NZLR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

15/6

AP No. 294/89

998
~~997~~

BETWEEN STEPHEN THOMAS HELSON
Appellant

AND POLICE
Respondent

NOT RECOMMENDED

Date of Hearing: 21 February 1990

Date of Judgment: 11 June 1990

Counsel: R.M. Lithgow for Appellant
Anna Tutton for Respondent

JUDGMENT OF NEAZOR J

This is an appeal against conviction and sentence on two charges of wilful damage to property contrary to s 298(4) of the Crimes Act 1961. The appellant was convicted in May 1989.

The facts are in a short compass. On 25 October 1988 at about 8.00 p.m., a person identified as, and accepted by the District Court Judge to be, the appellant came upon a motor car containing two women. The car was stopped at the intersection of Alpha Street and Cambridge Terrace in Wellington. The driver was making sure that the road was clear before turning left into Cambridge Terrace. At that stage the appellant moved off the footpath and came to the car which he proceeded to kick and beat with his fists. He shouted abuse as he came towards the car and continued to do

so as he went about kicking and punching it. That vehicle was damaged.

The appellant was then seen to go to a motor dealer's yard by one of the women who had been in the motor car and also by a passerby. Sounds of shouting and the kicking of vehicles were heard from that place. The appellant was then seen to come out onto the street and kick and punch and jump up and down on and pull pieces from another car which was parked at the side of the road with no persons in it. The appellant was shouting whilst he was damaging that car.

About that stage the Police arrived. The appellant was described by one of the witnesses as attempting not very successfully to hide from the Police, then making off up a side street pursued by a Police Sergeant. The Sergeant said that when he caught up to the appellant, the latter turned to face him making threatening gestures with his fists. The Sergeant threatened him with his baton and when the appellant advanced on him, the Sergeant struck him twice on the arm with the baton. The appellant was then subdued by the Sergeant and another officer and arrested.

The women who had observed the appellant described him as staggering when he was coming to the first car and going away from it towards the car yard, but as running off after the Police arrived. The Police Sergeant also said that the appellant was running away from him, had tripped whilst running up the side street, and had got up and continued running until he stopped and turned to face the Sergeant.

The prosecution witnesses were cross-examined as to possible reasons for the appellant's attack on the cars: no suggestion is to be found in any of the evidence that there was any rationality about what he did. The first car had not impeded the appellant's way when its driver had stopped it to make the turn. Nothing was said by the women in it to the appellant. The other vehicles were stationary and no

person was about who might have incited the appellant in some way. The appellant shouted and screamed at people in the first car or the cars themselves or at nothing in particular at all. His language was either swearing or abusive.

The three women were asked about their observation of the appellant's state. They were all about 29 and had seen people who had been affected by alcohol or by drugs. The first believed from her observation that the appellant was affected by drugs, not alcohol. She accepted a colloquial expression put to her by counsel that the appellant was "out of it" as being a description of a person who takes limited notice of his surroundings and behaves in a way driven by substances the person had taken. The witness' acceptance of that description was based on her observation. The second witness said that she thought the appellant was on drugs or some other substance but that he was not drunk. She would have described his behaviour of that of a person who was "high". She could not see any rational explanation for his behaviour.

The Police Sergeant said that the appellant had definitely smelt of alcohol; that he had been in the Police for eleven and a half years and had dealt with many people in various stages of the effects of alcohol. He expressed the opinion that the appellant had been moderately intoxicated and that he had had mental and physical co-ordination and was easily able to run away from the Sergeant.

The Sergeant had written reports in relation to the appellant at the time of his arrest. In those reports he referred to the appellant being "slightly intoxicated or high on drugs prior to arrest" and in another report relating to the use of the baton, that "Helson was either highly intoxicated or high on drugs prior to his arrest". The Sergeant referred to degrees of intoxication. He gave a range as a basis for description of "a person who can be

slightly affected to one heavily affected by intoxication where they do not know what they are doing". In that range he put the appellant at the stage of moderately intoxicated. He placed no significance on the use of the term "high" in relation to drugs, which he equated as a synonym for "affected" by drugs.

At the Police Station the appellant had been asked for an explanation and had been formally charged with the offences. His response on both occasions was simply to swear.

The appellant had given evidence that he was an alcoholic and described what he had done on the day in question. He said that he had gone to a hotel near Cambridge Terrace at lunchtime and that so far as he knew he had been there from that time until the early evening. He said he had no recollection of any events but that he had probably drunk a substantial amount of beer during the period that he was in the hotel. He gave that evidence as a matter of conclusion from the amount of money he had with him in the morning and the amount that he had left after he had been in Police custody. His evidence was that he had no recollection of any events of the evening except an exchange with a police officer in which he was asked for and gave his name and address before he was suddenly arrested by the Police. No other witness suggested that that had happened nor was it put to the Sergeant that that had happened. The appellant said that he had no idea of the cause of his injuries.

