IN THE HIGH COURT OF NEW ZEALAND
GREYMOUTH REGISTRY A.P. No.9/94

94/1159

BETWEEN PETER AWATERE

Appellant

A N D POLICE

Respondent

Hearing: 27 June 1994

Counsel: Miss L. Matthews for the Appellant
Miss J. Farish for the Respondent

Judgment: 27 June 1994

ORAL JUDGMENT OF TIPPING, J.

This is an appeal against a sentence of three years disqualification from driving on a charge of excess breath alcohol. The Appellant's level was 684g. As well as being disqualified for three years he was sentenced to the maximum of three months imprisonment and to twelve months supervision to follow thereafter. On the face of it this was an extremely heavy sentence for a charge of excess breath alcohol but one realises why the Judge imposed such a sentence immediately on looking at the Appellant's previous record. Indeed the Judge himself said that he had not seen anyone with such an accumulation of alcohol impaired driving convictions than this Appellant.

The previous convictions are fourteen in number This was the Appellant's fifteenth. In addition he has three offences in his record of

refusing to accompany an officer. Of course we do not know what his state was on those three occasions, but one might have a pretty fair suspicion in the light of the record overall. So we have here a man technically on his fifteenth alcohol related driving conviction and probably on his eighteenth.

It is a constant amazement to me that Parliament provides for a maximum sentence of five years imprisonment for a second and subsequent charge of driving while disqualified but one can commit as many offences of drunken driving and the like as you wish and the maximum sentence available remains at three months imprisonment. All the protestations from various quarters about drunken driving do not seem to be matched by the Parliamentary approach to this sort of problem. I cannot start to work out the logic why you should be liable for five years imprisonment on your second driving while disqualified and to only three months imprisonment on your fifteenth or eighteenth offence of alcohol impaired driving.

That said this really does not have much to do with this particular Appellant, save for the fact that he has received the maximum permitted under the legislation so far as imprisonment is concerned. The real issue on this appeal is whether in all the circumstances three years disqualification was too high. Miss Matthews has presented some excellent submissions, if I may say so, on his behalf. She has raised everything that could possibly be raised on behalf of the Appellant and one does see the circumstances in a slightly different light on being told the background. Whether or not that fresh light is enough remains to be seen.

The Appellant was in the process of separating from his wife. They had had an argument. He had stayed away overnight. He is in addition a diabetic and he had not taken his insulin. On the occasion which led to his apprehension his wife had responsibly alerted the Police to the fact that he was out on the road having drunk too much alcohol and not having taken his insulin. Miss Matthews has emphasised the fact that there was no

bad driving, no accident, no injuries. She has accepted, as she must, that the reading is quite high but it is not grossly high.

Counsel responsibly faced up to the previous convictions and points out, and this is really the only real card that this Appellant has in his hand, that the last of the alcohol related driving convictions was in 1989, about five years ago. It is said that the fact that the Appellant resorted to alcohol and driving on this occasion is the product of the stress that he was under at the time following the break-up of his marriage. Counsel tells me that he had made a concerted effort to give up alcohol and just relapsed on this one occasion. The five year gap, I agree, is significant. He had been making efforts and, against his record, a five year gap is really quite a substantial achievement.

Miss Matthews submits that the learned Judge on this occasion placed too much weight on the previous convictions and not enough on the rehabilitative steps that the Appellant had been engaging in. Counsel points out that this is not a case to which s.30A applies because the reading was not high enough. There is some irony she suggests because if s.30A had applied the indefinite disqualification that would have been mandatory would have meant a two year minimum but against that, of course, people in those circumstances do not always get their licence back after two years. They still have to satisfy the Secretary for Transport they are fit to get their licence back.

Counsel told me something of the Appellant's personal circumstances. He is eligible to apply for a limited licence but apparently has no funds to do so. I am told that his employer is willing to keep a job open for him which involves driving, but whether that will continue for three years is doubtful I agree. Counsel also points out that the Appellant for his fourteenth alcohol impaired driving offence back in 1989 only got one year's

disqualification. The Judge was, as Miss Farish rightly observed, faced with a rather difficult problem here.

Ignoring the five year gap and the efforts that seem to be inherent in that there could not possibly have been anything wrong with the three year disqualification. Indeed it could well have been longer. The public interest is very much a factor in these cases. Everytime someone like the Appellant goes out on the road drunk, and what is more here in difficulties with his diabetes, there is a major risk to other road users Therefore the most practical sanction the Court can impose is the period of disqualification. Imprisonment punishes but disqualification protects. It protects the community. Of course some people, unfortunately, do not obey orders of disqualification but there is no suggestion of that here. We come back to the fact that all the Courts can do in these cases from the point of view of public protection is to keep people off the roads if they offend in this way for as long as is reasonably necessary.

I agree with Miss Farish that this sentence was right at the top of the range. The real question is whether it can be characterised as manifestly excessive in all the circumstances. The only point that gives me any hesitation is the five year gap. I think, on reflection, that in the light of that gap and the apparently sincere efforts that the Appellant has been making, three years is too long. It might tend to crush the Appellant and undermine what resolve he has to get on top of this problem. I can understand why the Judge imposed a really heavy sentence of disqualification in this case but, with respect, I think he has gone too far and has not recognised enough the effect of the gap.

I am very mindful of the public interest and the need to keep people like this off the roads but frankly if two years does not have the desired effect it may be debatable as to whether three years will either. The only advantage would then be for the additional year road users would not

be at risk. I have not found it an easy matter to decide because when I first read the papers my mind went to putting it up rather than bringing it down but I think because of all the matters that were reasonably put to me the sentence is too long. I may be taking an unduly lenient view but I think in the circumstances a reduction is justified.

The Appellant must realise that on this occasion the Court is responding to the fact that he has kept himself out of this sort of trouble for five years. If the Appellant does not respond in turn he will only have himself to blame and on any further offence of this kind he can look forward to a substantially longer period of disqualification than what it is going to be on this occasion. The appeal is allowed. The disqualification is reduced to two years.