SET 2.

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

AP.157/87

BETWEEN GRAEME LIDDINGTON
Appellant

AND POLICE
Respondent

Hearing: 4 February 1988

Counsel: D.M. Wilson for the Appellant
C.Q.M. Almao for the Respondent

Judgment: 4 February 1988

ORAL JUDGMENT OF DOOGUE J

This is an appeal against conviction.

The Appellant was convicted of two offences under the Arms Act 1983 arising out of his having a firearm in his possession in the public bar of the Mangakino Hotel on 22 January 1986.

The matter has a somewhat chequered history. The case appears to have been heard on 3 March 1986 in the District

Court. At that time the District Court Judge, after hearing the evidence, determined to state a case to this Court on a question of law as to whether the defence of automatism raised by the Appellant in the District Court was sustainable in law and in the particular circumstances of the case where, as the District Court Judge stated:-

> "There has been an excessive consumption of alcohol coupled with head injuries sustained in a fight."

The matter then came before this Court on 20 March 1987. On that occasion Holland J referred to the fact that the District Court Judge had indicated that he intended to state a case but that he had not done so. Holland J then made various comments about that aspect of the matter and about the necessity for the District Court Judge to determine the issues arising in the case. In the course of his reasons for judgment Holland J said:-

> "However, in this case the question of law simply does not arise because there is no finding of facts on which a question of law can be determined."

Holland J then went on to consider the law relating to automatism. Having done so he indicated that it was necessary for the District Court Judge if he found:-

> "... some element of automatism to exist to decide what effect it has on both elements of this offence, the first of which involves an onus on the prosecution, and the second of which involves an onus on the defendant."

He then went on to say:-

> "Nevertheless, it is the obligation of the Judge at first instance first to make the findings of fact, and then in almost all cases to apply the law as he considers appropriate to those facts and to make a decision.. An appeal will then follow its normal course. At present I am satisfied that there is nothing properly before me by way of a case stated and there are no facts before me of which I can answer the question of law which is raised. I therefore direct that the matter be referred back to the District Court with an invitation to the District Court Judge to complete the hearing of the matter according to law."

The matter was then referred back to the District Court Judge who, on 1 September 1987, more than 18 months after the original hearing, gave a reserved decision, the effect of which is that he found that where automatism was the result of self-induced intoxication, it was not available as a defence as a matter of law. In reaching that conclusion he relied upon a decision of the House of Lords in The Director of Public Prosecutions v Majewski, [1976] 2 All ER 142.

In the course of his reserved decision, the District Court Judge made no finding of fact as to either the credibility of the Appellant or the psychiatrist called by the Appellant as a witness or in respect, for that matter, of the prosecution witnesses. The District Court Judge stated that:-

> "An experienced psychiatrist gave evidence that in his view the Defendant was in a state of automatism, due to the excessive consumption of alcohol and the head injuries received in the fight."

The District Court Judge further stated:-

> "Mr Liddington, the Defendant, had been drinking all day at the bar and voluntarily took part in a tight. His state of unconsciousness has thus been self-induced."

Nowhere, however, did the District Court Judge in his decision make any findings of fact relating to the matters traversed in the decision of Holland J.

In this Court there is no dispute that the District Court Judge has misdirected himself in applying the House of Lords decision of The Director of Public Prosecutions v Majewski, Supra. The law in New Zealand in relation to drunkenness is covered by the decision of the Court of Appeal in R v Kamipeli, [1975] 2 NZLR 610. There are decisions of this Court such as Steinberg v Police, (unreported, M.313/83, Christchurch Registry, Hardie Boys J, 18 August 1983) which make clear that in New Zealand the law is as stated in R v Kamipeli, Supra, and not as in The Director of Public Prosecutions v Majewski, Supra.

Mr Wilson for the Appellant also criticized other reasoning of the District Court Judge in his reasons for judgment. First, in that he had extended the reasoning in R v Roulston, [1976] 2 NZLR 644, beyond the circumstances of that case, and secondly, that in applying the reasoning in R v Cottle, [1958] NZLR 999 and R v Burr, [1969] NZLR 736, the District Court Judge had applied his mind to automatism

resulting from intoxication as a result of a self-induced state, but had not sufficiently applied his mind to the additional aspect of this case where there had been a fight. Accordingly Mr Wilson was submitting that the conclusion that the District Court Judge reached, based on self-induced automatism, did not necessarily apply to the particular circumstances where a fight had been involved.

Having regard to the fact that there is no dispute that the District Court Judge, in reaching his conclusion, has misdirected himself as to the law in applying The Director of Public Prosecutions v Majewski, Supra, the problem arises as to how I should deal with the appeal.

Mr Wilson for the Appellant urged upn me that it was a necessary inference from the terms of his decision that the District Court Judge accepted the evidence of the Appellant and the Appellant's psychiatrist. I could not accept that submission as, on the face of it, the District Court Judge has approached the question in principle as to whether automatism was available in the circumstances to the Appellant, and having found against the Appellant on that issue, has not gone on to make any findings of fact.

The consideration for me is whether I should be referring the matter back to the District Court Judge, or

endeavouring to determine the issues of fact in this Court upon the record.

Counsel for the Appellant preferred that the matter should be referred back in the first instance to the District Court Judge notwithstanding that, having regard to the time lapse, he submitted that there was substantial injustice to the Appellant in seeing such a course adopted. Nevertheless, it seems to me that it is the only possible course. I have not had the benefit of hearing the Appellant or his witness and would find it impossible, solely on the record, to determine the issues of credibility which arise. The delay in the final determination of this case is greatly to be regretted.

Mr Wilson suggested that if the matter were to be referred back to the District Court it would be appropriate that there should be some order of costs in favour of the Appellant. Mr Almao for the Respondent submitted to the contrary. However, in my view of the matter it is appropriate that there should be an order for costs in this particular case. This is not a reflection on the manner in which the case has been handled by the Respondent. It arises out of the fact that this is the second occasion upon which this matter has come before this Court. On each occasion the Appellant has been basically successful. On neither occasion has the Appellant brought about the consequences upon his own head.

It is apparent from the course which these proceedings have followed that the District Court Judge has found the issues involved difficult.

I think it appropriate that I award costs under Section 8 of the Costs in Criminal Cases Act 1967. I would certify for costs under Part II of the Schedule to the Costs in Criminal Cases Regulations 1967 for one day. I would order that the Crown should pay the Appellant's costs for one day in this Court upon the appeal.

So far as the appeal itself is concerned, I remit the determination appealed against to the District Court Judge, with the direction that he should make the findings of fact upon the issues which were before him and which were adverted to in the decision of Holland J so that this court is in a position to determine the issues arising upon the appeal.

Solicitorfor the Appellant: D.M. Wilson Hamilton

Solicitors for the Respondent: Crown Solicitor Hamilton