19/12

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

AP.68/88

NOT RECOMMENDED

BETWEEN HEKE

Appellant

AND POLICE

Respondent

Hearing and Judgment: 29 November 1988

Counsel: Ms A.C. Wills for the Appellant
H.S. Yapp for the Respondent

ORAL JUDGMENT OF DOOGUE J

The Appellant appeals against her conviction in respect of an offence alleged to have been committed on 20 May 1988 of:-

> "being a person sentenced to 4 months Periodic Detention in the District Court at Tokoroa on the 17th May 1988 did fail without reasonable excuse to report at the Work Centre at Tokoroa as directed by the Court."

The Appellant also appeals against a sentence of four months imprisonment imposed upon her in respect of an offence of receiving property valued in excess of $100.00 but not greater than $300.00 on 10 August 1988 and a sentence of two months imprisonment in respect of the breach of periodic detention offence, with those sentences being cumulative. Those sentences were imposed on 8 November 1988.

At the same time as those sentences were imposed, the sentencing Judge convicted and discharged the Appellant in respect of a further offence of breach of supervision.

The Appellant is 33 years of age. She has been before the Courts on numerous occasions since 1971 and has received nearly every type of non custodial sentence and, at an early stage, received a sentence of borstal training. More recently she came before the Courts in 1986 for receiving and attempted false pretences when she was sentenced to supervision for one year. In 1987 she came before the Court for breach of that supervision order and was convicted and discharged. In October 1987 she came before the Court again in respect of a receiving charge and was sentenced to four months periodic detention and given a final warning. On 17 May 1988 she came before the Court again in respect of three offences of receiving stolen property, one of theft, and eight charges of intent to defraud. On that occasion she was sentenced to four months periodic detention, one years supervision, and again given a final warning. It is for alleged breaches of the sentence of non residential periodic detention and the sentence of supervision imposed on that latter occasion that she again found herself before the Courts.

So far as the appeal against conviction is concerned, it is submitted on behalf of the Appellant that the conduct of the trial resulted in a miscarriage of justice because, first, the District Court Judge unnecessarily and inappropriately recalled

the Warden of the Periodic Detention Centre to give evidence, and secondly, that the District Court Judge took himself into the arena in cross-examining the Warden when recalled and when that cross-examination, on the submission for the Appellant, provided considerable assistance for the prosecution and without any opportunity being given to the Appellant's counsel to ask questions arising out of such questioning.

Secondly it is submitted on behalf of the Appellant that the District Court Judge failed to make findings on facts and determinations as to credibility in support of the conviction and, in particular, that there was no finding as to whether there was a conversation between the Warden and the Appellant as to whether she should be at the Periodic Detention Centre or not on the night in respect of which the breach is alleged, and further, that there was no determination whether the Appellant honestly believed she had a reasonable excuse.

The third submission on behalf of the Appellant is that the test to determine whether there was a reasonable excuse for non attendance was incorrectly or inappropriately applied and that the District Court Judge made no determination as to whether there was a reasonable excuse for the Appellant not to be present.

Lying behind these submissions is the evidence given before the District Court Judge and the course taken by him in the hearing.

Evidence was given by the Warden of the Periodic Detention Centre at Tokoroa. He gave evidence that there had been an order of the Court that the Appellant report on Friday, 20 May 1988, at 6.00 pm. He produced that order. He said that the Appellant did not report in accordance with the Court's order. He then went on to say:-

> "No communication was received from her regarding that non appearance. I do not recall any conversation with Mrs Heke during the previous week regarding approval not to attend on that date."

The Warden was then cross-examined. The first question was:-

> "You said that you don't recall any conversations with Mrs Heke. Do you recall whether you would have been in your office on 18 May?
> Possibly."

The Warden was not cross-examined at all in respect of the evidence that the Appellant subsequently gave.

The Appellant said that the day after she had been sentenced she went down to the Probation Office and told the Probation Officer that she wanted to go and get her children. She then said that she went to see the Warden of the Periodic Dentention Centre. Her evidence was:-

> "I went to see him and that's no word of a lie, I went to see him and I told him what was happening. He said to me why don't you go and pick them up after P.D. but because I never had a vehicle I had to borrow one and that was off Gary Poti. I borrowed his car to go up and pick up my children. That was the only time I could. So he said to me well you make sure you be there Saturday morning, be back by Saturday morning for P.D. and I said thank you and went. ... I went on the Saturday.
>
> I was never told I was gong to be charged for not turning up on the Friday because I already had permission from him to go and get the children so I didn't have to worry about that. When I was told I was gong to be breached, I thought it was for the days I never turned up."

