18/8

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP No. 146/86

(3)

/070

BETWEEN HAWKINGS

Appellant

AND POLICE

Respondent

NOT RECOMMENDED

Hearing: 25 July 1986

Counsel: D. Conway for appellant
D. Jones for respondent

Judgment: 25 July 1986

ORAL JUDGMENT OF CHILWELL J

On 8 May 1986 the appellant, Hawkings, was sentenced in the District Court to 8 months imprisonment for the offence of false pretences. At the same time the District Court Judge imposed a 12 months driving disqualification. After a change of counsel the appellant filed an appeal on 22 May 1986. He was released on bail on or immediately after 5 June 1986 after bail was granted on application to this Court.

Essentially, the issue on this appeal is whether the District Court Judge gave proper weight to factors relevant to section 6 of the Criminal Justice Act 1985. The effect of that section is to keep offenders out of prison unless the Court is satisfied

that, because of the special circumstances of the offence or the offender, any other sentence would be clearly inadequate or inappropriate.

The special circumstances referred to by the District Court Judge in his sentencing remarks were, first, that this was the appellant's third occasion of appearing before a Court for offences of dishonesty; secondly, that this particular offence was on quite a substantial scale, the amount of the false pretence being in the vicinity of $13,000; and, thirdly, the way in which the offence was carried out with a certain amount of deliberation. As to the third matter, the Judge said that the appellant had been prepared to embark upon a cleverly conceived plan that involved a theft of a vehicle and a subsequent approach to an insurance company in order to obtain payment for its loss. He then made certain observations about the need in the public interest to protect insurance comanies from false claims, a view which I share. The Judge referred to the appellant's intention to perfect the scheme and to get away with the proceeds of the cheque; then the Judge said that because of suspicion as to his activities a search warrant was issued when the engine of the alleged stolen vehicle was found in his premises.

The limitations upon the jurisdiction of this Court on appeals against sentence are well known. But

the Court can take into account substantial facts relating to the offence or to the offender's character or personal history which were not before the Court imposing sentence or because those facts were not substantially placed before the sentencing Court. The circumstances of the offence, outlined by appellant's counsel in this Court, differ from those outlined by counsel in the lower Court. Counsel for the respondent has fairly indicated that there is no dispute with the account given to this court today. The summary prepared by the Police and referred to by the District Court Judge was very short. It said:-

> "On the 2nd March 1986 the defendant, Hawkings, reported to Police that his 1978 Chrysler Valiant car, Registration No. MJ7994, valued at $13,000 was stolen from the Dire Straits concert at Onehunga.
>
> On the 24th of March 1986 the defendant went to AA Mutual Insurance in Papakura and made an insurance claim for $13,000 in respect of his Chrysler Valiant. The defendant received a cheque for $13,000 from AA Mutual Insurance on the 8th April 1986.
>
> As a result of information received Police executed a search warrant on an Otara address and the engine from the defendant's vehicle was located.
>
> The defendant was spoken to and admitted to Police that he had arranged with an associate to take the car from the Dire Straits concert and dispose of it so that he, the defendant, could subsequently obtain the $13,000 insurance. The defendant further said that the vehicle was removed as arranged."

It was common ground at the hearing in the District Court that the Police accosted the appellant

contemporaneously with his receipt of the cheque, that the appellant gave a full and frank explanation to the Police and apparently handed the cheque to the Police. In consequence, the insurance company was not, in fact, defrauded.

The outline of the facts given to the Court today is that the appellant who was, and still is, the proprietor of a motor vehicle towing business, was, in the course of his business, asked to store the motor vehicle in question. The vehicle had been with a firm of panel beaters for 18 months. The owner had not paid the cost of repairs. The panel beater requested the appellant to store the vehicle and this the appellant agreed to do. Some months later the owner of the vehicle made arrangements with the panel beater to pay in kind rather than in cash and some equipment was offered and accepted in settlement of the account. For some reason, the panel beater did not advise the appellant of that arrangement but he did advise the owner where the car could be found and observed that the storage fees would have to be paid to the appellant.

After the appellant had had the car in his possession for a considerable number of months, and without hearing from anyone making any claim for it, he advertised it for sale in the local newspapers asserting some form of lien, I presume. He notified the Police,

which appears to be the customary practice in this field, and, having done that, he took over the car himself, arranged to provide it with new registration papers and acquired the ownership of it. He then insured it for $13,000. The vehicle then became the family motor car.

Some two months later the appellant received a telephone call from a person claiming to be the owner but who did not identify himself. The appellant informed the inquirer that he had advertised the car and, after getting in touch with the Police, had assumed ownership of it whereupon the purported owner threatened to put the Black Power Gang on to him. There were subsequent telephone calls to similar effect. Following those telephone conversations, the appellant was approached by a person who appeared to know all about the transaction. It was suggested to the appellant that if he followed a certain procedure both of them could restore the situation without loss to either. The scheme was to have the car left outside the Dire Straits concert, that it would then be stolen and the appellant could make the appropriate claim on the insurance company. The appellant, being concerned over the threats, decided to go along with the scheme. His counsel properly concedes that he could well have left the car for the supposed owner to pick it up but without making any claim on the insurance company. However, he did make such a claim.

The insurance company apparently accepted the claim - it seems extraordinary that a 1978 Chrysler should have been regarded by the insurance company as worth $13,000 - however, $13,000 by cheque was sent to the appellant. As previously mentioned, as soon as he was accosted by the Police he handed the cheque over.

Later, the appellant got in touch with the person in Otara where, as a result of the execution of the search warrant, the engine had been found. It was established that he was an innocent purchaser of the engine. The appellant arranged to buy it back, obtained Police permission to do so and paid $500 for the engine.

