IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

M.No. 116/84
(CRN 9/84)

IN THE MATTER of an appeal from a determination of the District Court at Kaikohe

BETWEEN THE AUCKLAND CITY COUNCIL (MICHAEL JOHN McCORMICK)

INFORMANT/APPELLANT

A N D PHILLIP MICHAEL CIVIL

DEFENDANT/RESPONDENT

Hearing : 29th November 1984

Counsel : Mr. Gresson for appellant
Mr. Watson for respondent

Judgment : 5-12-84

JUDGMENT OF VAUTIER, J.

This is an appeal by way of Case Stated brought to this Court in terms of section 107 of the Summary Proceedings Act 1957. The appeal is brought by the appellant, as the informant, in respect of a decision of His Honour Judge H.R.H. Paul Esq., given in the District Court at Kaikohe on the 3rd April 1984 wherein he convicted the respondent, following his plea of guilty to a charge brought in terms of section 56(1) of the Transport Act 1962, and imposed a fine of $175 and ordered payment of Court costs of $20 but did not impose any disqualification upon the respondent from holding or obtaining a driver's licence.

It is the omission to impose such disqualification which constitutes the alleged error in law on the part of the Judge and the reason for the appeal.

In the Case Stated it is mentioned that, because of the respondent's plea of guilty, no evidence was adduced by the appellant, as informant, but, in the usual way, a summary of facts was read to the Court by counsel for the prosecution. This summary was as follows :-

> "On Saturday, 26th November, 1983 at about 11.20 p.m. the defendant drove a Honda car on Great North Road approaching the uncontrolled intersection with Kiwi Road. Forty metres prior to the intersection he collided with the rear of a stationary vehicle that was stopped in a line of traffic.
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> A passenger in the other vehicle suffered a chipped vertabrae and whiplash.
>
> The defendant's vehicle was extensively damaged. The other vehicle sustained moderate damage.
>
> The defendant said: 'I was travelling along very slowly in the traffic. I looked down. When I looked up I went straight into the back of her.'
>
> Conditions at the time were road surface dry, visibility good, traffic volume heavy."

In the Case Stated it is mentioned that counsel for the defendant submitted that there were special reasons for imposing no disqualification and he made submissions accordingly but called no evidence. It is further mentioned that the Judge himself has no recollection of the scope and contents of the submissions other than those set forth in a memorandum signed by both counsel which is incorporated in the Case and is stated to have been agreed upon by counsel

on each side as accurate a record of the submissions as possible. In this memorandum it is mentioned that the informant's summary of facts was admitted but it was considered that it should be extended and counsel then "addressed the Court with regard to special circumstances relating to the offence which Your Honour should consider". The memorandum then continues:-

> "It was submitted that the offence was a momentary indiscretion which occurred whilst the defendant was driving in heavy traffic after the David Bowie concert at Western Springs. There were two lanes of traffic travelling in a stop start fashion. The defendant was momentarily distracted and when he looked up he saw the traffic in front was stopping. He jammed on his brakes, his wheels locked and his vehicle hit the car in front. It was stated that the defendant's car in fact was hit on the tow bar by the vehicle stopping behind him. It was submitted for the defendant that there was no question of speed involved and the injury sustained by the passenger sitting in the front passengers seat of the vehicle hit was a minor one."

The memorandum then refers to submissions being addressed to the Court on the defendant's circumstances which included a number of circumstances which were such as to result in there being some substantial degree of hardship caused to the respondent if he was deprived of his driving licence. There is then a reference to the Judge having asked counsel "if it was a case of a country boy in the city" and to counsel advising the Court that the respondent had not been driving his own car at the time in question. The memorandum, as originally typed, made reference to the Judge holding "that there were special reasons relating to the offence" and that he did not "intend to touch the

defendant's driving licence". The words "you held that there were special reasons relating to the offence and that" however, have been deleted in the memorandum attached to and forming part of the Case Stated.

