IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY M.1319/84

BETWEEN ROBERT ANDREW DAVIS
Appellant

AND MINISTRY OF TRANSPORT
Respondent

Hearing : 16 November 1984

Counsel : H.M. Romaniuk
Mr Jones for Respondent

Judgment : 16 November 1984

(ORAL) JUDGMENT OF BARKER J

This is an appeal against the length of the term of disqualification from driving imposed on the appellant in the District Court at Otahuhu on 9 August 1984. The appellant pleaded guilty to a charge of driving with excess breath alcohol; he was fined $600 plus costs and disqualified from driving for 12 months.

The difficulty arises from the fact that on 10 June 1983, the appellant was convicted of an offence of driving with excess blood alcohol and fined $150 and disqualified from driving for 6 months.

Under S.38(2) of the Transport Act 1962, as inserted by the 1978 amendment, it is not possible for a disqualified driver to obtain a limited licence to drive for the purposes of his employment on the grounds either of extreme hardship to himself or undue hardship to others where, inter alia, he has been convicted of driving with excess blood alcohol or excess breath alcohol, and the offence is committed within 5 years before the commission of the offence for which he is currently disqualified.

The appellant is employed by Air New Zealand at Mangere Airport and is required to work as a shift worker. There is information on this aspect of his life contained both in the probation report and in counsel's submissions to the District Court Judge. Mr Romaniuk has today filed an affidavit which sets out in some detail the difficulties faced by the appellant in observing the disqualification order. If he is on a shift that starts at 6 a.m., his wife has to take him to work; this causes difficulty because she is working and she has to organise the family in the morning. For other shifts, afellow worker normally takes him, subject to his availability. On some occasions, he has travelled by bicycle a distance of 7 miles, taking one hour. Taxis cost about $20 return.

The appellant asks for some reduction in the period of disqualification because of the very real hardship suffered by him and his family.

The appellant does have a drink problem. It is stated in the probation report that he has been taking some steps to combat that problem.

In his sentencing remarks, the District Court Judge rightly noted that, for a second offence of this nature, Periodic Detention is a usual form of punishment. However, he decided that thatpunishment would impose too much hardship for a person in the appellant's employment. He therefore dealt with him by way of a fine and noted that the loss of his licence was going to impose hardship on the appellant; however he stated that this was a problem that he had brought on himself and that he saw no reason for departing from what he considered to be the minimum disqualification for a second offence, namely 12 months.

In a case I heard yesterday of McGrevey v. Auckland City Council, a similar plea was made in respect of a sentence imposed on an appellant whose previous offence was over 4 years before the offence for which he was being sentenced. He received a sentence of 4 months' Periodic Detention plus 12 months' disqualification. He was a self-employed baker who needed his

licence to establish a business and for promotional and sales purposes. On all the facts of that case, I held that the cumulative effect of Periodic Detention and the inability to drive for 12 months was too harsh a penalty. I quashed Periodic Detention and substituted a fine of $750.

However, with that variation, I really see little difference between the case of McGrevey and that of the present appellant. I think the basic difficulty that he suffers is from the fact that the legislation makes it clear that persons who have drink/drive convictions within a 5 year term must suffer a severe penalty. Whilst I have every sympathy for the appellant and have given earnest consideration to Mr Romaniuk's conscientious submissions on his behalf, I feel that I cannot hold that the District Court Judge acted on a wrong principle or that his sentence was manifestly excessive. Indeed, the sentence imposed by the District Court Judge was, in roughly comparable circumstances, equivalent to that fixed by me on appeal in McGrevey's case. If anything, the present offence was worse because, in McGrevey's case, the previous conviction was over 4 years prior to the one under appeal.

One must applaud the efforts of the appellant to comply with the terms of his disqualification and to take steps to deal with his alcohol problems. However, I feel that I am not able to interfere with the sentence of the District Court Judge who had in mind all the relevant matters, even though he may not have had the detail which the affidavit now discloses. Clearly, he treated the appellant with some leniency when he did not impose a term of Periodic Detention which he could well have done for a second offence of this nature, especially one so recent in time compared with the first offence.

I stress again that the difficulty with this appellant and others is caused not by the approach of the District Court Judge but by the intractibility of the legislation.

The appeal must therefore be dismissed.

SOLICITORS:

Yolland & Romaniuk, Auckland, for Appellant.
Crown Solicitor, Auckland, for Respondent.