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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP. 37/86

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[redacted]

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BETWEEN EDWARDS

Appellant

AND POLICE

Respondent

Hearing: 21 March 1986

Counsel: Mr C J Field for Appellant
Mr F Rose for Respondent

Judgment: 14 April 1986

JUDGMENT OF THORP J

This is an appeal against concurrent sentences of eighteen months imprisonment imposed on the appellant in the District Court at Otahuhu on 31 January 1986 on each of six charges to which the appellant had pleaded guilty. The first offences were committed in early December 1985, the others on the 6th and 7th January 1986. All six related to the theft, conversion or receiving of stolen motorcars.

In imposing sentence the learned sentencing Judge specifically noted the provisions of Section 6 of the Criminal Justice Act 1985, which reads:

> "6. Where an offender is convicted of an offence against property punishable by imprisonment for a term of 7 years or less, the court shall not impose a full-time custodial sentence on the offender unless 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."

He concluded that there were special circumstances relating to these offences, these being the high level of such offending in his district, its difficulty of detection, the significant gains to be made from it, and the fact that the number of offences in which the appellant had been engaged pointed to something more than his being a mere amateur or caught up in the matters on the spur of the moment.

For the appellant Mr Field argued that the matters noted by His Honour should not be regarded as "special circumstances" for the purposes of Section 6. He further submitted that "the circumstances of the offender" pointed rather against his being imprisoned than towards his imprisonment.

Dealing with the latter submission first, the circumstances that the appellant was eighteen years of age at the date of the offending, that he was for all practical purposes a first offender, and that the offences were committed by him in the company of a twenty-one year old of vastly greater criminal

experience, did indeed point towards the imposition of a non-custodial sentence on this man if the circumstances of the offending could be seen to make that course "practicable and consonant with promoting the safety of the community," to adopt the language of Section 7(1) Criminal Justice Act 1985. On the other hand, looking at the circumstances of the offending, I believe that the learned trial Judge was justified in concluding that the number and nature of these offences pointed to the appellant's involvement being something more than spur of the moment, something more than that of an amateur.

The critical issue, in my view, is whether or not the learned trial Judge was entitled to bring into account as a "special circumstance of the offences" the fact they were offences of a type which had become particularly prevalent in his district.

There is no doubt, that prior to the 1985 Act, sentencing officers did consider that prevalence of offending should be taken into account in assessing penalties.

Time and again New Zealand Judges have expressed the view that increases in particular kinds of offending have reached such proportions that increased penalties are required, both for the due protection of the innocent and to discourage further increases in such criminality.

The same view has been taken by the English Courts. Thomas' Principles of Sentencing 2nd (1979) Edition notes at pages 14 and 17 two instances in which the Criminal Division of the English Court of Appeal recognised prevalence of a particular kind of offending as a factor supporting the imposition of a "tariff" sentence, though the circumstances of the offender could have suggested a lesser sentence.

There was no suggestion in the present case by Mr Field that the learned Judge was not justified in his expressed belief that there had been an increase in the level of such offences as those committed by the appellant, nor did he argue against the relevance of prevalence to the assessment of penalty if one looked simply to the general principles of sentencing. In the course of argument I asked Mr Field whether it would not accord both with broad principle and with common sense for the Courts at this time to take account of the vast increase in thefts of codeine and like chemicals to enable the "homebake" manufacture of morphine and heroin when assessing penalties for such thefts. He replied that while he would not wish to argue against the logic of such a proposition, the legislature had specified criteria in Section 6 which did not accord with it.

That submission rested solely upon his interpretation of the phrase "special circumstances of the offence," and the proposition that it contemplates only the particular offending, not the fact that there may have been an increase or reduction in the number of similar offences committed by others.

As yet there has been no reported judicial commentary on the meaning of Section 6 of the Criminal Justice Act 1985. That makes it necessary to consider the general intention of the legislation and try to give the section a meaning which accords with that intention.

A perusal of the Report of the Penal Policy Review Committee confirms, as a matter which has come forward in the Act itself, the fact that its primary aim was to reduce the use of imprisonment as a penalty for crime and encourage the greater use of community and financial sanctions. In that general policy it particularly proposed reduction of the imposition of imprisonment for offences against property and the greater use of terms requiring the offender to make reparation for the economic loss he or she had caused.

But while it is obvious that some such provision as Section 6 was necessary to implement those policies, it is not easy to see how the phrase which now particularly

requires construction, "the special circumstances of the offence or of the offender," relates to those broad issues.

