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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

AP 122/93

**NOT
RECOMMENDED**

1713

BETWEEN

FRANCIS

Appellant

AND

NEW ZEALAND POLICE

Respondent

Hearing: 27 September 1993

Counsel: Appellant in person
C T Gudsell for the Respondent

Judgment: 27 September 1993

ORAL JUDGMENT OF HAMMOND J

This is an appeal against sentence by Francis. He was charged under s 228(1)(a) of the Crimes Act 1961 with taking unlawfully and without colour of right, but not so as to be guilty of theft, for his own use, a Toyota Starlet motor vehicle valued at \$14,000, the property of one Hessie Cavanagh.

The facts are these. It seems that the appellant, who had had some real difficulties of a matrimonial character, was - to use his language - "desperate to get to Tauranga to see his son." He had not seen that son for some three months. He says, and it seems to be plainly the case, that this was not a premeditated taking, nor was the taking one with the intention of permanently depriving the owner of the vehicle of it. To again to use his words, "the opportunity presented and he took the vehicle."

The learned District Court Judge had before him at the time he dealt with the matter three briefs of evidence, and he also had before him a report from Health Waikato. Mr Francis had been on bail for a psychiatric report pursuant to s 121(2)(a) of the Criminal Justice Act.

I have the sentencing notes of the learned District Court Judge. The Judge began his sentencing by noting that this was not what he termed a case of car conversion. He noted that the appellant is now bankrupt. He noted that the appellant appears to be of above average intelligence. He noted that the car had been taken simply to get the appellant to Tauranga. Towards the end of his sentencing notes he noted that the appellant is an undischarged bankrupt with no job, and that therefore a fine would be inappropriate. He thought the offence might well not be in the imprisonable range, but that periodic detention was appropriate. To use his words, "Given it is the first charge of car conversion, it will be for four months only."

Before me today, the appellant contended that insufficient regard was paid by the learned District Court Judge to the stress he was undergoing. Without in any way suggesting that he suffers from a psychiatric condition, the appellant

suggested he was faced with difficult personal circumstances which made his judgement less than would otherwise have been the case.

Secondly, he contended before me that a fine would have been appropriate and that he could have paid it. He emphasised that that is still the position.

There was some discussion about this factor and his legal status prior to the luncheon adjournment. As it transpired, it was convenient to take the luncheon adjournment and to allow the Crown solicitor to make enquiries of the Official Assignee's office over that adjournment.

A letter was presented to me after the adjournment by the Crown. The position, it transpired, is that the appellant is an undischarged bankrupt. He certainly appears to have had, and to have, a relationship of an employment character with an organisation called Telesearch. His duties, according to this letter (dated the 25th August 1993 under the signature of a Mr Gray) are specific, but his wages are yet to be finally determined. However, the letter does go on to state: "Mr Francis has consented to waive wages pending the activities of the business coming 'on line'." It appears from what Mr Francis himself had to say to me in his submissions that there is a sharp dispute between he and his advisers, and the Official Assignee's office, as to his financial position and as to whatever monies may come into his possession.

Against this background I deal with the matter as follows.

In the first place, the offence charged is certainly not a minor charge. It can attract a sentence of up to seven years imprisonment, which gives some indication

of the seriousness with which the legislature regards this particular offence. Car taking, for whatever purposes - whether it be simply joy-riding, or for personal transport to some other city, or more directly nefarious purposes - is far too prevalent. It gives rise to considerable distress on the part of the owners of the vehicle, and property damage to the vehicle can be incurred, although nothing of that character could be suggested to have occurred in this case. But the offence is one of a kind with respect to which, in my view, the Court has to take a firm hand.

Secondly, even allowing for the fact that the appellant has had personal circumstances which have understandably caused him some distress over the last two or three years, he has begun to accumulate, unfortunately, a number of offences which I will term broadly of a character of dishonesty.


Thirdly, the medical report itself shows that whilst the appellant was under stress, he was nowhere near disabled in a psychiatric or behavioural way.

Fourthly, it is clear that under the relevant insolvency laws and the status of this appellant, he is not in a position to pay a fine, which might necessarily have to be a reasonably stiff one in the circumstances. In short, I share the learned District Court Judge's view that this was not a viable sentencing option in this particular case.

Fifthly, sentencing has to be of a progressive character. In this particular incident the appellant has taken the quite serious step of unlawfully taking a motor vehicle. That was an advance on some of his previous offences, and should be recognised as such.

The appellant has to demonstrate in this Court that that sentence is manifestly excessive. In my view, the particular mode of sentence in this case was not inappropriate; and having regard to all the circumstances, it certainly could not be said that the sentence was manifestly excessive within the meaning of that term as it is understood in criminal appeals of this character.

That being so, the appeal will be dismissed. The sentence of periodic detention is of course confirmed, and the first report to Myrtle Street should be on Friday of this week.

A handwritten signature in black ink, appearing to read 'R G Hammond', written in a cursive style.

R G Hammond J