

BETWEEN

ROSS HAMILTON

Appellant

AND

MINISTRY OF TRANSPORT

Respondent

Hearing: 4 March 1987

Counsel: W R Harris for the Appellant
CQM Almao for the Respondent

ORAL JUDGMENT OF BISSON J

This is an appeal against the sentence imposed on a conviction in respect of a breath alcohol offence. The appellant pleaded guilty to driving a motor vehicle on Lake Domain Drive in Hamilton while the proportion of alcohol in his breath exceeded 500 microgrammes of alcohol per litre of breath in that it was 950 microgrammes of alcohol per litre of breath. He was convicted and fined \$1250.00 with Court costs \$38.50, disqualified from holding or obtaining a motor drivers' licence for 12 months and an order was made that his motor vehicle be confiscated.

The summary of facts reveals that at 10.53 pm on Friday 12 September 1986 the appellant was the driver of a vehicle on Lake Domain Drive. It was seen in a stationary position and then when the driver turned left, he accelerated heavily causing the rear tyres to squeal loudly which could easily be heard at 80 metres away. He was then interviewed and the breath test carried out. He was cooperative.

He has a conviction in 1983 of careless driving causing injury when he was fined \$350.00 and a further conviction in the same year for driving with an excess blood alcohol concentration when he was fined \$400.00 and disqualified from driving for six months. This second offence in respect of drinking and driving although some four or five years later would call for a sentence which would demonstrate to the appellant that this kind of behaviour had to stop.

The learned District Court Judge referred to the very high level of alcohol content and said that if he had continued to drive undoubtedly he would have had an accident and that he was still within the dangerous age group of 15 to 24 years.

As the appellant was a soldier the learned District Court Judge considered that periodic detention would not be appropriate having regard to his occupation and he felt that left him with two choices, one of imprisonment and one of a

substantial fine. He chose the latter course and hence the fine of \$1250.00. Without any reference to the provisions of s.84 of the Criminal Justice Act 1985 which empowers the Court to order confiscation of motor vehicles in certain cases an order of confiscation was made.

Although the notes of sentencing show that the defendant was not represented by counsel that appears to be an error as his counsel Mr Harris in this Court has advised the Court that he also appeared for the appellant in the District Court and he has informed this Court that prior to the imposition of the order of confiscation the only question asked by the learned District Court Judge was as to the make of the vehicle and its registration number.

There are four matters which are set out in subs.(4) of s.84 to which the Court shall have regard. The first two relate to undue hardship either to the offender or to any other person. That aspect of the matter does not appear to have been considered. While depriving the appellant of the vehicle may not cause undue hardship in relation to the appellant's trade, business, occupation or employment, it would of course have some financial implication and in effect amount to a substantial increase in the already high fine. It appears from the copy of the hire purchase agreement that the appellant had invested \$2400.00 in cash when he purchased this vehicle in May

1986 and from the information before this Court it appears that the vehicle was held under a hire purchase agreement which had been discounted with a finance company. If the vehicle were confiscated and sold there would be repercussions first so far as the finance company was concerned by it having recourse to the dealer and then by the dealer in turn having further recourse to the appellant and the amount involved in that respect may be as high as \$5400.00 so that that would indeed be a very substantial increase to the amount of the fine.

The second consideration is any undue hardship that the making of the order would cause to any other person who would otherwise have the use or benefit of the motor vehicle on a regular basis. There has been no submission made in that respect. The third matter is the nature and extent of the offender's interest in the motor vehicle and the nature and extent of any other person's interest. That I have already referred to and that is a very relevant consideration which should have been taken into account by the learned District Court Judge in considering whether confiscation was appropriate in this case.

Finally such other considerations as the Court thinks fit are to be taken into account. One other consideration which comes to mind is of course the possible disparity in making the confiscation order in this case when compared with

other such cases of breath alcohol which come before the Court. It is well known in cases of second offending that periodic detention is considered appropriate with a 12 months disqualification. In this case periodic detention was not appropriate and in all the circumstances the case did not call for imprisonment but did call for a substantial fine which was imposed in the figure of \$1250.00.

Mr Harris has referred to the unreported judgment of Ongley J in MacFarlane v Police M.221/86 Wellington Registry of 25 July 1986 in which the introduction by the legislation for orders of confiscation in respect of motor vehicles involved in blood and breath alcohol offences was carefully considered and the learned Judge said:

"The fact that the provision has been so rarely applied to cases under the Transport Act 1962 even in respect of the most serious offences would seem to indicate that the Courts have taken the view that the type of offending which warrants an order depriving the offender of his property in this way will be characterised by some special feature; or that such an order will be specially suited to the circumstances of the particular offender. If that has been the approach in relation to the more serious offences one would expect the lesser offences more recently brought within the ambit of the confiscatory provision to be similarly regarded."

In that case the learned Judge considered there were no special circumstances which made it appropriate to impose the more unusual and additional penalty of ordering the appellant's vehicle to be confiscated and he said and I quote:

"The order for confiscation brought about a significant disparity between the severity of the sentence imposed on the appellant and sentences of a kind usually imposed in respect of comparable offences."

On the facts of this particular case I see no special circumstances which warranted the confiscation order and it would clearly introduce a significant disparity between the severity of the sentences imposed on this appellant and sentence of a kind usually imposed in respect of comparable offences.

Accordingly, the appeal is allowed and the confiscation order quashed.

G. Brimmer

Ap. 4/87

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

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