NZLR

IN THE HIGH COURT OF NEW ZEALAND 6/5
DUNEDIN REGISTRY AP 27/94

488

BETWEEN JAMES STEPHEN WALKER

Appellant

A N D THE POLICE

Respondent

Hearing 21st April 1994
Counsel M A Stevens for Appellant
W J Wright for Respondent

ORAL JUDGMENT OF WILLIAMSON J

A suspended sentence rather than a sentence of imprisonment would have been more appropriate, according to the submissions made by Counsel for the Appellant. It has been argued that, in the appeal before the Court, recognition should be given, first to the rehabilitative efforts made by the Appellant, and secondly the opportunity presented to the Court to encourage and discipline him in those endeavours by way of a suspended sentence of imprisonment.

In the District Court at Dunedin on 15th March this year he was sentenced to a total of nine months' imprisonment on two charges, namely, driving while disqualified and driving with excess breath alcohol. The

circumstances which gave rise to these charges were that on 5th January this year at about 8.40 pm the Appellant was observed driving a vehicle in Lees Street, Dunedin. When stopped he admitted that he was a disqualified driver. A breath test was taken and found, upon analysis, to contain 934 micrograms of alcohol per litre of breath. The Appellant told the police he had driven because he had had an argument with his girlfriend. He was co-operative with them and entered pleas of guilty to the charges.

At age 32, the Appellant has accumulated a substantial list of convictions, many of which, significantly, are for charges of driving while disqualified, driving under the influence of liquor or other driving offences. In the past he has been given sentences of supervision, community care, periodic detention and imprisonment.

The probation officer who reported on him said that the Appellant is an alcoholic and that he impressed as now having a genuine desire to stay out of trouble. It was said that he had an insight into his current lifestyle and an appreciation of the steps that would need to be taken concerning his alcoholism.

After being charged with these offences the Appellant had been assessed as suitable for Moana House. He commenced a programme there in February. At the time it was said that he desired to undertake this programme and that he was an ideal candidate for it. In the usual course, conditions in relation to that programme were stipulated, and he accepted these. On 18th February, after about two weeks, he left that programme. The reasons given in the report before the Court were that "he found the dynamics difficult and felt unable to continue there". He then referred himself to the Straight Approach programme. A community care contract in

relation to Straight Approach was prepared and at the time of sentencing in the District Court a probation officer was prepared to recommend that programme as an appropriate one for the Appellant.

The District Court Judge, after reviewing the history of the Appellant, said that he considered imprisonment was the only appropriate sentence for him because he had wilfully disregarded Court orders and had endangered the public. He pointed to lenient sentences given in the past and to the lack of success of these sentences.

Offenders who drive while disqualified with excess blood alcohol pose real sentencing problems. In the past consideration has been given to various ways in which they should be treated. Ultimately the decision has to be made in each individual case based upon the facts at the time of sentencing. One difficulty always is that it appears to be only at the time when a custodial sentence is a likely outcome of a Court appearance that strenuous efforts are made in relation to rehabilitative programmes. Such programmes are available not only when a person is liable for a sentence of imprisonment but upon parole or release from imprisonment. In this case there is no submission that the sentence of imprisonment was excessive but, rather, that it was inappropriate given the Appellant's changed motivation and the opportunities open to him.

Counsel for the Appellant has fully and persuasively argued the case for Courts endeavouring to assist persons with such problems by sentences which will provide a motivation or discipline to carry out a rehabilitative programme. The task of this Court on appeal is not to substitute sentences which may be preferred by particularly judicial officers but rather to consider whether or not it has been shown that the particular

sentence was clearly an inappropriate one. As to the term, it was, in my view, a lenient one. The length of it in practical terms made available to the Appellant other programmes for him upon release if he was then motivated to undertake them.

For reasons which weighed with Fraser J in the case of ***A S Wright v The Police*** Dunedin Registry 63/89 13.7.89, Courts have a responsibility so far as the public is concerned to stress the seriousness of offences of this nature and the danger that such persons are, not only to themselves but also, to other members of the public. In the long run this appellant would no doubt be helped by attending programmes; indeed I note that he intends to do so in prison according to his own letter to his Counsel. Whether his motivation would be sufficient or appropriate under the threat of imprisonment is difficult to ascertain. It must be assessed in the light of his non-acceptance, for whatever reasons which appeared valid to him at the time, of the Moana House programme.

Having weighed up those matters and given as much weight as possible to the submissions made by Counsel for the Appellant I have not been brought to the view that the sentences were clearly inappropriate and accordingly this appeal is dismissed.

Solicitors M A Stevens, Dunedin for Appellant
The Crown Solicitor, Dunedin for Respondent