She was cross-examined as to whether there had been any conversation with Mr Collis, the Warden. She was asked:-

> "You heard Mr Collis say that he cannot recall having any conversation with you prior to 20 May. What do you say to that?
> He's wrong. He should remember because he told me to go up after P.D. on Saturday and I explained why I couldn't and he just said alright then, but you make sure you be there."

After the cross-examination concluded, and there being no re-examination, the District Court Judge asked the Appellant:-

> "So what you are saying really is that the Warden said to not turn up on the Friday?
> I went to see him and because I had seen him he said to me it was alright after I had explained to him."

After a further question and answer the District Court Judge said:-

> "None of this has been put to him. I think we'd better call him back and ask him those questions."

The Warden was then recalled. The District Court Judge then questioned the Warden:-

> "What do you say about all that? She's really saying that she told you about the car that she needed on the Friday and that you said turn up on Saturday.
> The only thing I can really say is I still don't recall the conversation, unfortunately, so therefore I can't really dispute the fact of what she is saying in specific terms.
> I still don't recall the conversation.
> Would you be likely to tell someone not to turn up for an induction?
> Normally no. The only part that really would ring any bells, it would be typical of me to say Why don't you go after P.D. report, be it a Saturday or a Friday, normally I would make a note of that for myself and my deputy because the deputy would have to know what was going on too. I did not make any such notes.
> Are you aware that you have no power at all to dispense with that first induction? That the Judge orders the person to appear at 6.00. From then on I think you have the statutory powers but as I understand it, you don't for that first visit. Are you aware of that?
> I am aware of that. It's thereafter, after the first report, the Warden may direct what time and dates."

The whole of the hearing before the District Court Judge was in a very short compass, with the evidence going into some eight pages.

In his oral judgment the District Court Judge stated:-

> "The Defendant says she had a discussion with Mr Collis, the Warden, two days earlier, when she explained she had to get a car to collect her children and that the only day she could get the car was the Friday. She seems to be under the impression that the Warden told her that she did not need to turn up to Periodic Detention until the Saturday, but he does not recall that conversation at all. He acknowledges he has got no power to defer that first report in any event, although of course he does later on.
>
> The issue is whether there was a reasonable excuse. I cannot see for one moment that Mr Collis could have done what she says and I am satisfied there was no reasonable excuse. The Judge said that she was ordered to report at 6.00 pm on 20 May and she did not. She will be convicted."

It is against that background that the Appellant's submissions are made.

The Appellant, in support of her submissions, referred to the decision in Judah v Auckland City Council, [1975] NZLR 695, 697 lines 45 and 49.

Mr Yapp, in his answering submissions on behalf of the Respondent, referred to Murray v Ministry of Transport, [1984] 1 NZLR 610, 617 lines 25 ff, and Couzens v Police, [1984] CRNZ 153, 154, lines 32-40, 43 and 44 and 155, lines 38-46. I do not regard it as necessary to set out the passages cited to me. The question is whether justice was achieved in the present case.

In my view, despite the submissions of Ms Wills on behalf of the Appellant, it was proper for the District Court Judge to recall the Warden when the Appellant gave specific evidence as to the nature of the conversation she had had with the Warden and when none of that conversation had been put to the Warden and nor had it been put to the Warden that there had been any such conversation. It was a case where the District Court Judge was quite unable to do justice to the Appellant without recalling the Warden. It was a case where the District Court Judge was quite unable to do justice to the Respondent without recalling the Warden. If the District Court Judge had endeavoured to determine the matter on the state of the evidence before recalling the Warden, he would have either had to disbelieve the Appellant to reach a conviction without knowing what the Warden said, and if he had found that the explanation given by the Appellant was an honest one to be believed, he would have been doing that without being aware of what the Warden's evidence was in respect of that conversation. It was therefore, in my view, entirely appropriate that the Warden be recalled.

