IN THE HIGH COURT OF NEW ZEALAND 29/3
HAMILTON REGISTRY

AP 20/93

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BETWEEN SMITHSON

Appellant

AND NZ POLICE

Respondent

Hearing & Judgment: 10 March 1993

Counsel: C Clews for appellant
CQM Almao for respondent

ORAL JUDGMENT OF PENLINGTON J

This is an appeal against sentence.

The appellant was charged with driving a motor vehicle at Hamilton on 11 October 1992 with an excess breath alcohol. The reading was 604 micrograms of alcohol per one litre of breath. To this charge the appellant pleaded guilty. He was represented by Counsel.

After hearing submissions in mitigation, the Learned Judge imposed a sentence of six months periodic detention. This was a second offence, the appellant having been previously convicted on an excess breath alcohol charge on 16 September 1991, the reading being 581 micrograms per one litre of breath. On that occasion he was fined $750 and disqualified for a period of six months. As well, between that conviction and the time he appeared for sentence on the charge which is now the subject of this appeal, he drove while disqualified. He was convicted on 3 April 1992 on this charge and

fined $300 and disqualified from driving for a period of six months.

The Learned Judge, in imposing the sentence of six months periodic detention, noted that this was the appellant's second conviction for a drink/driving offence. He also observed that he would not have the opportunity to pay a fine. Plainly the means of the appellant were considered by the Learned Judge at the time sentence was imposed. He further pointed out that even if a fine was the sentence of the Court, it would be "a very substantial fine".

At the time the appellant appeared for sentence there were outstanding fines in the sum of $390. The Learned Judge considered that four months periodic detention was the proper sentence for the offence itself with a further one month for the arrears of fines and, as the Work Centre was about to close for the Christmas vacation, a further one month was added, making a total of six months.

The appellant now appeals to this Court. His essential plea is that the sentence of periodic detention was inappropriate in all the circumstances.

The appellant is aged 21 years. He is single. He lives in Hamilton. On 21 October 1992 he was adjudged a bankrupt. He had been in business on his own account as a developer of speculation lifestyle properties. As I understand his business he upgraded properties for sale. The business was unsuccessful. On adjudication in bankruptcy he had a deficiency of $178,526.

It is obvious from these facts that the appellant was unable to pay a fine even if the Learned Judge

had considered that as a sentencing option available in the circumstances.

The sentence was imposed on 17 November 1992. Thereafter the appellant did three days at the Periodic Detention Centre and then lodged his appeal. The Notice of Appeal is dated 8 December 1992. In support of the appeal a medical certificate has been placed before me today in argument by Mr Clews who was not counsel in the Court below.

The medical certificate reads as follows:

> "This is to certify that Peter Smithson (d.o.b. 6.2.72) is a patient currently under my professional care.
>
> He suffers from a psychiatric condition which renders him sensitive to stress.
>
> Whilst it is acknowledged that he must comply with the conditions of any penalty or sentence imposed by the Courts, it would most respectfully be pointed out that the imposition of Periodic Detention may well be detrimental to his mental health; accordingly an alternative such as Community Service could perhaps be considered. I would add that he is benefitting from psychiatric treatment, and this in itself should diminish the chances of his reoffending.
>
> Dr G S Cliff.
> 28.12.92"

I was informed from the bar that no submissions were made to the Learned Judge in connection with the topic of stress or its possible psychiatric consequences. It is now submitted that on the basis of the appellant's present financial circumstances and the opinion of the consultant psychiatrist the appropriate sentence which ought to have been imposed was one of community service.

Mr Almao for the Crown subjected the report to a careful analysis and detailed criticism. He

submitted that the report was unhelpful in that it did not specify the psychiatric condition suffered by the appellant. The psychiatrist expressed the opinion that "detention may well be detrimental to his mental health." Mr Almao submitted that that was not definitive opinion as to whether detention would be detrimental to the mental health of the appellant. He also drew my attention to the fact that the report was dated 28 December 1992, some three weeks after the Notice of Appeal when the sentence would have been suspended and that the report did not comment in any way on the three days already served by the appellant at the Detention Centre. In short he submitted that there was no nexus in the report between the appellant's condition and the sentence which is under attack in this appeal.

Mr Almao, as well, pointed to the appellant's driving record to which I have earlier referred in this judgment. He emphasised that this was the appellant's second offence, that the earlier offence took place only one year before and that in the interim the appellant had driven while disqualified and finally that the breath alcohol level on this occasion was higher than it had been when the appellant committed the first offence.

Against the background of these submissions, in response to the submissions made by Mr Clews for the appellant, Mr Almao submitted that a sentence of periodic detention was not wrong in principle and that a sentence of community service would not be appropriate.

In my view the last submission is well made. Mr Clews very candidly conceded that community service is a rare sentence for a second excess blood

alcohol offence. The Learned Judge, as I have said, considered but rejected the imposition of a fine. On the facts he could not have done anything else. In my view that was a perfectly correct and proper decision.

It has been accepted in the argument today that community service is a rare sentence for this kind of offending. I accept Mr Almao's submission that community service would not have been appropriate.

I have carefully considered the contents of the psychiatric report which was not before the Learned Judge but having done so and having considered the analysis and criticisms made by Mr Almao in his argument, I am not persuaded by that report to the point of view that periodic detention is an inappropriate sentence.

I next look at the length of the sentence. In all the circumstances I do not consider it to be an excessive sentence. Accordingly, for the reasons given, the appeal is dismissed.

Mr Smithson, I direct that you remain within the precincts of the Court.

I confirm that you will serve the balance of the sentence imposed in the District Court, namely four months and one week periodic detention. You are to report to the Myrtle Street Work Centre this coming Friday, 12 March 1993 at 6pm. Thereafter you are to report where and when the warden instructs you so to do. You are not required to be at the Work Centre for more than nine hours on any one occasion.