IN THE HIGH COURT OF NEW ZEALAND 3/12
CHRISTCHURCH REGISTRY

AP 320/93

BETWEEN

EDGEWORTH

2137

Appellant

A N D THE POLICE

MEDIUM PRIORITY

Respondent

Judgment 22 October 1993

Counsel B Green for Appellant
J Pilcher for Respondent

ORAL JUDGMENT OF WILLIAMSON J

At about 8.00 am on a mid-winter morning the Appellant, who was on his way to a dentist appointment, turned right into the path of an oncoming motor cycle. The rider of the motor cycle was unable to avoid a collision. As a result the motor cyclist died.

The Appellant was charged with causing the death of the motor cyclist by the careless use of a motor vehicle He pleaded guilty and was sentenced in the District Court at Christchurch on 29 September 1993 to a term of periodic detention for four months. He was also disqualified from holding or obtaining a driver's licence for a period of 12 months and ordered to pay reparation for emotional harm which was fixed at $2,000.00 upon

the basis that payments were made at $10.00 per week by means of an automatic payment authority.

In this appeal Counsel submits that the term of periodic detention was inappropriate. No attack has been made upon the other elements of the sentence.

Judges involved in sentencing motor vehicle drivers for offences which have led to the death of a person are conscious of the difficulty in balancing the various matters which must affect sentence. On the one hand the sentence has to reflect the fact that a person has driven in a manner which is careless and on the other hand reflect the consequences of that driving. The very many cases contained in the text books, including those which have been referred to by Counsel in argument on this appeal, illustrate the tremendous variety in circumstances. On the one hand an accident may occur which is due to gross carelessness on the part of a driver but the consequences may be very slight. On the other hand there can be cases of a very small degree of carelessness which lead to the most horrific consequences.

There is no need in this judgment to repeat the matters which have been referred to in a number of authorities. While the Court must have regard both to the degree of carelessness and the consequences, the primary consideration is to the degree of carelessness. It is that element which contains the criminality or culpability of the offender. In this case the consequences were dreadful. An 18 year old who was on his way to his first job and who had been a precious eldest son was killed. His parents and family are naturally upset and indeed, to use the words contained in the victim impact report, they "feel cheated and angry" about what has

happened. A letter was written to the Court by the victim's expressing amazement at the appeal and pointing out the manner in which the victim's family suffered and will continue to suffer as a result of this death.

The fact of the death obviously must also weigh heavily with the Appellant, who, according to the reports before the Court, is a family man with two pre-teenage children. He will be conscious of the loss which a child must mean.

The Appellant, at age 46, appeared in Court for the first time. The pre-sentence report and the references describe a person who has worked diligently for a number of years but who has suffered like many others in recent years because he was made redundant and has been unemployed for some period. His circumstances are modest. The report notes that he has suffered healthwise since the accident and that the strains involved both in unemployment and in having caused the death of this young man have expressed themselves in his loss of weight and general stress related conditions. The assessment of the probation officer is as follows:

> " Edgeworth presents as a quiet, conscientious 46 year old man already suffering the effects of his unemployment and, since this accident, suffering from post traumatic stress. He has limited awareness of the grief cycle. He seems to have ample support available from his wife, general practitioner and friends, while he continues to work through his predicament. It seems likely that it will take him some time to re-adjust and come to terms with having caused a young man's death."

The probation officer recommended a sentence of community service.

The District Court Judge noted at the outset of his sentencing remarks that the task was not an easy one because the degree of negligence of the Appellant, while blameworthy and culpable, was not high. He properly and accurately set out the consequences of this carelessness, the maximum penalty which might be imposed and the strains caused to the victim's family. He said:

> "I am afraid I am not going to sentence you to community service. I think that the appropriate sentence is one of periodic detention, to reflect not only the degree of carelessness you were involved in but also the serious consequences of that carelessness."

