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RM Bunk

92/2/27

IN THE COURT OF APPEAL OF NEW ZEALAND C.A.256/92



BETWEEN STEPHEN MALCOLM HEFFEREN

Applicant

AND MINISTRY OF TRANSPORT

Respondent

Coram: Casey J (presiding)
Gault J
Thomas J

Hearing: 1 October 1992

Counsel: P J L Hunt for Appellant
J C Pike for Respondent

Judgment: 1 October 1992

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**JUDGMENT OF THE COURT DELIVERED BY CASEY J**

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The appellant, now aged 21, was sentenced on 25 March 1992 to 2 years' imprisonment by the District Court at Palmerston North in its summary jurisdiction and disqualified for 2 years after pleading guilty to a charge under s55 of the Transport Act 1962 in that while the proportion of alcohol in his blood exceeded 80mg per 100ml he was in charge of a motor vehicle which caused the death of another by an act in relation thereto. Following an afternoon's drinking he drove home with a friend, ran off the road and his friend was killed. He was found to have a blood alcohol content of 204mg per 100ml.

He appealed unsuccessfully to the High Court, one of the grounds being that the sentencing Judge had fixed the prison term by reference to the maximum of 5 years under s55 of the Transport Act, whereas he should have paid regard to the jurisdictional limit of 3 years to which the District Court was subject under s7 of the Summary Proceedings Act and fixed a lesser term in relation to that. This proposition was rejected by Greig J who dealt with the appeal. On the merits of the case he had this to say, in line with the approach taken by the District Court Judge :

> "There is no evidence of bad driving, racing, or other matters which can be taken into account. On the other hand there are present a number of mitigating features which include the appellant's plea of guilty, the fact that this was a single accident arising out of what appears to have been, in other respects, adequate driving. The appellant has no previous convictions for traffic offences. He has expressed, and that has been accepted, remorse and he has been responsible for the death of a close friend.
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> In the end this is a case where, because of driving under the influence of alcohol, the appellant was not in proper control of his vehicle, failed to drive in circumstances in which he would ordinarily have driven without mishap and the result has been the death of his friend. There is, in a sense, some deliberation in his actions because he chose to spend the afternoon and early evening drinking, knowing that he was going to have to drive and he then did so. The alcohol count was some two and a half times the limit so that it ought to have been obvious to him that he was not in a fit state to drive. Moreover, there were some defects in the vehicle, presumably known to him or certainly those that he ought to have known of, which may have contributed to the accident but he chose to ignore and to continue driving.
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> Although, as I have said, the appellant did not have any previous traffic convictions he did have other previous convictions which at least indicated that he had an alcohol and drug problem which he had not fully resolved. There were a number of other matters in mitigation which were properly taken into account by the District Court Judge."

On the appellant's application and without opposition from the respondent, Greig J granted leave to appeal to this Court on two matters, the first being whether the District Court is bound by its summary jurisdiction limit of 3 years as the maximum to be taken into account in sentencing (clearly a question of law); and the second being whether there should be a distinction in sentencing under this section between bad driving as an aggravating factor, and those cases in which alcohol alone is the contributory cause. Greig J clearly had doubts over whether this involved a question of law. We are satisfied it does not. Section 55 makes no reference to anything but alcohol as the element in this offence. Other factors may aggravate it. The part alcohol plays may be one among many others to be taken into account in selecting an appropriate penalty. That approach is illustrated in the passage quoted above from Greig J's decision.

Sentencing is not an exact science and attempts to refine and sub-divide useful general guidelines may be counter-productive and restrict the proper exercise of the sentencing discretion reposed in Judges. Accordingly, we do not feel called upon to respond to the second question, and would add that we agree with Greig J's comments and conclusions about the adequacy of the sentence. We would also observe that in keeping with increasing community concern about offending of this nature, recent sentences in this area have tended to become more severe than those generally thought adequate in earlier years.

The first question was prompted by a division between High Court Judges. In **Ngaamo v Ministry of Transport [1987] 1 NZLR 170** at p184 Gallen J held that the District Court Judge was bound by the maximum within the jurisdiction and not by that imposed by the statute when passing sentence. That view has not been followed in subsequent High Court cases - see for example **Mills v Police [1988] 1 NZLR 742**, and **Slattery v Ministry of Transport 6 CRNZ 419.**

Parliament fixes the maxima laid down for offences to guide Judges in sentencing. Section 7 of the Summary Proceedings Act simply imposes a ceiling beyond which the District Court cannot go in arriving at a sentence within the maximum laid down for the particular offence. If the Judge feels something more is called for than that allowable to him or her the proper course is to send the case to the High Court, but s7 cannot be read as partially repealing the penalty provisions of the Crimes Act or other statutes fixing the maximum to which the offender is liable.

With respect, we consider that Gallen J was mistaken in his approach to sentencing in **Ngaamo.** We have no doubt that sentencing must be approached with regard to the maximum imposed by the Act, whether it takes place in the High Court or the District Court. The only qualification is the jurisdictional restriction imposed by s7. Accordingly the appeal is dismissed.

**Solicitors:**
Jacobs Florentine & Partners, Palmerston North, for Applicant
Crown Solicitor, Palmerston North, for Respondent