The Case Stated concludes as follows:-

> "I DETERMINED, on the basis of submissions of Counsel for the Defendant, that in this case there were special reasons relating to the offence for not ordering the Defendant's disqualification from holding or obtaining a driver's licence for the minimum period of six months in terms of Section 30(3) of the Transport Act 1962.
>
> THE QUESTION for the opinion of this Honourable Court is whether or not my decision was erroneous in point of law and in particular:-
>
> (a) Where an application is put forward by or on behalf of a Defendant for special reasons for imposing no or a lesser disqualification than is required by statute, is the Court obliged to act only on formal evidence put before it or may it act on the basis of oral submissions of Counsel?
>
> (b) Were the reasons put forward by the Defendant's Counsel special reasons for imposing no or a lesser disqualification within the meaning of the Transport Act 1962? "

The statutory provision applicable to the offence under Section 56(1) of the Transport Act 1962, to which the Respondent pleaded guilty, is contained in Section 30(3)(b) of the Act which, in its amended form, and so far as here applicable, provides that:-

> "Every person who commits an offence against..... Section 56(1) of this Act (which relates to causing bodily injury or death through careless use of a motor vehicle)..... is liable to

> "imprisonment for a term not exceeding 3 months or a fine not exceeding $1,500 or to both and (without prejudice to the powers of the court to order a longer term of disqualification) the court shall order him to be disqualified from holding or obtaining a driver's licence for a period of 6 months unless the court for special reasons relating to the offence thinks fit to order otherwise."

As Mr Gresson, for the appellant, mentioned, the section, as now framed, gives statutory recognition to the original interpretation given by Lord Goddard to the words "special reasons" in the case of Whittall v. Kirby (1947) K.B. 194 - a case dealing with the corresponding statutory provision in England. Just as was held in that case it is, of course, now made clear by the section itself that there must be excluded from the special reasons referred to in section 30(3) reasons which are special to the offender as distinct from the offence.

With regard to question (a) of the Case Stated the submission which Mr Gresson advanced and the basis which he put forward for the contention that the Judge's determination in this case was wrong in law, was that the Court is not entitled, in such circumstances as were here present, when considering the question of the imposing of a disqualification as regards the driver's licence, to act merely upon the basis of oral submissions of counsel. It was his contention that the Court could act only upon sworn evidence presented to it when considering the question of whether or not special reasons, within the meaning of the section, were shown. He relied upon a dictum again of Lord

Goddard C.J. in the case of Jones v English (1951) 2 ALL E.R. 853 reading as follows :-

> "But where, on a plea of Guilty or after evidence has been heard, a defendant has been convicted of an offence for which the penalty of disqualification is laid down by Act of Parliament and he seeks to rely on special reasons for the non-imposition of disqualification, he ought to give evidence, and the justices ought to hear evidence on the point and not merely to accept statements. This is highly desirable because the onus is on the defendant to show special reasons why he should not be disqualified."

He also relied upon the statement of Lord Widgery in Pugsley v Hunter (1973) 2 ALL E.R. 10 at page 14 that the onus of proof of the relevant and material facts relied upon as constituting special reasons under the corresponding English provision rests on the defendant. Lord Widgery quoted the passage to which I have already referred from the judgment in Jones v English and said this :-

> "Not only is there the authority of this court for that conclusion but it seems to me to be entirely consistent with the principle that the defendant, who is the only person who knows what the special reasons are, should face the onus of proving the facts on which he relies for this plea."

Reference was also made to the decisions in Rennison v Knowler (1947) 1 ALL E.R. 302 where it was said, at page 304 :-

> "We are in agreement with decisions given in Scotland that the question whether, on facts found by the court, it is open to the court to hold that special reasons exist is one of law."

Again, it was pointed out that in Duck v. Peacock (1949) 1 ALL E.R. 318 it was said, again by Lord Goddard:-

> "We have to look at the facts found by the learned magistrate here, and say whether as a matter of law he could hold that a special reason existed."

The matter was put similarly in Jowett-Shooter v. Franklin (1949) 2 ALL E.R. 730, as it was also by F. B. Adams J. in Profitt v. The Police (1957) N.Z.L.R. 468 at 470 and by Cook, J. in Reedy v. Brown (1951) N.Z.L.R. 1040 at 1042.

It will be noted that in the first case to which I have referred above, upon which Mr Gresson primarily relied, Jones v. English, exactly the same situation was presented by counsel who, following the defendant's plea of guilty, made submissions to the Justices which included submissions with regard to the facts of the case. As Lord Goddard said at page 853:

> "From the way in which the Case is stated I think we must assume that the justices considered that the prosecution did not dispute the facts so put before them for the purpose of asking them to find special reasons for not disqualifying the respondent...."

