, 1980. The relevant papers were received in this Court on 6 January, 1981 and the appeal was set down for hearing on 11 February, 1981.

When the Respondent's name was called there was no appearance. Viva voce evidence was then given before me to the effect that the Police had been unable to serve the Respondent either with the notice of appeal or with notice of the fixture for 11 February. I am satisfied from the evidence given before me that the Respondent knew of the appeal and also knew that the appeal was to be heard on 11 February. I am further satisfied that he had gone into hiding for the purpose of preventing the Police serving him with the notice of appeal or notice of the hearing.

Although in the case of an offender sentenced to imprisonment the notice of appeal does not suspend the sentence, s.124(3)A of the Summary Proceedings Act, 1957 provides that:-

"Where under any determination in respect of which either party appeals the Court has sentenced the offender to periodic detention, the sentence shall cease to run from the date the notice of appeal is filed."

Similar provisions are contained for the suspension for a period of probation and the stay of execution of any monetary penalty or other type of order.

Section 137A of the Summary Proceedings Act, 1957 provides that the sentence of periodic detention shall be resumed as from the date the appeal is determined if the conviction is not set aside and the sentence is not quashed or the appeal is not prosecuted or is dismissed for non-prosecution.

Accordingly, in the case of this Respondent, so long as the appeal by the Solicitor General is current, the sentence on the Respondent is suspended.

The right of an Informant to appeal against sentence is a relatively new provision having been added to the Summary Proceedings Act in 1969. It may well be that when such a right of appeal was given, insufficient attention was given to the possibility of a convicted person being at large and either avoiding service or, even having been served with a notice of appeal, failing to appear at the hearing of the appeal.

It may well be competent for a Court to consider submissions that a sentence imposed on an offender should be increased in the absence of that offender, if the offender has been served and notified of the date and declines to appear. It was submitted to me by Counsel for the Crown, that this Court had jurisdiction to consider the appeal on the merits and to increase the sentence imposed on the Respondent in his absence even where he had not been served with the notice of appeal and where he was not present. With respect to the argument of Counsel for the Crown, I do not consider this jurisdictional question but indicate that in this case I would not consider increasing a sentence of a convicted person when it was shown that he had not been served with a notice of appeal and there

was no evidence that he had been notified either by the Court or the Informant of the date of hearing.

The Summary Proceedings Act in its original form provided only for appeals against sentence by a Defendant and, of course, if the Defendant did not appear on the hearing of such an appeal, there was no difficulty then by way of disposing of the appeal by dismissing it. However, s.107 of the Summary Proceedings Act, 1957 did provide for an appeal by way of Case Stated on a point of law by the Informant and it may not be inconceivable that a Defendant who had been acquitted by the District Court, might consider it expedient to avoid service of proceedings brought by the Crown rendering him liable to conviction.

The problem that arises is, what is the Court to do on an appeal brought by the Crown where the Respondent is not present and has not been served?

There can be no question but that it is desirable in the interests of justice that an appeal brought by the Crown seeking to vary a final decision of a Court to the detriment of an individual should be heard in the Appellate Court at the earliest practicable time. I have previously dismissed an appeal brought against sentence by the Crown on the grounds that the delay between the imposition of the sentence and the hearing of the appeal rendered it unconscionable for the sentence to be varied.

It may well be that some new form of notice of appeal to be given by the Crown should be provided by an amendment to the Summary Proceedings Regulations, 1958 and that the High Court should grant a date for hearing for the notice of

appeal at the time the notice of appeal reaches the High Court, and accordingly when the notice of appeal is served on the Respondent, it will notify the Respondent of the time and place where the appeal is to be heard.

It may also be necessary to make specific provision for the issue of a warrant for a Respondent to such an appeal where it is shown that service in the ordinary course of events is impracticable. Such, however, is not the situation at present, but I merely record this because in my view there is need for the matter to be considered by the appropriate authorities.

Section 121 of the Summary Proceedings Act, 1957 provides the procedure and powers of this Court on the hearing of a general appeal. It is clear that an appeal by the Crown against sentence is a general appeal. Section 121(6) provides:-

"In any case the High Court may exercise any power that the Court whose decision is appealed against might have exercised."

It was first urged on me by Counsel for the Crown that this Court had an inherent jurisdiction to control criminal proceedings in inferior Courts and that pursuant to that inherent jurisdiction, this Court had the power to issue a warrant for the arrest of the Respondent. He referred me to the decision of the Court of Appeal in Gill v. Fulumua given on 1st March, 1978 in C.A.19/78, and I accept that there is such a jurisdiction. However, it must be borne in mind that the Summary Proceedings Act, 1957 is a code for the conduct of criminal proceedings by an inferior Court which has no inherent jurisdiction. Although, if necessary, I should be willing to exercise the inherent

jurisdiction of the Court, it seemed to me appropriate first to examine the code to ascertain whether there is jurisdiction under that Code.

Section 19 of the Summary Proceedings Act, 1957 provides that when an Information has been laid a District Court Judge may, if he thinks fit and whether or not a summons has been issued or served, issue a warrant in the prescribed form to arrest the Defendant and bring him before a Court. By virtue of the provisions of s.121(6) of the Act such a power is vested in the High Court after a general appeal has been commenced.

The provisions of s.124(3A) of the Act providing for the term of the sentence of periodic detention to cease on the day notice of appeal is filed must have the effect that the Respondent is in the same position as a person who has been convicted and not sentenced.

I am accordingly satisfied that the Informations laid against this Respondent are not spent because although the Respondent has been convicted, there is at this stage no sentence in respect of those convictions. The evidence satisfies me that the Respondent is in hiding and justice requires him to be brought before the Court to enable the Court to deal properly with the appeal brought by the Crown.

I accordingly direct that a warrant be issued pursuant to s.19(c) of the Summary Proceedings Act, 1957 in the following form, which is as close as practicable to Form 5 in the Summary Proceedings Regulations, 1958.

"To every Constable:

On the 19th day of September, 1980, an Information was laid that Harry Brin Swepson of 49 Amaru Road, Onehunga, unemployed cleaner, (hereinafter called "the Defendant")

at

on

(here set out the alleged offence in Indictment No. CR.0048049676)

And Whereas the said Harry Brin Swepson was convicted of such offence on the 23rd day of October, 1980, and on the 6th day of November, 1980 sentenced to nine months non-residential periodic detention, And Whereas the Informant with the consent of the Solicitor General has given notice of appeal to the High Court against such sentence And Whereas the High Court is of the opinion that there are grounds for the issue of a warrant I DIRECT YOU TO ARREST THE DEFENDANT and bring him before the High Court at Auckland as soon as possible to answer to the Information and the said appeal.

Dated this day of 1981

Registrar"

a d Holland J