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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M 176/84

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BETWEEN PAUL KEPA

Appellant

A N D POLICE

Respondent

Hearing: 21 September 1984

Counsel: Mrs C.J. Rushton for the appellant
L.H. Moore for the respondent

Judgment: Delivered 28 SEP 1984

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

This is an appeal against sentence only. The appellant, Paul Kepa, has appealed against the sentences imposed upon him in the District Court at Tauranga on 17 May 1984 of 12 months imprisonment on a charge of escaping from custody and another of three months imprisonment for resisting a constable in the execution of his duty. The matter has a somewhat unusual history which it is necessary to recount.

On the night of Friday, 16 December 1983 the appellant was drinking at the Te Teko Tavern. He was spoken to by the manager and requested to leave but refused to do so. The police were called and an ugly altercation ensued, in the course of which the appellant violently assaulted a constable whilst resisting arrest. He later escaped from the custody of the constable. Other police officers were summoned and

eventually the appellant was again arrested but not before he had again violently assaulted the constable. On 22 February 1984 he was sentenced in the District Court at Whakatane by Judge Wilson to six months periodic detention on the charges of escaping from custody and resisting a constable in the execution of his duty. I was told by Mr Moore that in addition there were a number of other charges, such as assault with intent to injure, in respect of which the appellant was required to enter into a bond to keep the peace, but no record of those charges appears in the papers relating to the appeal before me. On 16 April 1984, that is nearly two months after Judge Wilson imposed the six month periodic detention sentence, the Warden of the Periodic Detention Work Centre at Whakatane, at which the appellant was required to carry out his sentence, applied under the provisions of s 22C of the Criminal Justice Amendment Act 1962 to the District Court at Whakatane for another sentence to be substituted for the sentence of periodic detention. The relevant parts of the section read as follows:

"22C(1) If a person serving a term of periodic detention appears to the Warden of the work centre at which the person is required to report to be medically unfit to undergo or to continue to undergo the sentence of periodic detention, the Warden may arrange for the person to be examined by a medical practitioner.

(2) If, from the medical practitioner's report, it appears to the Warden that the person is unfit to undergo or to continue to undergo periodic detention, the Warden may apply to

> the Court to substitute another sentence for the sentence of periodic detention."

It is necessary, in the light of this section, to refer to the appellant's medical history. He has a manic depressive psychosis. He was first admitted to the Whakatane Hospital Psychiatric Unit in 1978 and since then has had many periods of both in-patient and out-patient treatment. He is, with the psychosis from which he suffers, subject to manic upswings and depressive downswings of behaviour but in a report made in December 1983 for the purposes of the hearing before Judge Wilson the psychiatrist responsible for the appellant stated that his condition had then been stable for some five months by means of a particular medication, lithium carbonate, and that in the psychiatrist's opinion the appellant's psychiatric condition was not responsible for his conduct the subject of the charges. Further, he had no doubt that it was the alcohol that the appellant had taken that was responsible and expressed the view that the effect of the alcohol would have been exacerbated to some extent by the lithium carbonate, though he added that the appellant had been advised of and was fully aware of the position. However, on 12 April 1984 the psychiatrist made a report to the Warden of the Periodic Detention Work Centre in which he said that since about March the appellant had become increasingly lacking in co-operation with his treatment, was not taking his medication and had reverted to a state of insightless hypomania. He expressed the view that the appellant was quite unsuitable for periodic

detention because of his changed mental state and that he required institution control to ensure that he took his medication regularly.

When on the Warden's application he imposed the substituted sentences of imprisonment on 17 May, Judge Wilson referred specifically to what had been put to him by the appellant's counsel at the original sentencing. He said that it had been represented to him that the appellant had certain medical difficulties, which, in the light of the psychiatric report to which I have already made reference, was correct enough, and that his family were prepared to stand behind him and to help him. On the strength of the appellant's medical condition, and with the assistance and encouragement of his family being available to him, the Judge said he decided to deal with the matter by way of a sentence of periodic detention. But now, said the judge, the appellant had let his family down by not taking his medication and, he added, the family had let the appellant down by leaving and going to Wellington, so indicating they were not carrying out their responsibilities. He concluded his comments by saying that he proposed to re-sentence the appellant on the charge of assaulting the constable and he then imposed the sentence of 12 months imprisonment. I observe in passing that in the press of business with which he had no doubt to deal that morning the judge had overlooked the fact that the appellant was not before him for re-sentencing on a charge of assaulting the constable but of escaping and resisting arrest.

Mrs Rushton in her submissions emphasised the appellant's psychiatric condition and the disadvantage the judge was under in not having before him a probation report in which alternatives that might have been open to the court could have been discussed. He submitted that a year's imprisonment was both inappropriate and excessive in the circumstances. She pointed out that so far the appellant has already served three months of the periodic detention and four months imprisonment. I raised with Mr Moore what appeared to me to be a somewhat surprising aspect of the sentence. Section 22C of the Criminal Justice Amendment Act 1962, set out earlier in this judgment, provides that if it appears from the medical practitioner's report that the person concerned is unfit to undergo or to continue to undergo periodic detention the Warden may apply to the Court to substitute another sentence. That was what was done here and it followed that on the ground that the appellant was unfit to continue to undergo the sentence of periodic detention he was re-sentenced to a term of imprisonment of double the length of the original term of periodic detention. Mr Moore, in dealing with this point, accepted that it appeared somewhat surprising but submitted that since the original substratum for the judge's first sentence of periodic detention had disappeared, owing to the appellant's own conduct and that of his family, the sentence imposed was no doubt that which the judge regarded as appropriate for the original offence. If that were the judge's view, Mr Moore urged, he would have been entirely justified, though Mr Moore accepted that it might have

been more in keeping with the circumstances if the 12 months sentence had been for the resisting of the constable and the three months for the escaping.

Had the original sentence been 12 months imprisonment and been imposed for the offence of assault with intent to injure or resisting the constable in the execution of his duty, it might well have been entirely appropriate and in no way excessive, though without seeing a probation report it is not possible to be definite. However, it was not; the original sentence was six months periodic detention. In my view it was not appropriate at the re-sentencing to impose a sentence of 12 months imprisonment because it does not seem just, on the grounds that the appellant is no longer medically fit to continue to undergo the periodic detention, to substitute for the periodic detention a term of imprisonment of twice the length. In my view, speaking generally, a sentence substituted for an original sentence of periodic detention on the grounds of the person's medical unfitness to carry out the sentence should not be of obviously greater severity than the original sentence, lest it appear that a person is receiving a heavier punishment than he otherwise would have received merely because of a medical infirmity. I say speaking generally because there may be circumstances in which the medical condition is brought about by culpable conduct on the part of the offender and so may be relevant to the nature and extent of the substituted sentence. This is to some extent such a case, for the

appellant seems to have deliberately neglected to take his proper medication.

In all the circumstances, allowing for the appellant's culpability for his medical condition, as well as taking into account those parts of the sentences he has already served, the appeal will be allowed and the sentence of 12 months imprisonment quashed. In place of that sentence he is sentenced to four months imprisonment to be followed by 12 months probation on the usual terms together with two special terms:

1. That he live and work where directed from time to time by the Probation Officer.
2. That he take and undergo such medical and psychiatric treatment, including in-patient treatment, as may from time to time be directed by the Probation Officer.

The sentence of three months imprisonment is undisturbed since there would be no point in dealing with it as the appellant has already served it.