IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A193/00

BETWEEN R LYON

Appellant

AND THE NEW ZEALAND POLICE

Respondent

Date of hearing: 14 November 2000

Counsel: Paul Heaslip for the Appellant
Sarah Mandeno for the Respondent

Date of judgment: 14 November 2000

(ORAL) JUDGMENT OF CHAMBERS J

Lawyers:

Mr Paul Heaslip, PO Box 4108, Shortland Street, Auckland, for Appellant
The Crown Solicitor, DX CP 24063, Auckland, for Respondent

The facts and the District Court hearing

[1] Robert Lyon was charged that on 25 February 2000 he assaulted a female, contrary to s 194(b) of the Crimes Act 1961. He denied the charge. On 11 September, a defended hearing took place in the District Court at Waitakere. The learned District Court Judge, having heard the evidence, found the charge proved and entered a conviction. He then considered sentence. He ordered Mr Lyon to undertake periodic detention for four months. At that point, Mr Lyon left the court room and went to the bail room next door. He there signed the necessary papers and was then free to go. Before he left the court building, however, a member of the court staff advised him and his counsel that the judge wanted him to return to court to consider whether a non-association order under s 28A of the Criminal Justice Act 1985 should be imposed. Mr Lyon did return. So did his counsel. Counsel was invited to make submissions. He did so. Following that, the judge did impose a non-association order against Mr Lyon for a term of 12 months. The effect of that order was to prohibit Mr Lyon from associating with the complainant.

Issues on this appeal

[2] Mr Lyon lodged a notice of appeal. The appeal was restricted to two matters:

[a] Did the judge have jurisdiction to impose a non-association order in light of the fact that the defendant had left the court room before he was called back and the non-association order was made?

[b] Is the order workable in light of the living arrangements of Mr Lyon and the complainant?

[3] There was no appeal against the conviction. Nor was there any appeal against the sentence of periodic detention.

Jurisdiction

[4] Mr Heaslip, for Mr Lyon, has submitted that there was no jurisdiction to impose the non-association order because the sentencing process had come to an end prior to the application for the non-association order and its consideration. Mr

Heaslip submits that the imposition of the non-association order was in breach of s 26(2) of the New Zealand Bill of Rights Act 1990, which provides that no one who has been finally convicted of an offence shall be tried or punished for it again. He submits that in this case Mr Lyon had been convicted and sentenced and he could not be required to re-appear and to be further punished with respect to the same offence. Mr Heaslip acknowledges that he did not put this jurisdictional argument to the trial judge. I do not regard that as fatal to the appeal because, if he is right that the judge lacked jurisdiction, his failure to complain at the time cannot be used to found jurisdiction if none existed.

[5] There is no case directly on point. The closest case I have found is *R v Namana*, unreported, CA 561/99, 3 April 2000. In that case, the Court of Appeal was concerned with s 80(1)(b) of the Criminal Justice Act. That subsection provides that 'if a court sentences an offender to an indeterminate sentence, it may also order ... at the same time as it sentences the offender, that the offender serve a minimum period of imprisonment of more than 10 years'. Mr Namana pleaded guilty to murder. Nicholson J sentenced him to life imprisonment. The Crown Solicitor advised that he intended to seek a longer minimum non-parole period under s 80(1)(b). That application was heard by Anderson J almost 2 months later. He held that he did not have jurisdiction because 'the sentencing process was defunct': *ibid* at para. 5. The Crown appealed. The question in issue on that appeal was whether the phrase 'at the same time as it sentences the offender' in s 80(1)(b) was 'to be interpreted strictly so as to mean that the indeterminate sentence and the application under s 80 [were] to be dealt with on the same date or as part of the one sentencing process'. The Court held unanimously that it had 'little hesitation in adopting the latter construction': *ibid* at para. 6. The words 'at the same time' referred to 'the sentencing process' and that process was not 'defunct': *ibid* at para. 10. The submission that the words 'at the same time' must be read literally was 'both overly-literal and unduly technical': *ibid* at para. 8.

