IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

AP 50/96

BETWEEN: CAROL FRANCES OLIVER

Appellant

A N D: POLICE

Respondent

Counsel: R. Barnsdale for Appellant
P. Morgan for Respondent

Judgment: 9 October 1996

ORAL JUDGMENT OF PENLINGTON J

Solicitors: R. Barnsdale, Hamilton
Crown Solicitor, Hamilton

This is an appeal against an order for restitution in the sum of $652.50 which was to be paid by instalments of $15 per week. The order was made in the District Court at Hamilton on 11 June 1996. The order for restitution accompanied an order for discharge under S.19 of the Criminal Justice Act 1985.

The appellant was charged with wilful damage on 16 August 1995 at Hamilton under S.11(1A) of the Summary Offences Act 1981. It was alleged that she intentionally damaged a motor car. The appellant pleaded not guilty to this charge and a defended hearing took place in the District Court. The appellant was represented by Mr Roose as Counsel.

Briefly, the facts of the case are as follows.

The appellant parked her motor car in a car park at the YMCA. Later, when she went to her car, there was a car parked behind her which she believed was blocking her path to get out of the car park. She thereupon re-entered the building to try and find the owner. At one stage she stopped at the enquiry desk and sought information from the receptionist.

In the event, she was unable to find the driver. She returned to the blocking car. There was evidence from the receptionist to the effect that she came out to the carpark and that she saw the appellant bending a

windscreen wiper on the blocking car. Subsequently the receptionist then assisted the appellant to back her car so that she could exit the car park.

When the complainant came to his car, which I have referred to as the blocking car, the appellant had gone. He then found that not only was the windscreen wiper bent, but also the car had some scratches on it. His evidence was that the car was unscratched before he had parked it in the car park.

The learned Judge gave an oral decision at the end of the hearing, during which the appellant elected to give evidence.

In her evidence, she denied that she had damaged the blocking car in any way at all.

The learned Judge, after carefully reviewing the evidence, found that the charge was established. In reaching that conclusion he made a finding of credibility. He accepted the evidence of the receptionist and rejected the evidence of the appellant.

The learned Judge then addressed the question of what should be done. He ultimately considered that it was a proper case for an order under S.19 of the Criminal Justice Act, discharging the appellant without

conviction on terms that she make restitution in terms of the order which is now under appeal.

Mr Barnsdale argued the appeal before me today. He did so with great care and has put forward every possible argument which could be put forward in support of the appeal.

Mr Barnsdale informed me from the Bar that the appellant still denies the allegations which were made against her. He however, quite properly argued the case on the basis that this Court is required to accept the findings in the District Court unless it can be persuaded to the contrary.

Mr Barnsdale, on behalf of the appellant, and for the purposes of this appeal, accepted that there was evidence to support the learned Judge's finding that the appellant wilfully damaged the windscreen wiper on the blocking car. His essential submission before me was that the learned Judge was not entitled to draw the inference that the appellant had scratched the blocking car. If this submission was successful, then that would inevitably lead to a reduction in the quantum of the order made by the learned Judge. Whether the appellant scratched the blocking car rested on circumstantial evidence. There were four points:

1. That the appellant was seen bending the wiper on the blocking car.
2. That the owner of that car deposed that there were no scratches on the car before the incident which has given rise to this prosecution.

3. The unlikelihood of any other person having any reason to scratch the blocking car at or about the time of the incident in question.

4. Clear motive on the part of the appellant because her desire to exit the car park was blocked.

As I have said earlier, the learned Judge rejected the appellant's denials and made an adverse finding on her credibility.

I am of the clear opinion that the learned Judge was entitled to draw the inference that the appellant had scratched the blocking car. There was evidence to support this finding. As I have said, one of the four points relied on by the prosecution was motive. The receptionist gave evidence that the appellant was in a rather agitated state. Later, when the appellant gave evidence in her own defence, she said, under cross-examination, that she was not a spiteful person, that she was not angry, and that she was not cross. She went on to say, quite unilaterally and without any direct questioning by the prosecutor, that she had been on numerous courses and had numerous counselling since she suffered brain damage. Unfortunately, the appellant suffered severe head injuries in a fall from a horse in January 1980. She was referring to that incident and the injuries which she suffered at that time.

Mr Barnsdale submitted that the evidence given by the appellant in answer to the prosecutor in cross-examination and later in answer to the

learned Judge on the same topic was in the nature of "propensity evidence". Mr Barnsdale accepted that there was no unfairness on the part of the prosecution. The prosecutor had not questioned the appellant directly on the subject of the head injuries suffered by her. Rather, as I have said, it was the appellant who volunteered the information.

Mr Barnsdale argued that in making the restitution order, the learned Judge had supplemented the circumstantial evidence, or put another way that the learned Judge had bolstered the inferences which he had earlier drawn.

I am unable to accept this argument. In my view the evidence was relevant to the appellant's motives on the day of the alleged incident and was also relevant to the making of the restitution order. The learned Judge was entitled to take that evidence into account, along with the other evidence in the case.

At the commencement of Mr Barnsdale's argument, he took a technical point with which I now deal. The learned Judge, in his remarks in relation to the S.19 order and the order which is now under challenge, said as follows:

> I have decided in all the circumstances to deal with this matter only by way of reparation. Now the Police tell me that you have no previous convictions. The Police also tell me that there is a sum of $652.5 owing and they further tell me that you were offered diversion in the first instance. I am prepared, on this your first visit to the Court, to discharge you without conviction under s.19 of the Criminal

> Justice Act, but to ask you to pay restitution of $652.50 at the rate of $15 per week, the first payment on or before next Friday the 21 June 1996.

It is to be noted that initially the learned Judge used the word "reparation". He then, when pronouncing the formal order, stated that the appellant was "to pay restitution of $652.50" at the rate stated. Mr Barnsdale rightly submits that an order for reparation can only be made when a person is convicted. Here, the appellant was not convicted and so there was no jurisdiction to make a reparation order.

On the other hand, there is power under S.19(3) of the Criminal justice Act for a Court to order, *inter alia*, restitution of any property.

Having read the recorded remarks of the learned Judge, and in particular the paragraph which I have set out above, I consider that the use of the word "reparation" was a mere slip of the tongue and that the learned Judge has properly made a restitution order, as he was entitled to do under S.19(3).

One last point. Mr Barnsdale challenged the quantum of the order. He submitted that he had information which suggested that the repainting component of the restitution order was excessive. I indicated that I was not prepared to receive that information without the consent of the Respondent. In reply to this point, Mr Morgan indicated that the order had been made in the District Court on the basis of information which had then been obtained

by the prosecution. I infer that there was no challenge to quantum at that time. The Respondent did not consent to any further information being placed before me. In the absence of an application to adduce fresh evidence, which was not made, I am not disposed to re-visit the question of quantum. That point therefore fails.

For the reasons given, the appeal is dismissed. The restitution order of the learned Judge is confirmed.

P.G.S. Penlington J