

17/12

42

X

IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

GR.36/84

BETWEEN P

NORMAN

Appellant

A N D P O L I C E

Respondent

Hearing: 19 November 1984

Counsel: R.H. Vincent for Appellant
N.J. Scott for Respondent

ORAL JUDGMENT OF HARDIE BOYS J.

This appellant was sentenced in the District Court on 13 February this year on a charge of defrauding the Social Welfare Department of \$2,682.88 and on a charge of burglary which involved the theft of some foodstuffs, some cash and a jacket. The appellant was quite properly sentenced to six months' imprisonment on each charge, and he was also ordered to make restitution of \$2,682.88 to the Social Welfare Department and of \$95.00 to the complainant in the burglary charge. He has filed an appeal, prepared by a prison officer because he is apparently unable to read or write, which purports to be in relation to the charge of defrauding the Social Welfare Department alone. It may be that it was also intended to cover the order for restitution in the burglary case, but in view of the conclusion I have reached about the Social Welfare fraud I think that there is no reason why the order for restitution to the complainant in the burglary case should not stand and that

order form part of the basis on which the appropriateness of the order for restitution to the Social Welfare Department ought to be considered.

The New Zealand authorities on the subject are quite clear. Although there is a slightly different approach discernible in England (see R v Bradburn (1973) Cr.App. R 948), for the purposes of New Zealand Courts the binding authority is R v Rollo [1981] 2 NZLR 667, in which the Court of Appeal made it quite clear that it is wrong for restitution orders to be made when there can be no real expectation that the amount will be paid. The fact that the offender has no present ability to pay is not conclusive if he has an early expectation of earning sufficient to enable him to make some kind of restitution within a relatively short time, but Courts are not to order large sums of restitution over a long period and they must certainly regard as generally undesirable the imposition of restitution orders following sentences of imprisonment of reasonable length. Of course the community is taking a greater interest in restitution as an appropriate punishment in criminal cases. But great care has to be exercised first to avoid bringing the criminal process into disrepute by the imposition of orders which it is highly unlikely will be able to be obeyed; and secondly, against creating in the case of persons released from terms of imprisonment the situation where they are unable to rehabilitate themselves and are perhaps provoked to further crime in order either to meet the restitution or to provide themselves with reasonable means of livelihood after having complied with the terms of the order.

In this case the appellant had had a very unsatisfactory work record over a number of years largely, one imagines, due to his intellectual impediments and to the fact that he has a speech defect which makes it very difficult for him to communicate. He is not the kind of man who is likely to be able to earn a satisfactory income. The probation officer reported that all the appellant could get was occasional work, he was currently on an unemployment benefit and he had no means of paying a restitution order. In those circumstances the imposition of an order for restitution of a sum as large as \$2,682 following his release from a term of six months' imprisonment was quite unrealistic, as subsequent events have demonstrated. For it appears that the appellant after obtaining employment for three days in Nelson went into hospital for six days and has been on a sickness benefit since. It is reasonable, I think, to assume that his likelihood of obtaining reasonable employment is remote. It seems that he may be well in arrears with a maintenance obligation to his child. And it is also particularly relevant to observe that while he is on a Social Welfare benefit, the department has itself the power to deduct moneys that might be owing to them in respect of this present offence as well as in respect of any maintenance obligation.

Bearing in mind that I am treating him as not having appealed against the order for \$95 restitution, which no doubt he may be able to pay, I think the law is quite clear that he ought not to have been required to pay as part of his penalty on a criminal charge (and of course this does

4.

not at all affect his civil obligations) this restitution to the Department of Social Welfare. Therefore the appeal is allowed and the restitution order on that particular charge is set aside.

Arthur J. Sullivan

Solicitors:

Raymond, Sullivan, Cooney & McGlashan, TIMARU, for Appellant
Crown Solicitor, TIMARU, for Respondent.