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IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

M.No.29/83

503

BETWEEN ROSS

Appellant

AND THE POLICE

Respondent

Hearing: 3 May, 1984.

Counsel: S.M. Henderson for Appellant.
C.P. Ramsdale for Respondent.

Judgment: 3 May, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

The appellant Ross was convicted in the District Court at Whangarei on 21 November, 1983 on a charge brought in terms of s.11(1)(a) of the Summary Offences Act 1981 that he did intentionally damage five glass windows, a car windscreen, a picnic chair, one telephone and various other parts of a motor vehicle, the property of one Bruce Francis Kemp. He was, after a defended hearing, found guilty on this charge and was, following the obtaining of a probation report, fined the sum of $750 and also ordered to make restitution in the sum of $1100. He appeals to this Court against both his conviction and the penalties thus imposed.

As regards the appeal against conviction, the basis of this is that the defence called three witnesses other than the appellant himself and his wife who had deposed that the

damage to the downstairs portion of the Towai Tavern which was the building involved in the damage the subject of the charges, was done at an earlier stage than the time referred to by the owners of the tavern in their evidence. They were speaking of events which occurred at 1p.m. involving the appellant whereas these witnesses gave evidence as to damage being done before 12.15a.m. on the same morning. It was, in the light of the evidence of the complainants, impossible to reconcile the version of the appellant and of the witnesses called by him with that of the complainants and the other prosecution witnesses but it is the contention advanced on behalf of the appellant that the decision arrived at whereunder the prosecution evidence was accepted in preference to that of defence witnesses involved a decision against the weight of evidence or, alternatively, the case was one where it should have been determined that there was a real doubt as to the time at which the damage was caused and the prosecution should have been dismissed for that reason.

I have considered the submissions which have been made with regard to the evidence of all the various witnesses and I have considered the record myself. It is clear from these submissions and my perusal of the record of the evidence that this was indeed a case where credibility of witnesses was very much the issue for the Court to reach a conclusion upon. The claim that the very substantial damage which the evidence showed was in fact done to the tavern premises on this particular night was, according to the complainants, done at approximately 1p.m. whereas the defence rested entirely upon a contention that the

damage was done some three-quarters of an hour earlier in itself clearly raises a question of the credibility of the various witnesses involved and the necessity for a very close scrutiny of the evidence and a careful evaluation of it. On the basis of acceptance of the evidence of the complainants it is completely clear that the damage could not have been occasioned at the earlier stage in the way that the appellant and the witnesses called by him sought to suggest. Mr Kemp and his wife obviously could not help but be aware of damage of the magnitude that the evidence shows was caused being carried out at this earlier time that the defence witnesses sought to say was the situation. When the evidence of the various witnesses comes to be considered it is very clear that in every case matters as to reliability and credibility are in the forefront. There was, for example, among the three witnesses to whom I have referred called on behalf of the appellant, one witness who had obviously been engaged in a heavy drinking session over a considerable portion of the evening. As regards another of the witnesses, Miss King, she speaks of having decided to "go to bed at a quarter to 12". She continued:

> "I heard people shouting and went to the window."

She then proceeds to give a description of what she saw. As Mr Ramsdale has pointed out it is not made clear that she is describing events which occurred immediately after she went to bed but in any case as regards this witness and indeed the other witnesses for the defence the striking thing about their evidence is that they are describing the kind of damage which

bears very close similarity to the damage which is described by the complainants and, of course, substantiated by their evidence as having actually occurred. It must obviously have caused the Judge before whom the matter was heard to look at the evidence with considerable caution when such a strange combination of circumstances was being put forward as the appellant's evidence and that of his witnesses was being suggested as being the true situation here. Then when one looks at the statement which was made by the appellant himself to the police as to what occurred, there is seen to be included in the statement:

> " At about 11p.m. I heard people talking about four gang members who had gone to the Towai Tavern and had smashed the front doors to this tavern."

That reference to a much earlier time is simply an instance of the kind of inconsistency and factual conflict which is to be found in quite a number of respects simply from a perusal of the evidence in the case.

