

BETWEEN

PETER GRAHAM RUSSELL

Appellant

AND

MINISTRY OF TRANSPORT

Respondent

Hearing: 9 July 1991

Counsel: Mr Malcolm for appellant  
Ms McAuslan for respondent

Judgment: 9 July 1991

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(ORAL) JUDGMENT OF HILLYER J

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This is an appeal against a sentence imposed in the District Court at Auckland on 28 May 1991. Appellant was convicted of four charges of driving whilst disqualified, one of excess breath alcohol, two of false information given to a traffic officer, and one of theft.

In respect of each charge of driving while disqualified, the appellant was sentenced to imprisonment of one year and disqualified for a period of three years. The total term of imprisonment was one year. Insofar as the excess breath alcohol charge was concerned, the level was such when taken with previous convictions of this type of offence, that s30A of the Transport Act applied. That meant in effect he had a lifelong disqualification, but he was disqualified for a specific period of three years,

commencing from 28 May, therefore under s30A he would not be able to make an application to the Secretary for Transport to regain his licence until the expiration of that period.

On behalf of the appellant, Mr Malcolm quite candidly accepts that with the very bad list of convictions he has, the term of imprisonment would not be manifestly excessive. What he says is that in the course of his submissions, the learned District Court Judge suggested that a term of periodic detention of 10 months would be appropriate. Because of his medical condition, the appellant said he would not be able to serve a term of periodic detention, and suggested instead he be given a short custodial sentence.

This is referred to in the Judge's sentencing notes where he said:

"I (would) have been prepared to deal with him by way of a longish periodic detention so that he could minimise the time he spends in a sentence and could give that time to his business, but he intimated that he does not want to do that and would prefer a short term of custodial sentence rather than a lengthy term of periodic detention, and that is confirmed by the probation report."

Mr Malcolm submits that a term of imprisonment of a year compared with a term of periodic detention of 10 months, is not in accordance with the suggestion made by the District Court Judge.

During the course of the hearing there was a fire alarm and the District Court had to adjourn. It was when the Court resumed that sentence was imposed. It may be that could explain a seeming oversight on the part of the Judge.

In a later part of his sentencing notes the Judge said:

"I have to view his driving while disqualified and driving with high breath alcohol as serious because in every one of those he is a potential menace on the road. ... I can certainly see no way of giving him less than what he has had before, but by the same token I am not prepared to make it more than he has had before in order to try and move him in the right direction as (soon) as I possibly can."

Mr Malcolm points out the appellant had previously had no more than a term of 9 months imprisonment, so that the Judge in sentencing him to imprisonment for a year seems to have overlooked that.

Ms McAuslan for the Ministry was unable to assist with any details of what happened before the Court, and I must accept, and do so without hesitation, what Mr Malcolm has said. Clearly however, there is something wrong with the sentencing notes.

I have considered whether I should send the matter back to the learned District Court Judge, but have come to the conclusion that I should look at the offences which were committed and determine a proper sentence for those offences. When I look at them in that light, it is clear

that the penalties imposed were very moderate. The appellant has a very bad history and has ignored the law. A term of one years imprisonment is certainly no more than is proper.

The appeal is dismissed.



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P.G. Hillyer J

Solicitors

Mr J. Malcolm for appellant  
Crown Law Office for respondent