It is clear from the foregoing recitation of the circumstances that the District Court Judge had a different complexion of the criminality of the appellant before him than is now before the Court. The District Judge, properly on the evidence before him, took the view that the appellant was the author of the scheme and that it was cleverly conceived by him. Wrongly, the Judge found as fact that the engine was found on the appellant's premises whereas, in fact, the engine was found on the premises of an innocent purchaser in circumstances which I have outlined. If the engine had been found on the appellant's premises his criminality would have taken a more sinister aspect than is reflected in the facts now before this Court.

So far as the appellant's previous convictions are concerned, in 1977 he appeared before the Court on a number of charges of dishonesty. I understand that the reason why all those charges were brought together and dealt with at the one time was that the parents of the appellant had been concerned at his behaviour and reported certain matters to the Police resulting in whatever the appellant had been doing being brought under control and then dealt with by the Court. He received four months periodic detention plus probation. There is no record of the appellant having offended again until he appeared in Court on 19 January 1982. On that occasion, he was convicted and sentenced for the offence of theft as a servant. The fine was $400. I accept the observation of counsel for the appellant that a fine of that amount for the offence of theft as a servant indicates that it could not have been in the serious category of that type of offence.

Those are the offences which the District Court Judge took into account in assessing special circumstances.

The second matter taken into account in that regard was that the instant offence was on quite a substantial scale. I think that must be right. Whatever the vehicle was worth, the sum of $13,000 was

fixed as its value when the appellant insured it and that was the amount for which he claimed and received a cheque.

The third special circumstance related to the way in which the instant offence was carried out. In that regard, the District Court Judge was led into error not of his own making, but because the true circumstances had not been sufficiently placed before him. No criticism is intended of counsel who then appeared. The Court can understand that these things happen without counsel being at fault.

Section 6 of the Criminal Justice Act prohibits a Court from imposing a full time custodial sentence in the case of offences against property punishable by imprisonment for a term of 7 years or less. That prohibition does not apply if the Court is satisfied that, because of the special circumstances of the offence or of the offender, any other sentence that it could lawfully impose would be clearly inadequate or inappropriate. The word "clearly" needs emphasising. It qualifies the word "inadequate" and also the word "inappropriate". Because the District Court Judge was not properly instructed in regard to the circumstances of the offence this Court is justified in looking at the matter afresh.

The Court of Appeal in R. v Sua (24 March 1986 C.A. 259/85) considered that a sentencing Judge had properly taken into account the offender's long record of previous convictions. I do not propose to refer to the decision in any material respect except that the Court of Appeal did observe in that case that the Judge had not overstated the effect of those convictions for the purpose of section 6 of the Criminal Justice Act. In this case, I do not think that a great deal of emphasis should be given to the previous convictions. It is certainly not the type of long list of previous convictions referred to in Sua. The convictions indicate a person who kept out of trouble from 1977 until 1982. Since 1982 the appellant has entered into a de facto marriage, has a young daughter, has established a substantial towing business, has made a commitment to a matrimonial home which requires substantial reductions and repayments within a short time from now. Handed to me in evidence is a letter dated 9 July 1986 from New Zealand Police Headquarters addressed to the appellant's company accepting the company as a tenderer for towing and storing vehicles. I am assured that the person responsible in the Police Department for accepting the appellant's company's tender was fully aware of his excursions into dishonesty. I mention that tender because it establishes that the business must be reasonably substantial for the Police to be prepared to have

vehicles of the public and Police vehicles towed away from accidents and other situations and stored at the premises of the appellant's company. So that, when one takes into acount what the appellant has achieved since 1982 and places all those factors against the previous convictions, I am not persuaded that his previous convictions would, of themselves, amount to a special circumstance, unless added to some other special circumstances.

I have already said that the sentencing Judge was not properly instructed in regard to the circumstances of this particular offence. Once the element of "clever planning" is taken from the shoulders of the appellant and when it is further known that he was not the author of the scheme, then it seems to me that it is a little difficult to place too much emphasis on what was clearly a scheme of dishonesty which he went along with. However, it was on quite a substantial scale.

Weighing up the matters of special circumstances to which I have referred in these sentencing remarks, I am not persuaded that there are special circumstances relating to the offender or the offence making a sentence other than imprisonment clearly inadequate or inappropriate. It has frequently been said by the Courts (including the Court of Appeal)

that periodic detention is to be regarded by the Courts, and ought to be regarded by the public, as a severe sentence because of the strains which it places upon the person who has to lose his freedom at times during the weekends.

I understand that a medical is waived and I propose to impose a term of periodic detention. I have regard to the fact that the appellant has already served one month of his sentence of imprisonment. I sentence him to periodic detention for a period of three months and before the Court rises I will have to direct where the reporting is to take place.

So far as the disqualification from driving is concerned, the Judge was empowered to impose it because the offence was committed in respect of a motor vehicle. But it was not committed by the physical use of a motor vehicle. I am not suggesting that section 83(1)(e) carries that interpretation, but I really cannot see what relationship there is between a false pretence against an insurance company in relation to a vehicle and the driving of a vehicle in terms of preventing people from using vehicles to commit offences. I cannot see anything more special about motor vehicles in insurance fraud cases than any other type of insurance claim. Disqualification, in this case, would seem to me to be particularly severe so far

as the appellant's business activities are concerned, he being the principal driver in the business. Accordingly, there will be no period of disqualification.

The appeal is allowed. The sentence in the District Court is quashed and in substitution therefor there will be a sentence of periodic detention for 3 months. The reporting place will be the Papakura Periodic Detention Centre. The first reporting will be Friday of this week at 6 p.m. I think I am obliged to mention that a minimum hourly period is required. I fix that at 9 hours.

Solicitors

Appellant : D. Conway, Esq.., Auckland
Respondent : Crown Solicitor, Auckland