The Judge in a fairly brief decision made reference to the fact that there was conflict in the evidence of these various witnesses some of which he thought could be explained by confusion or error in recollection or over-indulgence in alcohol. He specifically went on to say this:

> "Where there is conflict between the prosecution witnesses or the defence witnesses I prefer having had the opportunity of seeing the witnesses and observing their demeanor in the witness box in the performance of these ..."

He is obviously there intending to say that having listened to the evidence he has reached a conclusion that the prosecution witnesses were more reliable in his view than the defence witnesses.

That is, of course, the sort of situation which has been referred to many times in relation to the duty of an appellate Court when considering an appeal such as the present. I have been referred to one such case which is very often cited, Toomey v. Police (1963) NZLR 699, the headnote of which reads:

> "On a general appeal under s.115 of the Summary Proceedings Act 1957 which is conducted by way of rehearing on the Magistrate's notes of evidence an onus is placed on the appellant to satisfy the Court that the Magistrate was not warranted in entering a conviction or at least that his mind should have been left in a state of reasonable doubt."

There is also to be found in that case the frequently-quoted passage in the judgment of Stanton, J. in Gillard v. Cleaver Motors Ltd. (1953) NZLR 885, at p.701:

> "The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial Judge. But the Court is still a Court of Appeal, and in exercising its functions is subject to the inevitable qualifications of that position. It must recognise the onus upon the appellant to satisfy it that the decision below is wrong: it must recognise the essential advantage of the trial Judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them an appellate Court can never recapture the initial advantage of the Judge who saw and believed."

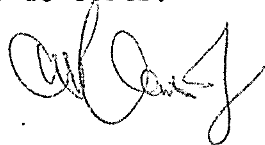
It is true that if I could, from a perusal of the evidence, be satisfied that the Judge in the District Court proceeded on a wrong basis in evaluating the evidence or that the evidence as recorded clearly indicates that he, in the end, came to the wrong conclusion, it would certainly be my duty to approach the matter afresh or indeed deal with the matter on the basis that the Judge's mind should have been left in a state of doubt and the charge should have been dismissed. From a consideration of the evidence as a whole I am quite unable to reach any such conclusion. There are, as I have already indicated, many matters in this case which could in my view very understandably lead a Judge to come to the conclusion that notwithstanding any shortcomings that there may have been in the evidence of the two complainants what they were saying represented the real truth of what occurred. It has to be remembered in this case that the evidence of these complainants is in a measure very substantially corroborated by the evidence of the appellant himself in that he came, in the end, to admitting to having caused some of the damage of which the complainants spoke. In this situation, I am of the view that the appeal against conviction cannot be sustained and it is dismissed accordingly.

There is also an appeal against penalty as I have indicated and it is submitted that it was incorrect for the substantial sum of $1100 by way of restitution to be ordered in addition to the fine of $750 which in itself, it is submitted, was excessive. It has to be borne in mind in relation to this aspect that s.403 of the Crimes Act, as Mr Ramsdale has said, clearly contemplates that orders for restitution are to be made as something quite independent from other

penalties imposed. It is indeed urged in many cases that insufficient attention is paid to the question of some reparation being provided for the victims of crime and that much more should be done in that regard than is being done. I, however, simply have to consider whether in view of the statutory provision and the nature of the offences here, it was reasonable and proper or within the proper limits of the Judge's discretion to impose the particular penalties that were here imposed.

As to the fine itself, it is indeed made clear by a perusal of the evidence that this was a serious incident with an actual rampage being carried out in the premises and very considerable damage being caused in a completely wanton fashion. The damage to the windows of the tavern alone is shown to have cost $577 to repair. The evidence of the complainants showed too, of course, that this damage was accompanied by threats and a display of violence which put these people in very great fear. In such circumstances I must conclude that the fine of $750 was quite a modest and lenient penalty and I have little doubt that it was set by the Judge at that figure because of his intention to impose liability on the appellant to make restitution as I think it was proper that he should do and the evidence that was placed before the Court and does not seem to have been questioned in any way indicated that $1100 for restitution was a fair and proper amount.

The appeal against sentence is accordingly also dismissed. There will be no order as to costs.



SOLICITORS:

Hughes Henderson & Reeves, Whangarei, for Appellant.

Marsden Wood Inskip & Smith, Whangarei, for Respondent.