The grounds of this appeal are that the District Court Judge was wrong because he attached undue weight to the consequences of the accident rather than to the degree of carelessness. It was also submitted that he had in effect failed to take into account a number of mitigating circumstances personal to the Appellant. Counsel referred, during the course of his submissions, to a number of cases dealt with in this Court where sentences have been upheld or altered. Those cases are as follows:

R V Guilfoyle [1973] 2 All ER 844

Whitehead v Police HC Rotorua AP 43/92 23.11.92

Paintin v MOT HC Rotorua AP 25/90 10.10.90

Bowman v Police HC Auckland AP 98/93 7.7.93

Hammond v Police HC Christchurch AP 119/91 5.6.91

Mavor v Police HC Timaru AP 21/89 24.4.89

R v Skerrett Court of Appeal CA 236/86 9.12.86

Reed v Police HC Nelson M 57/82 24/2/93

Whitton v MOT HC Wanganui M 28/91 22.5.91

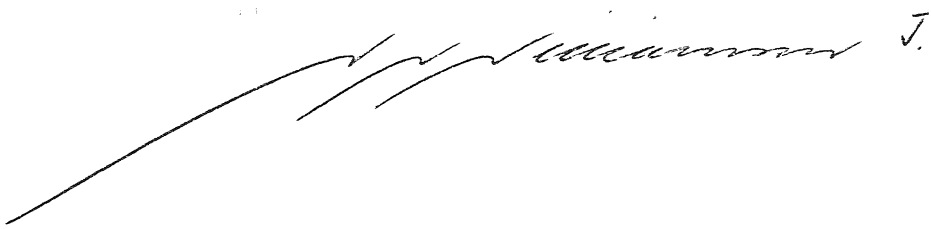
In some of the cases the sentence has involved fines with disqualification for varying periods, in others, community service has been imposed and, in others, short periods of periodic detention. Those in which periodic detention have been imposed appear to include factors indicating a reasonably high degree of carelessness such as speed or cutting corners (See London v Ministry of Transport, Sole v Ministry of Transport, Gale v Ministry of Transport) or a history of offending for driving matters, (See McGrath v The Police). A consideration of those matters confirms that both community service and periodic detention have been considered appropriate for offences of careless use causing death.

Ultimately this Court may interfere with a sentence only if it has been brought to the view that the sentence imposed in the District Court was clearly inappropriate. As with so many other matters upon which a Judge has to make a decision, questions of degree are vital. The decision in this case is whether or not the degree of carelessness was such that the recommended sentence of community service was inappropriate and that periodic detention was called for. So far as the actual essence of those sentences is concerned there is considerable similarity because each involves an offender spending hours of his own time carrying out projects within the community rather than facing a custodial sentence. Periodic detention, however, is a sentence which has more discipline attached to it. It is a sentence which has been described in a number of cases as being one which is available when Courts would otherwise have sentenced the offender to imprisonment. In this case the District Court Judge's reason was related to both the degree of carelessness and the consequences. So far as the consequences are concerned they are of course the same consequences as appear in all of the other cases which have been referred to, namely, the death of a person. Of themselves they did not form a

reason for periodic detention rather than community service. Consequently the real decision depends upon the degree of carelessness. That judgment has to be made having regard to the road and traffic circumstances which applied at the time.

There were no independent witnesses to this accident. The evidence is that at a time when the light was on the turn, ie, immediately prior to sunrise, in damp road conditions, the Appellant commenced a right-hand turn. The effective cause was that he failed to observe the motor cyclist approaching. It is impossible now to say exactly why. Certainly there does not appear to be any element in the driving or the conditions which would point to a high degree of carelessness. Indeed of course that is what the District Court Judge said. The degree of negligence, as he referred to it, was not high. On that basis and having weighed these matters as best I am able I am of the view that it has been shown that the sentence of periodic detention was clearly inappropriate in this case.

Accordingly the appeal will be allowed. The sentence of periodic detention is quashed and in substitution a sentence of 160 hours' community service. Otherwise the sentence passed in the District Court is confirmed.



Solicitors Cameron & Co, Christchurch for Appellant
Crown Law Office, Christchurch for Respondent

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