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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.202/84

893

BETWEEN BRIAN LINDSAY GOUGH

Appellant

A N D CHRISTCHURCH POLICE

Respondent

Hearing: 14 June 1984

Counsel: P.R. Taylor for Appellant
B.M. Stanaway for Respondent

ORAL JUDGMENT OF HARDIE BOYS J.

This is an appeal against a sentence of 12 months' imprisonment imposed on a charge of theft of a motor car. The appellant was a passenger in a car being driven by one Soloman who had announced his intention to steal a car and Soloman and his passengers were looking for one that was suitable. They found the complainant's car, and Soloman drove it away whilst the appellant or someone else with him drove Soloman's car. They went to an address in Christchurch where they set about repainting it and were in the midst of doing that when the police arrived. This was Gough's 15th appearance in Court and his 81st offence. Some 70 of those previous offences had related to matters of dishonesty and this was in fact his 44th offence of taking or interfering with a motor vehicle. He is

only 18 years of age and he had had what one could describe as the usual disastrous upbringing. His notice of appeal which he filed himself really puts forward three grounds and I quote it:

> " That I did not steal the car. One of my co-offenders got six months' P.D. and I got 12 months in jail and I think that is a bit hard. I have made a better effort while I was out this time. If I had another chance to do P.D. I would go all the time. All I am asking for is just one more chance please. "

Mr Taylor has put forward some thoughtful and helpful submissions which were directed to persuading me that a more appropriate solution to the problem presented by this young man is a further community based sentence. The appellant had in fact been sentenced to periodic detention on 19 January 1984 on a charge of driving whilst disqualified. He had only just completed a sentence of six months' imprisonment on charges of burglary and car conversion. Prior to that there had been the period that he mentions in his notice of appeal when for some six months he had been in the community without offending, a rare achievement for him. But in his probation report it is stated that the periodic detention centre warden considered him unsuitable for that sentence and had in fact instituted action for breach. Having stated that, the probation officer went on to describe the dilemma with which the Court is confronted in dealing with this appellant, because although he is unsuitable for a community based sentence and apparently incapable of surviving in the community for any length of time, custodial sentences in the past have done little to equip him for

survival or to deter him, and the probation officer sees a grave danger of institutionalisation.

Now there are always competing considerations in sentencing. Especially with young people, the Court's anxiety is to deal with them in a way which will hopefully make them eventually useful productive members of the community. But against that are other aspects of public interest, particularly the protection of the public from criminal activity and the need to indicate the community's rejection of anti-social behaviour and to adopt an element of deterrence. Sometimes, even in the case of a young person, it is necessary for the second of these considerations to prevail over the first. The Judge took that view in this case, and I think he was justified in so doing. The problem, as Mr Stanaway put it, is that until the appellant gets some motivation himself, nothing anyone else does is going to make much difference. But the measures that are available to the Courts to deal with people like this are not likely to give them much motivation, so we become involved in a rather vicious circle.

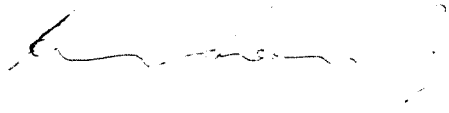
It being therefore appropriate to send this lad to prison, the question is how long should the term be. The Judge, who had very little to say in passing sentence, clearly took the view that 12 months was the appropriate term having regard to the long record of previous convictions. Even if one looks at this young man's offending in isolation from the question of disparity, although 12 months would be quite appropriate for this offence committed by someone with the history of this offender, such a sentence does not necessarily

grapple with the problem of institutionalisation or perhaps recognise that the public interest might be able to be satisfied by a somewhat lesser term, which would contain a lesser danger of institutionalisation.

Then there is the argument as to disparity. Soloman, who appears to have been the instigator, was sentenced to six months residential periodic detention. There is a very striking difference between him and this appellant. Soloman was making only his third appearance in Court and it was only his sixth offence. Only once before had he been convicted of car conversion, although there were two other offences of dishonesty. That difference in the past record of the two youths certainly explains and warrants the distinction between on the one hand periodic detention and on the other imprisonment. But the question I must ask is whether it really warrants a distinction between six months' periodic detention and 12 months' imprisonment. This question of disparity was discussed by the Court of Appeal in R v Lawson [1982] 2 NZLR 219 where it was pointed out "the test is objective; not subjective. It is not merely whether the offender thinks that he has been unfairly treated but whether there is a real justification for that grievance; whether a reasonably minded independent observer aware of all the circumstances of the offence and of the offenders would think that something had gone wrong with the administration of justice." Soloman was sentenced on a different date by a different District Court Judge and it does appear to me that there is some real justification for the suggestion that there

has been an inappropriate disparity in the sentences imposed.

When that consideration is added to the aspect of institutionalisation that I have referred to, it seems to me that a case has been made out for some reduction in the sentence of imprisonment. Giving the matter the best consideration I can, I propose to quash the sentence of 12 months' imprisonment and in its place substitute one of six months' imprisonment and to add in addition a term of probation for 12 months to commence on the expiry of that sentence.



Solicitors

Anthony Polson & Co, CHRISTCHURCH, for Appellant
Crown Solicitor, CHRISTCHURCH, for Respondent.