In just the same way as the Case here sets out, the facts which the Justices were told by the prosecution, again with no evidence given, but, just as here, with a simple summary of facts presented by the prosecution, had not been challenged by the defendant.

The cases certainly appear, therefore, to justify the contention that in England in all events, and it seems in this country too, it has been concluded that matters should not be dealt with in the way that was done here and accordingly appear to support the view that the first question in the present Case Stated should be answered by saying that the Court is obliged to act only on formal evidence placed before it and may not act on the basis of oral submissions by counsel. I certainly agree with Mr Gresson that if the Court is obliged to find facts and record its finding of fact in the manner indicated in all the authorities to which I have referred above this cannot properly be done when the Court has had nothing more presented to it than counsel's submissions containing, as here, references to what his client has instructed him were the circumstances surrounding the offence.

As I pointed out in the course of the argument, however, the laying down by this Court of a rigid rule, in this way, could result in considerable impediment to the speedy and efficient despatch of traffic cases in District Courts. The prosecutor, no doubt, because of the usual practice being that when it is known that a case is to be defended it is adjourned for a special fixture, would, in most instances, be unprepared to cross-examine the defendant in any effective way on the evidence given by him with regard to the special circumstances put forward. It would also, of course, not be in a position to call any evidence in rebuttal at that time.

It appears to me, nevertheless, that the practice which was adopted in the present case is unsatisfactory and not in accordance with authority. In my view, the difficulties to which I have just adverted could be largely overcome through these cases being dealt with in the manner adverted to by Beattie J. in Lower Hutt City v McAlpine (1972) N.Z.L.R. 168. I think it is desirable to quote the whole paragraph in which the statement to which I am particularly referring occurs. It is on page 172 :-

> "In England, where Justices find special reasons for not disqualifying on an offence carrying the mandatory disqualification, s 9 of the Road Traffic Act 1962 (as Bridge J said in Brown v Dyerson (supra)) requires them to do two things - first, to state their grounds for so doing in open Court; secondly, to enter those grounds in the Court Register. Indeed, in Jones v English (1951) 2 All ER 853, it was held that the proper practice to be followed when special reasons are alleged is that evidence should be called to substantiate them. While it is true that in this country there is no statutory direction relating to stating grounds, it is very desirable that a Court should do so. It could well happen that the police or traffic prosecutor could make a formal admission in open Court as to the facts which are relied on as constituting a special reason but the important factor, in my view, is that when they are found they should be stated and recorded in such a way that they can be reviewed on appeal. (See R v Recorder of Leicester (1947) KB 726; (1946) 1 All ER 615)."

In the majority of cases I have no doubt the prosecutor would be prepared to make such a formal admission and the facts upon which the Court relied for reducing the period of disqualification or imposing no disqualification could then be made the subject of a formal finding by the Judge in his decision. The situation evidenced by the

present case is certainly quite unsatisfactory. There is no mention at all of the facts upon which the Judge relied for his decision upon the matter in question apart from the reference in the Case Stated to the determination made being "on the basis of the submissions of counsel for the defendant". These submissions, of course, as will be noted, included references to matters of fact which related to the offence itself as well as a substantial number of facts which had no relation to the offence itself but concerned the appellant personally.

I accordingly conclude that the first question in the Case Stated should be answered in the following way:-

Where an application is put forward by or on behalf of a defendant that the Court should not impose any disqualification or should impose a lesser than the minimum period referred to in the statute, because there are special reasons for the Court's consideration, the Court should act only upon formal evidence placed before it unless the prosecutor is prepared to make a formal admission that the facts are as the defendant or counsel state they were and the special reasons upon which the Court has acted should be formally found and recorded. I accordingly conclude that the appeal should be allowed on the ground that this was not done in the present case and that accordingly there was no proper foundation for the order that no disqualification be imposed. This conclusion, in the circumstances of this case, really renders it unnecessary for me to deal with the second question but, because it was argued fully, I propose to deal with it briefly.

Mr Gresson submitted that even if the facts

were accepted as being those which I have previously referred to as put forward by counsel, there was insufficient justification for these being regarded as special reasons within the meaning of the section. In Mr Gresson's submission they amounted, not to special reasons, but were simply the sort of reasons which are very commonly put forward in relation to cases of this kind. They were not such as to fulfil the test as it was expressed in the case already referred to Profitt v. Police (1957) N.Z.L.R. 468 at 470:-

> "The reasons must of course be special and not such as are common to the ordinary run of cases."

