

BETWEEN

ENNIS

1194

Appellant

**NOT  
RECOMMENDED**

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 13 August 1986  
Counsel: R.F. Perry for Appellant  
M.N. Zarifeh for Respondent  
Judgment: 13 August 1986

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ORAL JUDGMENT OF HOLLAND, J.

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The appellant appeared for sentence in the District Court on a third charge of driving a motor vehicle with an excess of alcohol in his blood. He was 27 years of age and is a single man. His first offence of this kind occurred on 20 October 1982 when he was fined \$300 and disqualified from driving for nine months. The second offence occurred on 15 March 1984 when he was fined \$600 and disqualified from driving for 18 months. This third offence was a serious one in relation to the proportion of alcohol in his blood in that the proportion was 219 mg per 100 ml. On the other hand there was no accident and hence no property damage or personal injury.

I agree with the District Court Judge that the offending of this man in relation to driving with alcohol had reached a stage where a prison sentence must have been a matter for consideration. I also agree with the submissions of counsel for the appellant that were it not for the health of this appellant he might

have had a reasonable expectation of receiving a sentence of periodic detention. Unfortunately this appellant at the beginning of this year was involved in some form of affray in which he suffered a fractured wrist and fractures of both elbows. As a result of that, he has suffered and is still suffering from a chronic specific rheumatic condition which has prevented him carrying on with employment and resulted in a medical certificate being supplied to the Court that he would be unable to carry out periodic detention work.

The District Court Judge appears to have taken the view that a community based sentence other than periodic detention was either inappropriate or would suffer from the same difficulties as arose from the appellant's inability to serve a sentence of periodic detention. There is a risk in the nature of community based sentences being misconceived and that was emphasised in the submissions made by counsel for the appellant that it appeared to be unjust that the appellant was to serve a sentence of imprisonment because he was not eligible for periodic detention. Periodic detention and community care and other similar sentences were introduced to avoid sending people to prison if alternative forms of punishment were available. Before those alternative forms of punishment are considered it accordingly followed that the offence and the offender otherwise warranted a sentence of imprisonment. It may be that in certain circumstances offenders can be treated more leniently because of the suitability of a community based sentence, but it cannot be said that it is unjust to send a person to prison when a community based sentence is not available, particularly if it is a prerequisite to the community based sentence that the offence and the offender warranted a prison sentence.

Notwithstanding all that I have just said, there is, however, an obligation on all Courts to avoid sending persons to prison if satisfactory alternatives can be provided. Undoubtedly imprisonment was an appropriate sentence for a healthy adult. This man is not healthy, and in my view the Court should take into account the difficulty to him in serving a prison term because of the disabilities from which he is suffering which are accepted as rendering him unsuitable for periodic detention. In those circumstances I do consider that the District Court Judge could have taken a more lenient view because of the particular disability from which the appellant suffered. I am satisfied that in those circumstances a term of imprisonment was not justified and that the matter was correctly dealt with by an imposition of a substantial period of disqualification. That period of disqualification of five years has not been challenged on appeal.

The appeal against sentence will be allowed. The sentence of two months' imprisonment will be quashed. In lieu thereof I impose a fine of \$750. That fine would have been higher but I have taken into account the fact that the appellant has already served seven days of his two month sentence. Accordingly the appeal will be allowed. The sentence will be varied by substituting a fine of \$750 for the period of imprisonment and the term of disqualification of five years will remain.

*A. O. Ireland J.*