The learned District Court Judge accepted the evidence of the three women as to events and concluded that all the actions which they had described suggested some degree of co-ordination coupled with deliberation. His Honour also accepted the evidence of the Sergeant as to the appellant's running away, adopting an aggressive stance and that the appellant uttered coherent even if abusive words at the Police Station.

The learned Judge referred to cross-examination of the women who had observed the appellant but said that he did not attach a great deal of significance to what was elicited from them. They did not profess to have expertise in relation to the activities of people affected by drink or drugs. Their evidence was accepted as showing that the appellant had acted in the manner of someone affected by something, probably alcohol or drugs or a combination of both, but that was about as far as their evidence went. His Honour noted that there was no evidence from any witness indicating what behaviour or characteristics might be expected of a person so affected by alcohol as to suggest a possibility of that person performing acts without a required criminal intention in so doing. His Honour further held that the evidence of the Sergeant suggested that the appellant had good control of his movements and co-ordination and that the appellant's actions were not those of a person who had consumed alcohol to a degree sufficient to incapacitate him.

After his review of the evidence, the learned Judge went on to say:

> "The question for determination is whether I am satisfied that the defendant had the necessary intent to commit the actions he unquestionably did. Has the defendant raised a doubt to such extent that I should resolve it in his favour? That the defendant has consumed alcohol, possibly a considerable quantity is clear. That he exhibited the signs of being affected by alcohol consumption is also clear. It nevertheless remains my view, on a consideration of all the evidence, that the defendant knew what he was about in relation to what he did, so far as the cars, the subject of these charges, are concerned. That the defendant might not have committed the acts complained of if he had been sober does not assist him if I am satisfied he had the necessary intent (the addendum to Kamipeli) ...

> I am satisfied in short that the defendant cannot be considered to lack intent to the degree referred to in Kamipeli. On the contrary I conclude he had the necessary intent to commit the offences as charged and he will accordingly be convicted."

It was submitted for the appellant that the learned Judge was wrong in his approach to the question of guilt. The authorities, R v Kamipeli [1975] 2 NZLR 610 and Steinberg v Police (1983) 1 CRNZ 129 require that attention be directed to the appellant's actual intent, not to his capacity or incapacity to form intent. It was submitted that the Judge had approached the matter in a wrong way in the first part of the passage which I have set out above where he raised the question for decision ie whether the appellant had raised a doubt. It was submitted that question was wrong because it placed some kind of onus on the appellant.

It was further submitted that the Judge should have accepted an attack on the credibility of the Police Sergeant who had used different expressions in respect of the degree of intoxication in a report written on the day of the arrest and in Court. It was submitted that there was a demonstrable inconsistency in written evidence and that the Sergeant's evidence should not have been accepted.

It was further submitted that the Judge had dealt dismissively with the lay witnesses, had rejected a submission that the appellant was very drunk, had accepted the officer's view of moderate intoxication based on the witness' description of physical movement showing co-ordination and of the appellant's speech, and had disregarded, but had not said he rejected, the evidence of the appellant about amnesia which would be consistent with his having been very drunk. It was submitted that the Crown had not negatived clear evidence about the appellant's

drunkeness and its effect and that the case should have been dismissed.

As to the submission that there had been an attack on the credibility of the Sergeant's evidence which was so demonstrably justified that the Judge should have rejected him as a credible witness, I am not satisfied that the matter goes nearly as far as it would need to if the Judge's findings are to be disregarded on appeal. The Sergeant was asked questions about the injuries suffered by the appellant. In response to several questions he said inconsistent things in that he said that the appellant had none of a number of listed injuries at the time when he batoned the appellant, but then suggested as possibilities that those injuries had been caused when the appellant was damaging the cars or when he fell over on the tarseal which on the Sergeant's evidence happened whilst he was chasing the appellant as well as when the appellant was being physically arrested. It appears from the transcript of evidence that the Sergeant's greatest concern was to deny that he had caused any of the injuries except bruises on the appellant's arm which he agreed he had caused. The inconsistencies referred to were not such as, in my view, significantly to damage his credibility.

The other inconsistency in the Sergeant's evidence related to the terms that he had used to describe the appellant's state of intoxication: on the day of the incident he had described him as highly intoxicated and in evidence he had said that he was moderately intoxicated. However the Judge was not dependent simply on the officer's choice of words; he had the evidence of the the non-police witnesses as to the actions which the accused had performed as well as the words chosen by the Sergeant to describe his condition.