The provision that Section 6 should apply to offences against property "punishable by imprisonment for a term of 7 years or less" indicates the belief that while such offences as theft, receiving and false pretences should in general not be punished by imprisonment, the fact or risk of violence involved in robbery and burglary should take those offences outside the purview of Section 6.

The critical clause in Section 6 is certainly capable of being interpreted in the manner proposed by Mr Field. There is no difficulty giving a meaning to the words "special circumstances of the offence" which will accord with the general policies of the Act while at the same time limiting the Court's consideration to circumstances directly related to the actions of the offender. Such circumstances as that a theft was of a very large sum of money, or by a person having plain fiduciary obligations to the owners of those funds, would be "special circumstances" of that nature.

However, there does not seem to be any logical necessity to limit "the circumstances of the offence" to circumstances having some causal relationship to the

offender, all the more when the circumstances of the offender are a separate matter for consideration by the Court.

Nor can I see in what way the policies of the Act would be advanced or better implemented by excluding from the Court's consideration in respect of this class of offences circumstances which would normally and logically bear on the seriousness of the particular offending to the community at large.

There are of course a multitude of cases under the Transport Acts which have considered the effect of phrases such as that now contained in Section 30(2) A Transport Act 1962 requiring the Court to impose disqualification "unless the Court for special reasons relating to the offence thinks fit to order otherwise." That phrase and phrases similar to it have been limited to circumstances directly connected with the commission of the offence; see e.g. Whittal v Kirkby (1947) 1 K.B.194. But as the sole purpose of considering special reasons in the Transport Act cases is to determine whether there is sufficient occasion to reduce the normal penalty, those reasons could hardly include prevalence of offending. For that reason, those cases are of no assistance.

Nor have I been able to find any other cases providing assistance by way of analogy.

In the course of the argument Mr Field submitted that if the legislature had intended the Courts to take prevalence into account, it should have said so. Mr Rose responded with the submission that if the legislature had intended to exclude logically relevant circumstances from the Court's consideration it should have done so expressly. I see no reason for preferring either submission to the other.

In the end, while the obligation to give the legislation a "fair large and liberal" construction does require the Court to recognise a major change in sentencing policy in the case of lesser offences against property, I do not believe it requires the Court to exclude from relevant circumstances the prevalence of the particular type of offending it is considering at the time when it is assessing penalty.

Before any circumstance can be brought into account it must be a "special" circumstance, not such as arises in the ordinary case. But that does not, in my view, mean that a major change in the incidence of particular offending should not properly be considered a special circumstance affecting the culpability of such offences.

On the other hand, it does appear to me that the injunction in Section 7(2) Criminal Justice Act 1985

that sentences shall be as short as in the opinion of the Court will be consonant with promoting the safety of the community pointed to something less by way of punishment in the case of this 18 year old first offender than the term of imprisonment which was imposed. In my view, the Court's disapproval and endeavour to avoid further growth of similar offending can be sufficiently met by the imposition of a shorter term of imprisonment than eighteen months.

That view was strengthened by the advice given to me by Mr Field that reparation is available, a situation not known to the District Court. The pre-sentence report furnished to it advised that in the time available to the reporting officer "it was not possible to explore either community care or reparation alternatives fully."

"Section 11 of the 1985 Act requires the Court, where an offender is convicted of an offence for which a sentence of reparation may be imposed, to impose such a sentence either on its own or in conjunction with some other sentence unless the Court is satisfied that it would be inappropriate to do so. In this Court Mr Field advised that the appellant's parents were in a position to make immediate payment of the sum of $3,430.00, being half the total reparation sought against the Appellant and his co-offender. I was advised that the appellant

has employment and that it is his family's intention that the Appallent should repay his parents from his wages.

The situation before this Court justifies taking into account, even at this late stage, the offer of reparation. Taking it into account, it is my view that the appropriate response is to vacate the sentence imposed and in its place to enter a sentence of corrective training, together with a sentence of reparation of the sum of $3,430.00.

I repeat the advice I gave to the Appellant's parents at the hearing, that they will be doing no kindness at all to their son if they fail to require him to repay to them, as soon as the nature of his employment permits, the full amount of the reparation advanced by them on his account.

The appeal is allowed. The sentence of eighteen months imprisonment is quashed. The appellant is sentenced to a term of corrective training, which he will commence forthwith, and is ordered to make reparation of the sum of $3,430.00 in one sum, within 7 days of the delivery of this judgment.

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