In my view the questions put to the Warden did not indicate an endeavour to descend into the arena and to assist the prosecution in any respect but to find out what the Warden's answer was in respect of the Appellant's evidence which was not put to the Warden. In addition, having regard to the question and answer upon which Ms Wills put some emphasis, namely the reference by the Warden that if he was to excuse someone from

a report "be it a Saturday or a Friday", the District Court Judge endeavoured to clarify with the Warden whether he was aware that he had no power at all to dispense with the first induction and he said that he was aware of that.

I cannot regard the Warden's answer in the first instance as being in conflict with his subsequent answer, nor can I regard the District Court Judge's question as an endeavour to provide assistance to the prosecution.

So far as whether or not an opportunity was given to the Appellant's counsel to cross-examine the Warden in matters arising out of the District Court Judge's questioning, there is no evidence before me at all from counsel for the Appellant in the Court below as to the course which was followed.

Miss Wills, in support of her submission, relies solely upon the notes of evidence which would not normally show whether or not the counsel had been given the opportunity to ask questions arising out of questions asked by the Court. In the absence of any evidence from counsel for the Appellant in the Court below, I cannot say that no opportunity was given to the Appellant's counsel to ask questions arising out of the questioning by the District Court Judge. In my view the questioning by the District Court Judge did not go beyond what was reasonable and proper to ascertain the answers of the Warden to the matters raised in evidence by the Appellant.

In respect of the second submission of the Appellant that the District Court Judge failed to make findings of fact and determinations as to credibility in support of the conviction, I uphold the submission of Mr Yapp on behalf of the Respondent that it is implicit in the final paragraph of the District Court Judge's judgment set out above that he did not believe the Appellant but preferred the Warden and in rejecting the evidence of the Appellant came to the conclusion that there was no reasonable excuse.

In my view it is clear from the language used in the reasons for judgment that that is the only explanation for the wording of the reasons for judgment or the conclusion reached.

So far as the third submission of the Appellant is concerned as to whether or not the District Court Judge properly applied the test to determine what a reasonable excuse for non attendance was, it seems to me plain from the same paragraph of his reasons for judgment that, having rejected the Appellant's explanation of events, he was left with no possible conclusion other than that there was no reasonable excuse. It is true that Ms Wills further submitted that there was no determination as to whether there was a necessity for the Appellant to pick up her children. However, as already stated, it is implicit in the District Court Judge's judgment that he rejected that explanation by the Appellant in reaching his conclusion.

For those reasons the appeal against conviction must be dismissed.

The appeal against sentence is directed towards a total sentence of six months imprisonment imposed upon the Appellant in respect of the two offences already traversed.

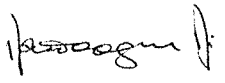
Ms Wills accepted that her position was more difficult if the appeal against conviction did not succeed as, in that event, clearly it was difficult for her to submit that there were no special circumstances for the purposes of Section 6 of the Criminal Justice Act 1985. The maximum penalty for the receiving offence was one years imprisonment so that the offence fell within that section. Whilst the breach of the periodic detention order did not fall within that section, it, like the other offence, came within the purview of Section 7 of the same Act.

The sentencing Judge, who was a different Judge from the Judge who had convicted the Appellant on 28 September 1988, applied his mind to the provisions of Section 6 of the Criminal Justice Act 1985. He had before him a pre sentence report and evidence from Tokoroa Hospital and from medical practitioners as to the Appellant's state of health. He came to the conclusion that, having regard to the Appellant's record, that the Appellant's complete inability to comply with any community-based sentence constituted a special circumstance for the purposes of Section 6 of the Criminal Justice Act 1985 which made imprisonment inevitable as no community based sentence could possibly be appropriate when the Appellant was in breach for the second time of a supervision order and in breach of a periodic detention order.

I certainly cannot say, having regard to the material before the District Court Judge on sentencing, that a sentence of imprisonment was wrong in principle or that there are exceptional circumstances calling for the revision of the sentence of imprisonment imposed as all relevant matters were before the District Court at the time.

The only issue remaining is whether the sentence imposed is, in its totality, manifestly excessive having regard to the matters for which the Appellant was being sentenced. Ms Wills did not develop that submission in any detail, primarily because of her acceptance that if the appeal against conviction failed, the appeal against sentence was made more difficult.

Having regard to the matters before the sentencing Judge, I certainly cannot say that the cumulative sentences imposed were inappropriate and, having regard to the nature of the offending and the Appellant's record, I cannot say that the sentences imposed were manifestly excessive and the appeals against sentence must also be dismissed.



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