Mr Gresson relied more particularly upon what was said in a decision of the Criminal Division of the English Court of Appeal in R v. Guilfoyle (1973) 2 All E.R. 844. The Court was there dealing with the provision regarding disqualification from driving for a minimum statutory period following a conviction for causing death by dangerous driving. At page 845 Lawton L.J. said:-

> "In the judgment of this court an offender who has been convicted because of momentary inattention or misjudgement and who has a good driving record should normally be fined and disqualified from holding or obtaining a driving licence for the minimum statutory period or a period not greatly exceeding it, unless of course there are special reasons for not disqualifying. If his driving record is indifferent the period of disqualification should be longer, say two to four years, and if it is bad he should be put off the road for a long time. For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly, a custodial sentence with a long period of disqualification may well be appropriate,

> "and if this kind of driving is coupled with a bad driving record the period of disqualification should be such as will relieve the public of a potential danger for a very long time indeed."

Mr Gresson relied only upon the first sentence in this passage, but I have quoted the whole paragraph because I think this makes it clear that the Court of Appeal was, in the customary way, seeking to make a pronouncement which would be of assistance to Courts of first instance in the matter of imposing penalties in cases of this kind and as indicative of the approach likely to be adopted by the Court of Appeal in considering appeals against sentence.

For this reason I do not think it would be appropriate to regard the statement relied upon by Mr Gresson as one which should be adopted and followed by Courts in this country. There are frequently differences in the levels of penalties imposed in respect of particular offences by the Courts in England as compared with those imposed in this country. This is, of course, understandable in view of different conditions pertaining in the two countries and the differing considerations which may call for some change in levels of penalty at any particular time and which properly influence the Courts with regard to such matters. In any case, as Mr Watson pointed out, Lawton L.J. qualified his statement by the introduction of the word "normally".

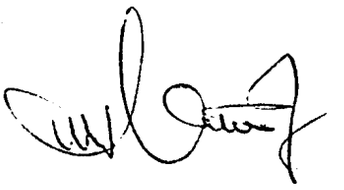
It must be noted also that there can be a very considerable difference in the degree of blameworthiness present in particular cases of momentary inattention or misjudgment on the part of a driver according to the particular

circumstances in which the driver is placed at the time. This is indeed exemplified in the very case which the Court of Appeal had before it. The appellant there, as the report shows, had driven his lorry out of a minor road across the carriageway of a major road and had failed to appreciate the presence of a Mini car proceeding along the main road. Momentary inattention, in such circumstances, is, in my view, a very different thing from the momentary inattention of a driver confronted with the type of situation referred to in the present case of a long line of vehicles constantly stopping and starting because of congested traffic conditions ahead where the likelihood of even the most careful of drivers being momentarily distracted is, I think, greater and the likely consequences much less serious.

I am not prepared to conclude that the circumstances adverted to by counsel as regards the accident itself could not properly be regarded by the Judge as constituting special reasons for not imposing a disqualification, but for the same reasons as I have set out in relation to the first question, the answer to the question as framed must, I think, be no.

The appeal is therefore allowed in part in that, for the reasons I have already indicated I do not consider that the Court was entitled to deal with the matter simply upon the basis of the submissions made in the way they were here. This is, indeed, the aspect of the matter with which the appellant, I was informed, is particularly concerned. In these circumstances, therefore, although I allow the appeal

in so far as the order made includes no provision regarding disqualification, I do not remit the matter to the District Court to deal with any further and make no further order so that the practical outcome is that the decision will stand effectively as it was given.



SOLICITORS:

Appellant: Butler, White & Hanna, Auckland.

Respondent: Johnson Hooper & Co., Whangarei

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WHANGAREI REGISTRY

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Reasons advised (Note)

Reserved Decisions Book noted

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A N D	PHILLIP MICHAEL CIVIL
	DEFENDANT/RESPONDENT

JUDGMENT OF VAUTIER J.

Reserved decision delivered by me this 5th day of December 1984 at 2.30 pm

[illegible] Gresson
[illegible]

E. S. Thompson

Duncan White & Kenna (Gresson)

Johnson Hughes & Co (Whangarei) Mr Watson. (posted at request of Counsel).