12/9

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.268/84

1051

BETWEEN K

Appellant

A N D POLICE

Respondent

Counsel: M.J. Knuckey for Appellant
C.Q.M. Almao for Respondent

Hearing and Judgment: 5 September 1984

ORAL JUDGMENT OF CALLEN J.

This appeal arises out of incidents which occurred at Te Whaanga or Whale Bay near Raglan earlier this year. As Mr Almao said, it is an unfortunate matter and one which has connotations which are concerning.

The appellant was convicted on a charge of assault and fined $200 and ordered to pay Court costs of $20. The appeal is not against conviction, but against sentence. It appears that the appellant became concerned at the presence of a number of young people who were on a beach and drinking there, a beach which he regarded as having significant historical and sacred aspects to him and from a tribal point of view. The reading of the evidence suggests there may also

have been some feeling over rights of access to this beach quite apart from the incident, but I am not in a position to pursue that aspect of the matter.

The appellant seems to have ordered the whole group which included the complainant, to leave the area concerned and seems to have done so in what must be described as a rather aggressive manner. The complainant reacted by refusing to go and relied on what he regarded as rights of access to a public beach. The appellant later returned with some support and the incidents out of which the charge arose occurred.

The learned District Court Judge after hearing a substantial amount of evidence, found that the complainant and his party had crossed land over which it appears access was not legally available. It is not wholly clear from his decision, but it seems likely that he did not come to any conclusion as to whether or not the incidents occurred on land to which public access was available. Any matter involving land and any matter involving trespass understandably give rise to strong feelings and in this case it clearly did on both sides.

In his notes on sentencing, the learned District Court Judge expressed some concern over what he referred to as a racist attitude. The remarks upon which this comment was based have formed the subject of submission by Mr Knuckey. In my view they must be considered in context and should

first be regarded as having been expressed in the heat of the moment. Nevertheless, they must also be considered in relation to the cultural aspects of the confrontation which obviously assumed great important to the appellant and which are referred to in some detail in the evidence which was called. It appears that quite apart from concern over the historical significance of the area, the appellant took exception to intoxicating liquor being consumed in that area, being one which was adjacent to food collecting grounds. I accept that this is a matter of concern to people who are anxious to preserve traditional Maori attitudes to such places and that to older people in particular, liquor in such a place can be objectionable. I make the observation in passing that the prohibitions which would relate to liquor in such a place would also apply to the use of offensive language in such a place. Here the appellant seems to have seen the situation as one where beliefs and traditions important to him were being violated and this was made worse in his eyes by what he regarded as an intransigent attitude by the complainant.

The complainant on the other hand, although he seems to have been aware that the place was significant to the appellant, seems to have been ignorant of the true nature of the cultural background and concerned to maintain what he saw as a right of public access to a public place. It is perhaps singularly unfortunate that the incident arose out of attitudes on both sides which were based on the land itself.

The learned District Court Judge expressed some concern of what he regarded as a failure of the appellant to accept the consequences of his actions. I am not entirely sure what he meant by that observation, but it seems clear enough that he has now accepted his consequences because he has accepted the conviction, the appeal being against sentence only. I consider that the other matter which seems to have influenced the District Court Judge and which has presumably translated itself into the penalty which he imposed, was a matter which needed to be considered in context and I think it is important to remember that it is a very different motivation from that which is not uncommon in assault cases coming before the Courts. I am concerned that the penalty imposed by the learned District Court Judge might effectively perpetuate the feelings of resentment which obviously exist in this case and prevent any resolution of what should be dealt with with some sensitivity. I appreciate that it is a difficult matter for a Court to resolve - it means taking into account a number of considerations which are not normally before the Court.

The appellant is not a young man, a matter which is referred to in the evidence. He has no previous record or any criminal conviction; it appears that he served his country in the past and he was acting in a situation where the connotations were likely to have a greater effect on him than on others. At the same time, as Mr Almao very properly said, it is exceedingly imporant that people do not take the law into their own hands. I accept that the law does not always

provide a very efficient method of maintaining and enforcing rights. In this particular situation, both the appellant and the complainant were some distance from any support they might have been able to call upon in that regard, but the law is all we have in order to preserve a degree of social order and if people were free to endeavour to deal with matters of dispute as they saw fit, confrontations of this kind would not only increase, but become considerably more serious. I am concerned if I can, to deal with this matter on a basis which would perhaps not be wholly appropriate to all assaults of this kind. If it were possible to do so, I would wish to deal with the matter in such a way as to remove some of the heat from the situation. I accept that the whole matter involves sensitivities which are not always taken into account and to leave those who are involved in it in such a position as to be able to make a fresh start without the resentment and recriminations which the present situation would undoubtedly give rise to. It is for that reason that I have a particular concern over the award of part of the penalty to the complainant.

Having regard to all the circumstances, I consider that it is appropriate to allow the appeal and having regard to the particular personal circumstances of the appellant, to discharge him under the provisions of s.42 of the Criminal Justice Act, which is what Mr Knuckey sought. In view however of the general background, in view of the concern which one must have for the situation in which the complainant

found himself, I think it is appropriate that the actions of the appellant should be taken into account to the extent that he should be required to make a contribution towards the cost of prosecution, which I fix at 120 dollars and this is a condition of the discharge.

Solicitor for Respondent: Crown Solicitor, Hamilton