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IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

No. M.102/84

1257

BETWEEN CLARK
Appellant

A N D NEW ZEALAND POLICE
Respondent

Hearing: 19 September 1984

Counsel: P.S. Rollo for Appellant
D.L. Wood for Respondent

Judgment: 19 September 1984

ORAL JUDGMENT OF HOLLAND, J.

The appellant appeals against a sentence of four months' imprisonment and an order to pay compensation of $2,272 imposed in respect of two offences of with intent to defraud obtaining a pecuniary advantage.

This matter has disturbed me. The appellant defended the charges in the District Court at Balclutha before Judge Seeman. That defended hearing took place on 19 June. The file indicates that he was remanded for a probation officer's report "(PD or CSO)" and sentence to Dunedin District Court on 15 August 1984 at 2.15 p.m. Presumably the District Court Judge was considering the possibility of periodic detention or a community service order, but no explanation has been offered as to why a remand of two months was considered appropriate. I have specifically asked counsel for the appellant who was present in the District Court as to whether any reason was expressed and he is unable to recollect any. He has assured me that the remand was not made at the request of the defendant.

A remand of two months after an entry of conviction of a man charged with crimes of this kind, where he is clearly liable to imprisonment, is generally unjustified.

There may be special circumstances, but they will usually arise from a specific request from the defendant for further evidence of a psychiatric nature or a financial nature or an opportunity to make compensation. No such request was made in this case and I am unable to understand why a remand of two months was ordered.

I am further disturbed, however, that when this appellant came to be sentenced he was sentenced by Judge Hay who had not heard the case. Judge Seeman apparently had gone on extended leave from 2 July to 2 October. It is hard to believe that he was not aware on 19 June that he was going to take this leave some 13 days ahead. I am surprised that he did not regard it as his duty to see that this man was sentenced before he went on leave. There may, however, have been good reason why that could not take place. If that were so, then I am satisfied that it was necessary either for the notes of evidence to be typed out so that the sentencing Judge had the whole facts before him, or alternatively a statement of facts supplied by the prosecution and to the defence and acknowledged by the defence as being an appropriate statement of the facts on which the appellant should have been sentenced. There is no record of either having occurred. Nor is there any record of the findings of fact of Judge Seeman - presumably he gave reasons when he found this man guilty of the charges presented against him. Those findings ought to have been typed out. We are left in a situation of not knowing on what basis of fact Judge Hay imposed the sentence that he did.

There is before me on the file a probation officer's report, the two informations and two references. In relation to the provision in the probation officer's report for the facts there is simply the reference "defended fixture"

which is common because it is inappropriate for a probation officer to summarise facts when the Court itself has heard and determined them.

I am quite satisfied that it is unjust for the present sentence to stand and it must be quashed and is quashed. It may well be that the Judge had more information available before him than the file shows, and I have no doubt that before imposing sentence he made such enquiries as he considered appropriate, but it is not only a matter of the Judge having sufficient information to impose sentence but the defendant or appellant must know what that information is so that in case there is any information that is to be challenged he has the right to challenge it.

I was originally minded to send the matter back to the District Court for the sentence to be imposed by Judge Seeman. However, in the first place I doubt if there is jurisdiction for me to do it, but in the second place I am quite satisfied that this man has had to wait far too long to know what the appropriate sentence is for his crime. Having already quashed the sentence I propose now to impose sentence as if I were imposing sentence in the first instance without having regard to what has been said by Judge Hay. I have asked counsel for the Crown to produce to me a copy of the police summary of facts described as a caption sheet. That has been produced. It has been seen by counsel for the appellant and the appellant himself and is accepted as an accurate summary of the facts. In addition, I have now received a letter which apparently was on the District Court file but was not sent up relating to a creditors' pool operating for this man.

Counsel for the Crown has very properly indicated that this is a crime that appears to have arisen from muddlement

and apart from that remark counsel has not wished to make submissions on sentence. It is not the first piece of muddlement that has rendered this appellant liable to criminal prosecution. Within the last 12 months he has been prosecuted for offences under the Meat Act and there are outstanding fines in this regard of $2,598. It is apparent from the submissions made on his behalf and in the probation officer's report that he has creditors in the vicinity of $35,000. They have apparently accepted an offer from the defendant's solicitor that in the meantime they defer action until three pieces of farm equipment are sold, estimated to be worth approximately $25,000. I am influenced by the fact that the two firms who suffered from this offence have been included in that list and that they have not apparently taken any action to enforce their civil liability in the meantime.

This is not a case of a man having stolen cheques. What he has done is he has presented cheques and obtained goods without any honest and reasonable belief that there was money in the account to meet them. He had overdraft facilities but he had clearly exceeded them. It is not an offence where in the case of a first offender the requirements of the public are such that a prison sentence is inevitable. He has not gone on a spending spree. The credit that was obtained presumably is related to his living or his work and he is to be distinguished I think from a number of irresponsible or criminal people who go throughout the community with either stolen chequebooks or having deliberately set out to obtain credit by fraud because they have never had any permanent arrangement by way of credit with the bank. He has now paid the sum of $750 in Court by way of restitution. He is engaged as an eeler and I am told that that is seasonal work which has started about a fortnight ago and should continue. He is assisted by his daughter.

I am satisfied that it is in the interests of the community as well as his creditors that he be given the opportunity to re-establish himself, difficult and all though that may be. He is, however, desperately in need of help by way of financial guidance. I am satisfied, however, that an appropriate sentence is for him to be released on probation for a period of two years with an order for restitution which I make for the full amount, but credit is, of course, to be given for the $750 paid which is to be distributed pro rata in relation to the amounts of the two offences. Restitution of the balance is to be in accordance with the directions of the probation officer and I make it a term of his release on probation that he make restitution in such manner as shall be directed by the probation officer. I make a further direction to the probation officer, because I have heard it said by some that probation officers regard it as their duty to rehabilitate the offender rather than to assist the offender's creditors, that this man is being released on probation rather than being sent to prison in the hope that he will be able to recompense his creditors and that he has been placed on probation to receive the guidance that he is entitled to expect from a probation officer in seeking that aim. I do not see any need to add any further conditions other than the statutory ones.

The appeal is allowed. The sentence is quashed and in lieu thereof is the sentence that I have just imposed.

A.D. Holland J.