2/8 N2LR.

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP.98/89

BETWEEN A R HOUTWIFFER

Appellant

829

AND THE POLICE

Respondent

Hearing: 20 June 19898

Counsel: Mr D Sharp for the Appellant
Miss Evans for the Respondent

Judgment: 20 June 1989

ORAL JUDGMENT OF ROBERTSON J

Alexander Houtwiffer appeals effectively against one sentence which was imposed on him in the District Court at Auckland on 5 May 1989 on a charge of theft. He was sentenced to 2 years imprisonment. This offence related to his stealing, from a locked, parked vehicle, sporting equipment and associated items to a total value of $4,275.25. The appellant stored this property at his home and then sold it the following day for $650. In fact he didn't get any money because the cheque was stopped and as it transpires the complainant received all his property back again.

Mr Houtwiffer contends that the penalty of 2 years imprisonment was manifestly excessive having regard to the fact that no actual loss was eventually sustained. There is a slight degree of artificiality about the whole matter because Mr Houtwiffer was that day, sentenced in respect of some 20 charges. The Learned District Court Judge took the view that because of the history of this man, and the number of offences, a term of imprisonment was inevitable. I whole heartedly agree. Mr Houtwiffer in the appeal which he filed himself did not cavil at that and certainly Mr Sharp who has appeared on his behalf today has not sought to persuade me that this man should have been dealt with other than by way of a term of imprisonment.

There was a charge of unlawfully getting into a car for which he was imprisoned for 3 months; there were several charges of unlawfully taking motor vehicles for which he was sentenced to 6 months; there were 3 breaches of periodic detention charges on which he was sentenced to 2 months and there were some miscellaneous other offences in respect of which he was convicted and discharged. All the sentences were to be served concurrently.

Miss Evans has indicated that the Judge was obviously entitled to apply the totality principle and

suggests that perhaps there was a weighting given in respect of the theft charge. I don't find evidence of that in what was said by the Learned Judge and if I understand recent decisions of the Court of Appeal it is not a course of action which is available either in the District Court nor in this Court. The appropriate sentence for each and every offence must be stipulated, even if sentences are to run concurrently.

Mr Sharp appeared in the District Court and his principal submission appears to have been that his client was at a time "where a short sharp shock would bring him into line with his responsibilities as a citizen." The Judge appears to have accepted that submission but without further comment imposed the 2 year sentence on the theft charge.

Miss Evans has frankly conceded that that period appears to be out of line with penalties otherwise imposed for a theft of this sort in these circumstances where no actual loss was occasioned. Although I cannot be sure, I suspect that the Learned District Court Judge may not have been aware that no loss had been occasioned. He certainly does not refer to it.

It is not for this Court to tinker with sentences but in view of the clear policy of the Parliament as ennunciated in the Criminal Justice Act and in light of

the proper concession that the penalty appears to be markedly out of step with others normally imposed in the District Court, I am forced to the conclusion that this sentence is manifestly excessive.

I have been exercised as to whether the Learned District Court Judge, if he had imposed a lesser penalty, would have have made it cumulative on the others. In light of the fact that he did not differentiate in respect of all of the other offences and in fact imposed concurrent sentences in all cases, I am unable to conclude that there is any reason or principle why he would have made this one cumulative - and of course that is not what he did.

Mr Houtwiffer is at the point where he needs to understand that even if his offending is property rather than person offending he has built up such a list that he has reached the point where he will forfeit the right to remain within the community at all simply on the basis of his nuisance value and his disregard for the rights of other citizens.

It appears to me that if he comes back before the Court for offences of the sort which he appeared on this occasion there will be special reasons why a lengthy term of imprisonment should be imposed simply to keep

him out of circulation and protect the citizen from him and his irresponsible behaviour.

I am forced to the conclusion that the one sentence which is before me is manifestly excessive. The appeal is accordingly allowed. In respect of the offence of the theft of the sporting equipment he is sentenced to 9 months imprisonment effective from the 5 May. I have taken into account a period of 21 days he had already served and have made allowance for that in the period set.