IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY A.P. No.48/95

BETWEEN JAMES

Appellant

NOT RECOMMENDED

A N D POLICE

Respondent

Hearing: 22 April 1996

Counsel: H.T. Young for Appellant
J.N.P. Young for Respondent

Judgment: 22 April 1996

ORAL JUDGMENT OF TIPPING, J.

This breath alcohol appeal against sentence puts into fairly sharp relief a problem which sentencing Judges, and indeed appellate Judges, are wrestling with on an almost daily basis. That is to say, the need to attempt consistency throughout the country against the need to do justice in the individual case, particularly bearing in mind the means of the person to be sentenced.

In this case the Appellant, Mr James, on a second breath alcohol offence, was fined $1,400.00 and disqualified for 12 months. There is really nothing wrong with the 12 month disqualification in the circumstances and that part of the sentence was not seriously attacked. What is attacked is the quantum of the fine, bearing in mind in particular the fact that the Appellant also incurred a speeding infringement notice for the same piece of driving. There he incurred a penalty of $210.00. So the total for the events in question was in effect $1,610.00. The learned Judge ordered the fine to be paid at not less than

$300.00 a month, that was some accommodation for the Appellant but he contends that the effective total was manifestly excessive.

I have been referred to the precedent cases of Ministry of Transport v. Graham and the more recent decision of the Full Court in McEachen v. Police [1995] 2 N.Z.L.R. 251. The last mentioned case surveyed penalties for first breath or blood alcohol cases. This, of course, is a second. The level in the present case was 508mg per litre of breath and the previous offence was quite some time ago in November 1988. Mr Hugo Young for the Appellant argues that the learned Judge did not bring sufficiently to account the Appellant's means and he also argues that the fine was out of line with two appellate decisions of this Court, the cases of Wilson v. Police A.P. No.71/91 Invercargill Registry (judgment 17/2/92) and Cooper v. Police A.P. 73/91 Invercargill Registry (judgment 17/2/92).

Cooper's case was a second offence, 804mg. There was some speeding and $1,800.00 and 18 months were reduced to $1,000.00 and 12 months. In Wilson's case the level was 574mg. There was nothing remarkable about the driving. I do not have the original levels but the transcript demonstrates that the learned Judge reduced whatever they were to $900.00 and 6 months. I emphasise that both of these two cases were second offences. Cooper's level was of course substantially higher than that in the present case. Times have moved on and we are now four or five years later and there is some change in the value of money but that is not a substantial factor, although it is something that should be borne in mind.

The present Appellant's financial circumstances were to an extent in front of the learned sentencing Judge in that he had a statement, a very brief statement, from the accountants who were involved with the financial affairs of the business run by the Appellant and his wife, this being a pet food business. We do not have full accounts. What we have is a statement that the Appellant and his wife each draw $250.00 gross or just over $200.00 after tax. They have

two dependent children. The statement which is now before the Court, being a full statement of means, sets out the income and expenditure and, on the face of it, demonstrates that the paying of a total burden of $1,600.00 plus Costs for this affair would be quite a substantial penalty on this Appellant.

Some difficulty arises with the statement of means in that it says that all the money they have, that is the Appellant and his wife, has been put into the business. They do not own a home. Of course the level of drawings does not necessarily equate to the full picture at the end of the year when full profit and loss accounts can be drawn. On the other hand, as I was told, this Appellant has a community services card which, at least on the face of it, suggests that his income is at a very modest level.

If anyone is looking at this case as a precedent they must bear in mind that a significant part of any equation in cases of this kind is the financial circumstances of the person concerned. While we strive for consistency we should not do so ignoring altogether individual features and that is why in the leading precedent cases we see ranges of fines. For example in the McEachen case while it has no direct bearing on the present it does have a useful indication that for low blood alcohols on the first occasion fines have been shown in the survey of 527 cases to have ranged from $150.00 to $1,100.00. The explanation must be, I would have thought, that the financial circumstances of the people concerned will have differed substantially, hence the need to reflect that and the quite significant spread of level of fines, the average of which for a first offender is apparently $534.00.

I have spoken at a little length simply because I want to guard against anyone using this case in some mechanical fashion. The temptation in a busy list is, of course, to work quite closely with guidelines and I am not endeavouring to undermine that general policy for one moment, but when the matter comes for closer examination on appeal there is always room to see that the general guidelines may perhaps have worked something of an injustice in the

particular case. As I said during the course of argument, a fine at the level of X dollars may be perfectly appropriate for a person on Y thousand dollars a year but inappropriate for someone on half Y per year.

All that said I return to the present case. I am of the view that when one adds up the breath alcohol fine and the infringement fee one reaches a total that can properly be regarded as manifestly excessive. There has been no question but that it is appropriate to add the two together because it was all part of one transaction. The appeal is allowed. The present fine is reduced to $800.00, my intention being that $1,000.00 in the round is about right. The amended fine of $800.00 can be paid at a somewhat lesser monthly level than the learned Judge imposed. The more detailed financial information before me suggests that $300.00 per month is an unreasonable amount. It is reduced to $200.00 a month.

J.