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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 152/88

BETWEEN SEDDON

Appellant

A N D THE WARDEN

Respondent

LOW PRIORITY

Hearing: 7th October 1988

Counsel: Mrs Catherine M. Hey for Appellant
J. Sandston for Respondent

ORAL JUDGMENT OF WILLIAMSON J.

This is an appeal against a sentence of two months' imprisonment on a charge of breach of periodic detention. The charge, which was defended, related to Saturday the 21st May of this year when the Appellant failed to report for periodic detention. Initially the appeal was one against conviction as well but that appeal was abandoned. Counsel for the Appellant has indicated that it was abandoned because essentially it was based upon a finding of credibility by the learned District Court Judge who had heard evidence not only from the Warden of the Periodic Detention Centre but also from the Appellant.

It is submitted that this sentence of two months' imprisonment was inappropriate primarily because of the Appellant's personal circumstances. He is aged 23 and is the father of two children aged 3 years and 12 months. These two children are in his care since the Appellant is now separated from his wife. Counsel has informed the Court that the Appellant's wife has been the subject of proceedings by the Social Welfare in the past in relation to her inability to look after the children. Consequently Counsel argues that the Appellant is the person with custodial and real responsibility for these children. He and the children have been living with

the Appellant's sister and her husband and their four children. Counsel argues that a period of imprisonment would impose distress and particular hardship, not only upon the children but also upon the Appellant's sister. Alternatively Counsel has submitted that the sentence of imprisonment of two months was manifestly excessive. Prior to the filing of the appeal and the granting of the bail, the Appellant served 7 days' imprisonment.

Counsel for the Respondent has argued that it has not been shown that the sentence was either clearly inappropriate or excessive in view of the previous breaches by the Appellant indicating his attitude to sentences given by the Court and his response to comparatively lenient treatment given to him in the past. Counsel also argued that the District Court Judge was aware of the Appellant's personal circumstances before imposing the term of imprisonment.

It is apparent from a reading of the decision and the remarks on sentencing of the District Court Judge that he was aware that the Appellant was separated and had custody of the two children. He expressed some concern at what he took to be an incorrect impression given to him by the Appellant that he was a solo father with sole responsibility for the children and that he did not in evidence tell the District Court Judge that he was living with his sister and brother-in-law.

On appeal this Court's task is not to impose a sentence as though at first instance, but rather to consider whether it has been shown by an Appellant that the sentence was clearly inappropriate or excessive or if there were substantial facts which were not properly or fully before the District Court Judge or that these facts were not substantially as placed before or found by that Court. (Section 121(3)(b) of Summary Proceedings Act 1957.) Imprisonment on a charge of breach of periodic detention could rarely be inappropriate. Obviously if persons, who are going to periodic detention, do not realise that a failure to comply with that sentence will

lead to imprisonment, then the Wardens of the Periodic Detention Centres have no effective sanction at all. The maximum period of imprisonment is one of three months. Although the Appellant has committed a previous similar offence, for which he received additional periodic detention, he has not been sentenced to imprisonment before in relation to such a charge.

In view of his background of offending the sentence could not be described as manifestly excessive. I am, however, of the view in this case that the facts relating to the Appellant's children were not substantially before the District Court Judge and in particular that he was not fully aware of the fact that the Appellant's sister and brother-in-law lived in a small house with four children of their own. Those facts are significant in an overall assessment of the matter. I do not think that they render this sentence clearly inappropriate but that they are such that the sentence in all the circumstances was clearly excessive.

For the reasons that I have indicated, the appeal will be allowed and the sentence of imprisonment reduced from two months to one month. With the time that has already been served and provided the Appellant meets the proper standards of conduct in prison, he will not have to spend a great deal further time there. It is important, however, that he realises that the driving conduct that he has engaged in over the years and which has led him to the position where he has received sentences of periodic detention, and that his failure to take that option of periodic detention up and perform it properly has led to this imprisonment. It should emphasise to him the importance of complying with such orders. Importantly, of course, he now has the responsibility of these two small children and the next few days will give him an opportunity to consider carefully the steps that he must take now to look after them properly. No doubt his family will help him to do that but he cannot expect that in the long run his sister and his brother-in-law can assume the responsibility for that task.

For the reasons I have given this appeal is allowed to the extent indicated.

Solicitors:
Wood Marshall, Christchurch, for Appellant
Crown Solicitor, Christchurch, for Respondent