GGH

11/5

SET 3.

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 77/90

2 JUN 1990

BETWEEN DEREK EDWIN SIMMONDS

Appellant

A N D THE POLICE

Respondent

669

Hearing: 10th April 1990

Counsel: G.D. Trainor for Appellant
J. Sandston for Respondent

ORAL JUDGMENT OF WILLIAMSON J.

This is an appeal against an order for reparation. The order for payment of $400 was made in the District Court at Christchurch on the 15th February 1990 after the Appellant had been convicted following a defended hearing of theft of a BMX Free Style bicycle valued at $400 the property of Joshua Rouxele.

At the time when the Appellant was sentenced on this matter he was also sentenced in relation to a charge of theft of another bicycle and a further charge of receiving a BMX bicycle. The sentence imposed on each of these three matters was one of four months' imprisonment. In addition the Appellant was ordered to pay reparation of $400 at the rate of $20 per week, with the first payment to be made on the 30th April. This was specifically stated to be "on the matter of Joshua's bicycle".

When this appeal came on for hearing before me on the 5th April, it became apparent that there was insufficient material on the file to determine the matters in respect of which argument had been presented. Accordingly I adjourned it until today to enable Counsel to make inquiries as to the procedure followed at the hearing in the District Court, the Appellant's means, and the financial facts available before the District Court on the 15th February.

Two arguments were made by Counsel for the Appellant in relation to the reparation order. He submitted first that there had been no jurisdiction to make such an order because the provisions of s.22 of the Criminal Justice Act 1985 had not been complied with. In particular he submitted that no opportunity had been given for the Appellant's Counsel to be heard in relation to reparation. Secondly, Counsel argued that an order for reparation in this case was not a proper exercise of the Court's discretion because the Appellant did not have sufficient means to meet such an order.

For the Crown it was argued that s.22(2) applied and that the circumstances in this case supported the exercise of the discretion provided that the payments were by instalments and to commence at a later time.

A Memorandum, which has been filed by Counsel who appeared for the Appellant in the District Court, recites the history of the various charges against the Appellant. It states that reparation was not considered prior to the sentence

being imposed. Counsel says that he was taken by surprise in relation to the District Court Judge's comments during sentencing about reparation and that he was not given any opportunity to be heard or to make submissions in relation to it. He further comments that at no stage was a reparation report sought or considered necessary.

For the Crown, Counsel says that inquiries from the prosecuting officer are inconclusive in that that officer cannot remember any submissions being made as to reparation, although he believes that he would have asked in the normal way for such an order for reparation.

Section 22 of the Criminal Justice Act, as amended in 1987, contains the following relevant subsection:

> " (2) Where, after giving the prosecutor and the offender an opportunity to be heard on the question, the court -
>
> (a) Considers that such a sentence should be imposed in respect of loss of or damage to property only; and
>
> (b) Is satisfied of the value of the loss or damage, -
>
> the court may impose such a sentence without further inquiry."

It is clear in relation to this reparation order that there was no further inquiry. Accordingly, in order for the District Court Judge to have had jurisdiction to make the order which he did, s.22(2) had to be complied with. There is no doubt that both prosecutor and offender's Counsel were given an opportunity to be heard as to sentence generally but it appears

that they were not given any opportunity to be heard "on the question", that is the question of reparation.

In my view s.22(2) clearly provides that if a Court is contemplating making an order for reparation then it must give a specific opportunity to the prosecutor and offender to be heard on that matter. In many cases a further report will be sought. In such a situation additional information as well as submissions will be available to the Court before making its decision. The importance of following s.22(2) is emphasised by the lack of detail available in this case.

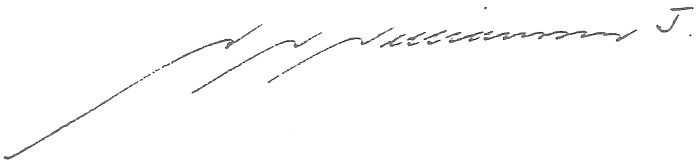
In various decisions of this Court on previous occasions, it has been said that reparation ought to be a reasonable sum to be paid back over a reasonable time. I refer to the judgment of Hardie Boys J. in Carroll v Police, High Court, Christchurch Registry, 24th September 1985. I refer also to the decision of Eichelbaum J. in the case of Belmont v Police, High Court, Wellington Registry, 13th October 1986. In the latter case a man who had stolen $19,000 and who had been sentenced to six months' imprisonment was also ordered to make full reparation. It was held that an order for full reparation in that case was not appropriate because of the sentence of imprisonment that had been imposed and because, on his release from prison, the Appellant, who had very few assets, would have been entirely reliant upon unemployment benefit.

Since I am satisfied in this case that the first ground of appeal advanced has been made out, namely that there

was not an opportunity to be heard on the question of reparation, it follows that in my view there was no jurisdiction for the District Court Judge to have made the order. It is not necessary for me to deal further with the question of whether or not such an order would have been a reasonable exercise of the discretion.

I have also considered whether it would be appropriate in this case to order a rehearing. In view, however, of the sentence of four months' imprisonment which was imposed, and the circumstances of the Appellant as described by Counsel, it would appear inappropriate to prolong this matter further by ordering such a rehearing.

Accordingly the appeal is allowed in that the order for reparation is quashed. Otherwise the sentence of the District Court is confirmed.



Solicitors:
Spiller Rutledge, Christchurch, for Appellant
Crown Solicitor, Christchurch, for Respondent

AP 77/90

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

BETWEEN DEREK EDWIN SIMMONDS

Appellant

A N D THE POLICE

Respondent

ORAL JUDGMENT OF WILLIAMSON J.
