IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 997/85

BETWEEN S.B. ENGLESMA

Appellant

A N D POLICE

Respondent

Hearing: 12 December 1985

Counsel: Mr Illingworth for appellant
Mr Andrew for respondent

Judgment: 12 December 1985

JUDGMENT OF HILLYER J

This is an appeal against a decision of District Court Judge Wallace, in the District Court at Auckland on 15 May 1985. The appeallant had pleaded guilty to a charge of theft. She was convicted and ordered to come up for sentence if called upon.

The facts of the offence are that she went into the ladies' department of George Court in Karangahape Rd, took a black woollen jersey from the display, took it around the corner of the showroom and placed it in her bag. She made no attempt to pay for the article, and did not go past the check out. She was approached outside the store, asked to return, and the police were called. She had sufficient money to pay for the jersey. It seems to be a clear case of shoplifting, an offence which is prevalent.

Unfortunately no note was taken either of the counsel's submissions or of the remarks on sentence by the learned District Court Judge. When the matter came before Casey J on 27 September 1985, Mr Illingworth attempted to persuade the court that the District Court Judge did not properly exercise a discretion in response to a plea that the appellant should be discharged without conviction. There was reference to a comment made by the District Court Judge that such a course was rarely, if ever adopted in shoplifting offences.

As a result therefore, Casey J asked the District Court Judge for a report, if she was in a position to recall the events, so that he could decide whether he should hear the matter de novo, or deal with it on the District Court Judge's recollection. Casey J said it was not necessary for the matter to come back before him, and I have heard the appeal this morning.

The District Court Judge says that she recalls the matter, first because of the extensive submissions made by counsel before her, and secondly because of the impression she formed of the defendant. She says she was certainly urged to discharge the defendant under the provisions of s.42 of the Criminal Justice Act, but refused to do so. She listed the following reasons she took into account when refusing such a discharge.

1. The deliberate nature of the offence did not seem to equate with the actions of a distraught woman.

2. The apparent lack of any remorse or contrition.

3. From the material put before her, it appeared the defendant's re-employment did not depend upon whether or not she would have a conviction, but other difficulties revealed in the submissions.

4. The defendant appeared to the District Court Judge to be a bitter woman, unwilling to face the consequences of her actions.

The Judge went on to say:

> "I would also have said something to the effect that a discharge is rarely given in an ordinary shoplifting case unless there were special circumstances, and I did not find such special circumstances in the defendant's case."

Before me today, Mr Illingworth has attempted to persuade me first that the Judge unduly fettered her discretion by having in mind the principle that a discharge is rarely given in ordinary shoplifting cases. Secondly, that there was no basis on which the District Court Judge could have arrived at the conclusions set out in No's 1-4 above. He said quite accurately of course, that it is wrong to fetter the exercise of a discretion by laying

down hard and fast principles, and cited Commission of Inland Revenue v Ryburn [1977] 2 NZLR.553 and Morgan v MOT [1980] 1 NZLR.432.

I do not consider in this case the District Court Judge did fetter her discretion. She took into consideration, as she was perfectly entitled to do, the fact that shoplifting is a serious offence, and because she said a discharge was rare does not mean she had closed her mind to that possibility.

S.42 certainly permits the Court to discharge where any person is accused of any offence, and that of course includes the offence of shoplifting, but a recognition of the serious nature of an offence is not in my view, fettering of a discretion.

As to the other matters that the District Court Judge said she took into consideration, I have no reason at all to doubt that she did so. Mr Illingworth was not the counsel who appeared in the District Court and was not able to give me details of what the counsel said to the District Court Judge. The Judge did, however, recall having material put before her, and the matters I have mentioned.

It was of interest to see a report put in front of me by

Mr Illingworth, dated 3 May 1985 which would have been before the District Court Judge. It said:

> "For the past year Ms Engiesma has been under considerable stress as a result of job dislocation. I consider her recent behaviour totally out of character, but not surprising considering the strain she has been attempting to cope with."

That comment about it not being surprising is echoed in a further report obtained after the District Court hearing from a psychologist who, in the course of the report said :

> "She now thinks, as would any person knowing her, that the offence was a stupid aberration but entirely understandable, given the circumstances."

It may be that the comments that the offence was understandable and not surprising were the sort of comments that induced the District Court Judge to come to the conclusion that she did.

The exercise of the power given under s.42 is the exercise of a discretionary power, and not one with which an appellate court would interfere unless it was clear that the power had been exercised or not exercised on a wrong basis. I do not find such a wrong basis in this case. Indeed, I am of the view that the penalty imposed was a merciful one, and I did contemplate the possibility of increasing it. I have decided in all the circumstances not to do so, but I am certainly not prepared to interfere with the discretion exercised by the learned District Court Judge.

The appeal is dismissed with costs to the Crown in the sum of $50.

P.G. Hillyer J

Solicitors

Meredith Connell for Police