IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. M.108/83

BETWEEN McGLYNN

287

Appellant

A N D POLICE

Respondent

Hearing: 3 February 1984

Counsel: W. Rosenberg for Appellant
G.K. Panckhurst for Respondent

Judgment: 3 February 1984

ORAL JUDGMENT OF HOLLAND, J.

The appellant was originally brought before the Children and Young Persons Court in Invercargill but was removed into the District Court where after pleas of guilty he was convicted on charges of rioting, wilful damage, possessing an offensive weapon and attempting to escape from the Invercargill Youth Institution in which he was lawfully detained. He received sentences totalling one year nine months. Some four months after the imposition of those sentences he filed a notice of appeal against sentence. At that stage he had a solicitor acting for him and the notice of appeal was filed by the solicitor. It states as the grounds of appeal:-

> "I am only 16 years of age. I had no legal representation for this sentencing. This sentence is cumulative on a three year sentence. I appeal because I think that the sentence was manifestly excessive."

The matter was part-heard before me on 15 December and I adjourned the appeal to today. I was anxious that the appellant should attend in person to hear the appeal because it was quite apparent from counsel's submissions and from what had been said on behalf of the appellant that he considered that he had been harshly treated by the Courts. After that adjournment an amended notice of appeal was filed in which leave of the Court was sought to appeal against conviction. Part of the submissions raised on behalf of the appellant include submissions that the provisions of section 13A of the Criminal Justice Act were not complied with and that the provisions of section 26 of the Children and Young Persons Act 1974 were not complied with.

I have heard evidence from the appellant and submissions advanced on his behalf. The appellant impressed me as an intelligent young man who was anxious in the witness box to tell the truth and I believe what he said in the witness box. Notwithstanding his unfortunate criminal record he speaks well, he obviously has some very good qualities and he obviously is intelligent. It is quite apparent that he has had every opportunity of obtaining legal service if he required it. Prior to his being brought in the Children's Court he was interviewed by a duty solicitor and indicated that he did not require legal aid. That was confirmed on his first appearance in the Children's Court when the District Court Judge presiding was told of this fact. Prior to his being dealt with in the District Court the presiding District Court Judge, who knew the appellant and had had discussions with him before, again asked him if he did not want legal aid. The appellant has satisfied me that he deliberately elected not to have legal aid

and that he did so in what may have been a mistaken view that legal aid would not have assisted him.

Before the Court was able to impose a term of imprisonment it was necessary for the Court to be satisfied that he had been informed of his rights in respect of legal aid, that he understood those rights and that he had had the opportunity to exercise those rights and either refused or failed to apply for legal aid. There is a rubber stamp on the informations saying "Right to see duty solicitor legal representation explained. Defendant does not require representation." In a case such as this dealing with a young offender I consider it unfortunate that the District Court at least in this instance has adopted the practice of recording its obligations under section 13A of the Criminal Justice Act by a rubber stamp. It would have been better if the District Court Judge when deciding to impose a term of imprisonment had in the course of his remarks on sentence fully covered the position under section 13A of the Act. Nevertheless the evidence produced by the appellant satisfies me quite clearly that he was informed of his rights, that he did understand those rights, that he did have the opportunity to exercise them and that he failed to apply for legal aid. In those circumstances no grounds exist for the submission that the sentence is a nullity under the provisions of section 13A of the Act.

That of course should not in any way inhibit counsel in his submissions to me on the appeal against sentence that nevertheless the fact was that this sentence was imposed with this young man being unrepresented but in so far as the submission is concerned that the conviction and sentence is a nullity it fails.

Section 26 of the Children and Young Persons Act 1974 requires there to be a conference between the prosecutor and the social worker before an information is laid in the Children's Court "unless the young person has been arrested" or under the terms of subsection (3) of the section the young person was for the time being under the supervision of a probation officer. The evidence satisfies me that there was no formal arrest of this appellant. He was in fact in custody. I am satisfied that there is a gap in section 26 of the Children and Young Persons Act and that applies particularly because of the reference to probation. It may well be that the use of the words "has been arrested" can be extended to mean "is in custody" but I do not consider it appropriate to so find. Section 45 of the Children and Young Persons Act provides that no information shall be quashed, set aside or held invalid by reason only of any defect, irregularity, omission or want of form unless the Court is satisfied that there has been a miscarriage of justice. In the first place I should say that it has not been satisfactorily established to me that there was no consultation. It is not acknowledged by the Crown that the provisions of section 26 in so far as requiring a consultation with a social worker were not observed and there is really no evidence about the matter. But I shall assume in favour of the appellant that there was no such consultation. In that case there was undoubtedly an omission or an irregularity. It was an omission or irregularity of a point of some substance and in most cases would not come within the provisions of section 45. This, however, related to offences brought against an inmate of a penal institution which were alleged to have occurred in the institution or relating thereto. Far from being satisfied that

there has been a miscarriage of justice, I am quite satisfied that had there been any consultation it would not have in any way affected the prosecutions having been brought in the way in which they were done.

Accordingly again in so far as the submission is that the sentence is defective as being brought on an invalid information the application fails.

I have now heard submissions from counsel for the appellant and from the Crown in respect of the appeal against sentence on its merits. It follows from my earlier ruling and the fact that no further argument has been advanced that the application for leave to appeal against conviction must be dismissed and it is dismissed.

