IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.109/84

496

BETWEEN R MAKAWE
Appellant

A N D MINISTRY OF TRANSPORT
Respondent

Counsel: J.F. Hooper for Appellant
C.Q.M. Almao for Respondent

Hearing and Judgment: 2 May 1984

ORAL JUDGMENT OF GALLEN J.

The appellant was convicted on 20 January 1984 on a charge of driving with excess blood alcohol. It was in fact the second conviction of this nature for him. He was fined the sum of $750, ordered to pay the usual expenses and costs and disqualified from driving for a period of 2 years.

The summary of facts indicates that the incidents which led to his apprehension were not particularly significant; that there was no great danger occasioned to another person and therefore the driving does not seem to have been a significant factor in the offence, nor has it reflected in the penalty. The

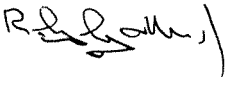
level of blood alcohol however at 228, is a very high figure and could and should reflect in the penalty imposed. This being a second offence, it was certain that the learned District Court Judge would impose a higher penalty than had been imposed on the first occasion and indeed he must have considered, as he did consider, the possibility of imposing a sentence of imprisonment. In his notes on sentencing, he indicated that it had been his intention to consider periodic detention as an alternative to imprisonment, but he did not consider this appropriate in view of the disproportionate effect that such a sentence might have had on the appellant's employment situation. It is clear from the Probation report that the appellant has been a good citizen and a decent member of the community, but unfortunately he appeared on an offence which can be committed by any member of the community and which the community has indicated is to be prevented and discouraged as far as possible by the imposition of the penalties which are contained in the Statute.

If those were the only matters in issue I should have thought that the sentence imposed was not open to question. I am however concerned with another matter raised by Mr Hooper. In the notes on sentencing the learned District Court Judge referred to another case which apparently took place on the same day and which I am informed involved reasonably similar circumstances in that it was a blood alcohol offence for the second time and I am also informed that the space of time

between the two offences was rather less than is the case for this appellant. The learned District Court Judge appears to have imposed a period of disqualification twice as long in the case of this appellant and gave as his only reason in doing so that this appellant was older and therefore should have known better than the other person facing a similar situation. I am informed that the age difference was 10 years. I cannot accept that age is a valid reason for making such a distinction and I am concerned that a person involved in an offence of this kind should be left with the impression that that is the reason why he has been singled out for a substantially heavier penalty than was imposed on the other person concerned. I accept that it does not appear from the file what were the precise circumstances which related to the other offender and it may well have been that there were other factors entirely which led to the conclusion of the learned District Court Judge and the sentence which was imposed. He has himself however, chosen to make the comparison and has done so during the course of his sentencing. Therefore, it is open to the appellant to be left not merely with the inference but the stated conclusion of the District Court Judge that that was why he has had a disqualification twice as long imposed upon him. It seems to me that this is one of those cases where justice must be seen to be done, as well as done. At the same time, it is important that the attitude of the community towards this type of offence should be made clear. Mr Almao pointed out that it is open on appeal to look at all aspects of the penalty

and Mr Hooper indicated that as far as his client was concerned, he would have preferred to have had a more substantial fine imposed with a lower period of disqualification. It is impossible for me as I have already said, to make the kind of comparison between offences which the learned District Court Judge refers to in his notes on sentencing.

I propose to allow the appeal and substitute a fine of $850 and the Court costs and other fees imposed will remain as they were. The disqualification imposed will be reduced from 2 years to 18 months. There will be no order for costs.



Solicitors for Appellant: Messrs McCaw, Lewis and Jecks, Hamilton

Solicitor for Respondent: Crown Solicitor, Hamilton