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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

1040

BETWEEN CLIFFORD JOHN PAHL

Appellant

AND POLICE

Respondent

Hearing: 1 August 1984

Counsel: B. O'Donnell for Appellant
K.G. Stone for Respondent

Judgment: 1 August 1984

ORAL JUDGMENT OF EICHELBAUM J

The appellant was sentenced upon pleas of guilty in the District Court on charges of unlawful taking of a motor vehicle and having a firearm in the motor vehicle, the sentences being 12 months and 3 months imprisonment respectively. He has now appealed against both conviction and sentence.

The circumstances in which a defendant who has pleaded guilty may appeal against conviction were considered in Udy v New Zealand Police 1964 NZLR 235, a decision of T A Gresson J, which was referred to with apparent approval or at any rate without disapproval by the Court of Appeal in R v Stretch 1982 1 NZLR 225. Reference may also be made to the recent decision of the Court of Appeal in England in R v Lee 1984 1 NZLR 1080. It is clear that such an appeal will succeed only in exceptional circumstances. Examples given in Udy's case are where there has been no plea at all for instance where a plea of

guilty to entering was made when the defendant had been charged with breaking and entering, or where some obvious mistake, misunderstanding or misapprehension existed on the part of the defendant or where he did not appreciate the nature of the charge. Another example given is where on true construction the defendant did not intend to plead guilty. For example although saying that he was guilty his real position was that he wished to deny intent or some other essential ingredient. An accused who was represented naturally will have greater difficulty in sustaining an appeal in these circumstances.

In the present case a number of matters have been put forward as justifying what in effect is a change of plea. In some instances they are inconsistent with other information on the file which includes a letter written by the appellant which counsel has seen. In that letter the appellant said that he had intended to plead guilty to the conversion charge, but not guilty to the firearm charge. Now it is claimed that the appellant had a tenable defence to both charges. On its face the information set out in the notice of appeal itself does not seem entirely credible. There the appellant said that he was buying the car in question but had not finished paying it off. There is no reference to any such suggestion elsewhere in the papers and counsel has informed me that when the suggestion was put to the complainant, he entirely denied that it had any element of truth whatsoever. If the true position was as just stated by appellant, then it is difficult to understand why he should at the same time maintain that his sister had told him that he could have the car at any time. Today it was said that the sister was available to give evidence that the previous night the complainant had authorised the appellant to use the car. All these inconsistencies lead one not to be surprised by the statement in the probation report des-

cribing the appellant as an accomplished liar and manipulator.

A more difficult matter is that the appellant was unrepresented at the time of sentence. Mr O'Donnell's enquiries have enabled him to explain to me that after originally being represented by the duty solicitor, the appellant then engaged the same solicitor to act for him. That solicitor had had previous dealings with the appellant and arising out of uncomplete matters relating to a fee, it seems that at some stage the solicitor decided to withdraw and obtained leave of court accordingly. It is uncertain on which of the appellant's four appearances in connection with this matter that occurred. Another matter arising out of representation that has been raised is that the appellant contends that the solicitor entered pleas on his behalf without his authority. It is difficult to believe that even if this was so, the appellant remained unaware of the pleas thathad been entered. He must have appeared in court on at least one subsequent occasion before being sentenced. The court file shows that there was an interval of a fortnight after the appellant's first appearance and a week between a further appearance and sentence during which time he was on bail. The appellant was familiar with the system and could have requested the opportunity to make other arrangements for representation. I find it difficult to believe that there is as much as an arguable case that the appellant allowed the matter to proceed without protest to sentence, when he really wished to contest either or both the charges. The District Court Judge in his sentencing notes explains the circumstances in which the appellant was left unrepresented. He said that the appellant had his rights explained to him and preferred to proceed. Nothing has been placed before me that would lead me to wish to go behind those statements.

As matters stand therefore I am not persuaded that there was any mistake or misapprehension, or that any of the other possible grounds on which exceptionally an appeal of this kind might succeed have been established, or even that there is an arguable case to that effect. Nevertheless but for the view I have taken in regard to the appeal against sentence, I would have been tempted to adjourn the appeal against conviction so that there was the opportunity for some further enquiry to be made on behalf of the appellant with a view to placing evidence before me.

As Mr Stone rightly pointed out if affidavit evidence had been filed on behalf of the appellant, the respondent would have had to have the opportunity to consider the position and put any further information before me by way of reply. I think that at a minimum the Court would have required credible information that pointed to the establishment of a ground on which an appeal could properly have been allowed before deciding, if this was the final conclusion, to remit the matter to the District Court. However, as matters stand I have decided to disallow the appeal against conviction in relation to both charges.

I turn to the appeal against sentence. There does not seem to be any doubt that there was some relationship between the complainant and the appellant. The appellant in fact says that he had been living with the complainant for some months. If the appellant's account is to be accepted he had had use of the car previously. I do not need to make any decision on that and indeed it would not be possible to do so on the information before me. What is quite clear is that it was not a situation where the offender took the car from a stranger or off the street. He had the car for some hours and then returned it to the owner apparently undamaged.

While the appellant has a number of previous convictions and indeed several for offences involving dishonesty, there are none in relation to conversion. I can well understand that having regard to the entirely unfavourable probation report and the background of persistent offending, coupled with lack of response to other forms of sentences, the learned District Court Judge reached the view that a sentence of imprisonment was appropriate. Indeed in the circumstances and having regard to the facilities available it would have been difficult to suggest any realistic alternative. Having said that, bearing in mind the facts of the particular offence a sentence of 12 months imprisonment,with respect to the District Court Judge,strikes me as a condign sentence. In my opinion it can rightly be described as manifestly excessive and I propose to allow the appeal against sentence, quash the sentence and substitute one of three months imprisonment. In fixing on that term I am conscious that the appellant has already completed serving it. Nothing was said about sentence in relation to the firearm offence in respect of which three months imprisonment was imposed. The appeal against that sentence is dismissed.

Solicitors :

Jeffries Partners (Wellington) for Appellant
Crown Solicitor (Wellington) for Respondent