[6] In the present case, we do not have the words 'at the same time' in s 28A(1), although they do appear in subss (3) and (3A). If it was within jurisdiction therefore in *Namana* for the court almost 2 months later to consider the application for a minimum non-parole period, *a fortiori* here it must be permissible for the court within minutes of sentencing a person to call that person back for the purposes of adding another order which was open to the court and which had been overlooked. Clearly, at some point, the sentencing process will be over. In this judgment, I do not attempt to define when that point will be. It may differ depending upon the

sentence to be imposed and the statutory provisions underlying the sentence. What I am satisfied about here is that that point had not been reached in this case when Mr Lyon was asked to return to the court room. Mr Lyon was still within the court building. In my view, the judge did have jurisdiction to impose the non-association order on the facts of this case.

[7] Even if I am wrong in that view, it would always be open for me on appeal to impose such an order: see Summary Proceedings Act 1957, s 121.

Workability of the order

[8] Mr Heaslip's second submission was that the order was unworkable in practice. In actual fact, the workability of the order has not yet been formally tested because the effect of the appeal has been to suspend the sentence. Notwithstanding that, it is clear from an affidavit sworn by Mr Lyon that he has been, in effect, obeying the order since his conviction and sentence on 11 September. Mr Heaslip advises that Mr Lyon lives in a flat close to the complainant's flat. His garage is right next door to the complainant's flat and it has been inevitable that each has seen the other from time to time. Mr Lyon, in his affidavit, advises that he has tried 'very hard to keep out of the complainant's way'. He further expresses the opinion that 'no further problems have arisen' between him and the complainant. So far as one can tell, it would seem that the complainant has not expressed any concern to the police about Mr Lyon since the case was heard on 11 September.

[9] I do not consider that the order is unworkable or will be unworkable. The order simply prohibits Mr Lyon from associating with the complainant. The words 'associating with' have been considered in *Harris v Police*, unreported, A140/99 (Christchurch Registry), 30 August 1999, Chisholm J. In that case, Chisholm J emphasised that 'a brief chance encounter would not constitute "associating with" in terms of s 28A(4) because those words contemplate some continuum of contact': *ibid* at page 5.

[10] I do not consider that Mr Lyon will be in breach of the order if he by chance sees the complainant as he is living in his flat or sees her or is momentarily at close quarters with her as he is moving to and from his garage. He seems quite adequately to have been able to avoid the complainant over the past two months, notwithstanding that the non-association order has been suspended. There is no complaint from the complainant as to his actions since 11 September. Accordingly,

provided Mr Lyon continues to act in the way in which he has since 11 September, there is unlikely to be any problem.

[11] For those reasons, I do not find that the order has proved or will prove unworkable in practice.

[12] In Mr Lyons' affidavit there is a suggestion that the complainant 'has made attempts to communicate with [him]'. Clearly, the complainant must not do anything to exacerbate the situation between Mr Lyon and her. I do not know what these attempts have been or why they have been made. I have no doubt, however, that Ms Mandeno, who has appeared today for the police, will pass on to the complainant the necessity on her part to keep out of Mr Lyons' way so that the two of them can continue living in their respective flats in a peaceable way.

Result

[13] Both grounds of appeal have failed. Accordingly, the appeal is dismissed.

Tailpiece

[14] An interesting thing occurred just after I finished delivering the above oral judgment. The registrar asked me whether I needed to activate the periodic detention order and the non-association order, which he believed from a document on the file had been suspended. I immediately asked the registrar to get Mr Heaslip and Mr Lyon to return. It turned out that the periodic detention order had not been suspended by the appeal and indeed Mr Lyon is in the course of serving it. Counsel, after some research over the afternoon adjournment, advised that the non-association order had been suspended by operation of law: see Criminal Justice Act, s 28D and Summary Proceedings Act, s 124(3D). Likewise, with the appeal's dismissal, the non-association order automatically resumes: see Summary Proceedings Act, s 137(1)(c) and (d). It will run from today. So, as it turns out, nothing further was required of me.

[15] This incident illustrates, however, how impractical it would be if the judge were to lose jurisdiction the moment he or she finished his or her sentencing remarks. Sentencing is highly complex. The Criminal Justice Act is replete with fishhooks, even for very experienced judges as the District Court Judge in this case

was. It is very easy to overlook some requirement or other. It would be intolerable if judges could not patch up matters overlooked, especially when the omission to do something becomes clear almost immediately, as in this case.