As always, it is for the judge of fact to determine the reliability of the witnesses and what evidence should be accepted. I am not satisfied that basis of the attack on

the Sergeant's evidence is anywhere near strong enough to warrant this Court overturning the Judge's findings in respect of it. The Judge was entitled to hold as he did in respect of the evidence of the women who gave evidence. Their answers in cross-examination in my judgment provided little support for the proposition that the appellant's apparently intentional infliction of damage on several cars was not in fact done with intent on his part. The appellant's own evidence took the matter no further than to say that he had no memory of events or only selective memory of events. If the Judge accepted that it was still a matter of inference which he would have had to draw that at the relevant time the appellant did not act intentionally when he inflicted damage on the cars. In effect, the appellant's evidence was not that he had no intent but that he had no memory of events. From that the defence case was, having regard to the evidence that the appellant was affected by liquor, that it should be taken that there was a doubt whether he had capacity to form intent and whether he in fact formed the necessary intent.

In the course of his decision the learned Judge had referred to the decisions of the Court of Appeal in Kamipeli and of Hardie Boys J in Steinberg. He accepted that mens rea had to be established as an element of the offence. He clearly directed himself through those references that the fact of intent rather than the capacity for intent was the relevant issue and that the evidence had to be evaluated on that basis.

It was after consideration of the authorities and the evidence that the Judge posed the question in the way set out. The second sentence containing the question the Judge asked himself was simply, in my view, one the answer to which might detract from an otherwise positive answer to the first question. The Judge placed no onus on the appellant, but had regard to whether the Crown had established the case as to intent notwithstanding the evidence of intoxication.

In my view his conclusion as to the appellant having the relevant intent was open to him on the evidence of the witnesses, the assessment of whom and of the effect of what they said was for him. Accordingly in my view the appeal against conviction fails and it is dismissed.

As to sentence the appellant was sentenced to five months' periodic detention, ordered to pay by way of reparation in all $1,957.41 by monthly payments of $200.00 on the 1st of each month and disqualified from driving for nine months. The appellant was already under an indefinite disqualification imposed in 1987.

By the time the appeal was heard, I was advised, the appellant had made full reparation in respect of one of the damaged motor vehicles by obtaining a replacement car for its owner. There was no indication that the other reparation had been made.

It was submitted that the sentence was excessive because:

(1) the appellant's intoxication had not been taken into account by way of mitigation on the basis that it affected the criminality of his offending. Further it was submitted that because the appellant was an addict who was demonstrably doing something about his addiction, it would have been appropriate to impose a lesser sentence;

(2) sufficient regard was not paid to the level of reparation ordered; some of which at least had been made;

(3) regard should have been paid to the lapse of time since the offending. The offence was committed in October 1988, the defended hearing was in April 1989, conviction was entered in May 1989 and the appellant was sentenced in August 1989.

Finally it was submitted that the disqualification was unnecessary because of the existing indefinite

disqualification. The disqualification imposed would simply further extend the time in which the appellant would be prevented from returning to full earnings as a car dealer. It was submitted that it would serve no purpose but could be destructive of the appellant's rehabilitation.

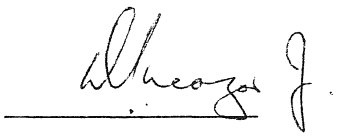
The Judge treated the matter as a drunken rampage which resulted in considerable damage. He adverted to the appellant's previous record as involving other convictions for comparable offending and a considerable number of driving offences involving drink. The Judge rejected drunkeness as an excuse or as a matter of mitigation. I entirely agree, particularly in the case of an accused person with previous offending of any sort involving excessive consumption of liquor.

So far as the periodic detention is concerned, the Judge reduced the term he otherwise would have imposed, by reason of the reparation ordered and by reason of the length of time the matter had been before the Court through no fault of the appellant. That period has been extended by a further 10 months again through no apparent fault of the appellant.

In my view the penalty of periodic detention was not manifestly excessive by reason of any of the considerations put forward by counsel and particularly not on account of the order for reparation. There is however an element of injustice by reason of the delay in final disposal since the penalty was imposed. The Judge made an allowance for that factor in relation to the determination of the charge when he assessed the penalty at five months' periodic detention. It is inappropriate to set aside the penalty entirely, but in my view a further reduction on account of delay would be just. Accordingly in lieu of the sentence of five months' periodic detention a sentence of three months' periodic detention is imposed. The appellant is to report to the Wellington Periodic Detention Centre at Thorndon Quay on

22 June 1990 at 6.00 p.m. and otherwise when and where directed by the warden. The maximum number of hours for any one period is not to exceed 9.

The order for disqualification was in my view a perfectly proper order to make in the circumstances of the case and the appeal in respect of it is dismissed. Finally, if reparation has not been completed, payment of the amount ordered by the District Court Judge which has not been made and which has not been satisfied by the provision of another motor vehicle is to continue at the rate of $100.00 per month, the first payment to be made on 1 July 1990. Successive payments thereafter are to be made on the 1st day of each month until the amount ordered by the Court to be paid has been paid.



D.P. Neazor J

Solicitors: Buddle Findlay, Wellington for Appellant
Crown Solicitor, Wellington for Respondent