I have been very troubled about this young man from the time the papers on appeal were first placed before me. He is now 17 years of age but at the age of 16 faced a sentence of imprisonment of three years, a very long time indeed to a young person of that age. He appeared before the Court on five charges which arose from a stupid attempt to escape which was unlikely to succeed. Having been detected in the course of attempting to escape he was locked in his cell by way of punishment. Apparently a request for food on his behalf lead to a riot in the prison institution as a result of which he was allowed out of his cell, joined the riot, escaped, was discovered, came back voluntarily, rejoined the riot, caused damage and had in his possession a knife which had been taken from the

kitchen. Notwithstanding the present circumstances of any prisoner and notwithstanding whatever sympathy a Judge may have for a prisoner, there can be absolutely no doubt that the requirement to support prison discipline and the public interest is such that people who offend in this way must expect their sentence of imprisonment to be extended. The only question before the District Court Judge and before this Court on appeal is by how much.

A great deal has been said on behalf of this appellant and it is apparent that there are a number of people in the probation service and in the Justice Department, including psychiatrists and others, who are anxious to help. Although his counsel and I have had some altercations during the course of the hearing about what is relevant and what is not there is not the slightest doubt that the appellant ought to be pretty grateful for the personal interest that his counsel has taken in him. There are lots of people who want to help a young man like this who sadly has had very very little help as a child and from then on has gone on rejecting whatever help might be given to him. The District Court Judge who sentenced him had obviously also at some stage taken a personal interest in this young man and had offered to help him personally, but for reasons not explained to me when he came to be released from the youth prison prior to committing the aggravated robbery for which he received three years that offer of help was apparently withdrawn. I offer no criticism in that regard because I am quite sure that this young man was arrogant enough to have done something perhaps to have justified this decision. It was unfortunate in my view that he came to be sentenced before the same District Court Judge. This happens to us all in the course of

criminal law, our customers have a habit of returning, and a Judge who has tried to help or be lenient to one particular prisoner may well feel that he has been let down when that young man, having been given the opportunity, offends again. It simply cannot be avoided, but I am satisfied in this case that the District Court Judge concerned may well have reached the view that this appellant was a leader and a causer of trouble from his own knowledge rather than necessarily from the statement of facts presented before him, because it is apparent on the statement of facts that when the riot commenced this appellant did not start it, he was then locked in his cell.

I have already said, and I am now addressing my remarks to the appellant in person, that three years in prison to a 16 year old is a very long term indeed. You, the appellant, are showing the signs of spending most of your life in prison and it is necessary for the Court to try to avoid that taking place. It is therefore important when imposing a sentence for crimes committed while in prison to have some regard to the fact that that prisoner is ultimately going to be released in the community and if all hope is taken away from him he can only finish up a permanent inmate of institutions. But having said that McGlynn, it is inevitable that that will happen unless you yourself make some decision and some attempt to fit in with society. You may well say that you do not owe society much because it really has not done much for you, and I agree with you, but nevertheless you have got to live in society and if you go on rebelling, kicking, and offending, society's only method of dealing with you is to keep you permanently locked up. I am told by your counsel, I am told by the probation officer, that

you are starting to grow up and that you have realised that you do not want to spend all your life in prison. I hope you are right. There is still a great deal going for you if you could only see it. You impressed me in the witness box. You must know from a number of the people that you have been with in prison that you have got more intelligence than a lot of them. A lot of them cannot read or write or cope with the world because they are quite inadequate. You cannot cope with the world because you want to fight it.

Now I rather think myself that there has been too much time spent by psychiatrists and social workers related at this stage to your release in the community. If you are going to adjust you have got to accept that your release in the community is a long way off and what you must do is adjust now to accepting the punishment of prison. You can take the advantage of improving your education and far more appropriate than talking about what is going to happen when you are released, because that cannot possibly happen until well into next year, it seems to me that you will be much better served to try and get yourself qualified to get a job and I am quite sure that if you are cooperative and show an enthusiasm in that regard the prison authorities can help you in that regard because you are still but a boy. I have been shown the sentences that were imposed on a number of other offenders. There must be some reasonable comparison between the sentences imposed on offenders in relation to their blameworthiness. Were it not for your expressed wish to change your way of life and were it not for your extreme youth and the long sentence that you were facing this Court could hardly say that a total period of 21 months was inappropriate or excessive. Because of those factors, however, I am satisfied that

it is excessive, but they are factors related solely to your personal circumstances and which bear no relationship to the sentences that are imposed on others. I am going to give you what I think is the greatest amount of leniency that any Court could in the circumstances. I am going to do that in what is a gamble. The gamble is that you might just sort yourself out. It is really all up to you because no matter how many welfare workers try and help you no-one can help you until you want to help yourself. You have got enough ability to do it and the choice is entirely yours. You can decide to serve the rest of your sentence sensibly, complying with it and be released in the community where people will help you get a job or you can carry on as you have again in the past and simply spend the rest of your life being locked up.

I am satisfied that the penalties were excessive. That being so it allows me a freedom to impose a sentence which in your particular case, as I have said, is very lenient considering the offences. But I am satisfied that it is in the interests of justice overall to allow the appeal, to quash the sentences on all counts and on each to impose a sentence of six months imprisonment each of which is to b concurrent but cumulative on the three years that you are now serving. That means that for your criminal behaviour while a prisoner your sentence is extended by only six months. You are very fortunate, now I only hope you can start coming right.

A D. Holland J.