IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 65/97

BETWEEN DEAN MURRAY HOLDER

Appellant

A N D POLICE

Respondent

Hearing: 11 June 1997

Counsel: M.J. Thomas for respondent
A.R. Gillon for appellant

Judgment: 11 June 1997

JUDGMENT OF DOOGUE J

This is an application for leave to appeal to the Court of Appeal on the following question of law:-

> "Is a person convicted of a second or subsequent offence of driving while disqualified, on an information laid summarily, liable to the maximum penalties provided by section 30AA(4)(a) Transport Act 1962?"

The background to the application is that on 9 April 1997 I held that the maximum term of imprisonment for a second or subsequent offence of driving while disqualified on an information laid summarily and not indictably under the provisions of s. 30AA(4) of the Transport Act 1962 ("the Act") is three months and it is only if there is conviction on indictment that the maximum term of

imprisonment is five years. That finding was on the basis of the decision of this Court in Wilson v New Zealand Police (unreported, High Court, Rotorua Registry, AP 10/96, 9 May 1996, Fisher J), where that conclusion had been reached, it being noted that any jurisdiction to impose imprisonment for more than three months required a "conviction on indictment". In neither the case before Fisher J nor the case before me were any submissions made for the Crown that any other course was open to the Court.

Section 30AA of the Act provides:-

"(1) ...
(2) ...
(2A) ...

(2B) Notwithstanding anything in subsection (4) of this section or in section 7 of the Summary Proceedings Act 1957, where a person is convicted (whether summarily or on indictment) of an offence against section 35 of this Act (which relates to driving while disqualified or contrary to the terms of a limited licence), the Court shall, in addition to any other penalties it may impose but subject to section 30AC of this Act, -

(a) In the case of a first offence, order the person to be disqualified from holding or obtaining a driver's licence for a period of 6 months or more; or

(b) In the case of a second or subsequent offence, order the person to be disqualified from holding or obtaining a driver's licence for a period of 12 months or more, -

unless the Court for special reasons relating to the offence thinks fit to order otherwise.

(3) ...

(4) Every person who commits an offence against section 35 of this Act (which relates to driving while disqualified or contrary to the terms of a limited licence) is liable -

(a) For a first offence, on conviction, to imprisonment for a term not exceeding 3 months or to a fine not exceeding $3,000, or to both:

(b) For a second or subsequent offence, on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine not exceeding $6,000, or to both."

Both in Wilson and in the present case there were appeals against the sentence imposed on a summary conviction for a second offence of driving while disqualified. Although reference was made to s. 30AA(4) of the Act, in both cases no reference was made to the provisions of s. 7 of the Summary Proceedings Act 1957 nor to earlier decisions of this Court to which I will refer in a moment. More important than the earlier decisions of this Court are the provisions of s. 7 of the Summary Proceedings Act, which reads:-

"(1) Subject to subsection (2) of this section, where any person is summarily convicted of an offence mentioned in section 6 of this Act, the Court may sentence that person -

(a) To imprisonment for a term not exceeding 5 years; or

(b) To a fine not exceeding, -

(i) The maximum amount prescribed by law; or
(ii) If no maximum amount is so prescribed, $10,000, -

or to both.

(2) No person shall be sentenced pursuant to subsection (1) of this section in respect of an indictable offence -

(a) To a term of imprisonment exceeding the maximum term of imprisonment that could have been imposed if the person had been convicted of the same offence on indictment; or

(b) To pay a fine exceeding in amount the maximum fine that could have been imposed if the person had been convicted of the same offence on indictment; or

(c) To a term of imprisonment if on conviction of the same offence on indictment the person could not have been sentenced to imprisonment."

Section 6(1) of that Act reads:-

> "A Court presided over by a District Court Judge shall have summary jurisdiction in respect of the indictable offences described in the enactments specified in the First Schedule to this Act, and proceedings in respect of any such offence may accordingly be taken in a summary way in accordance with this Act."

The First Schedule to that Act includes a second or subsequent offence against s. 35(1) of the Act of driving while disqualified or contrary to the terms of a limited licence.

It is apparent, once the provisions of s. 7 of the Summary Proceedings Act 1957 are read, that the maximum sentence for a second offence of driving whilst disqualified is that provided for within s. 7(1) of the Summary Proceedings Act, subject to the qualifications contained within s. 7(2).

Between the decision of Fisher J in Wilson and my own decision in this case there was a further decision in this Court of Cartwright J in Nepia v Police (unreported, Auckland Registry, AP 287/96, 18 December 1996), which reaches the conclusion just stated. That decision was not cited to me at the time of the appeal being heard before me. Counsel today is different from counsel on that occasion. However, I make no criticism of counsel on the earlier occasion because of the method by which the point was raised before me. In any event, I did not have the assistance of the fully argued decision in Nepia, any more than Fisher J had had the assistance of argument or reference to s. 7 of the Summary Proceedings Act 1957 in Wilson.

In Nepia there is reference to earlier decisions of this Court which treated the language of s. 30AA(4)(b) "conviction on indictment" as meaning conviction on a charge that may be laid indictably: see Riddell v Police (unreported, High

Court, Napier Registry, M 100/80, 3 December 1980, Hardie Boys J) and Police v Baker (unreported, High Court, Hamilton Registry, AP 147/92, 22 March 1992). Both of those decisions were made prior to statutory amendments to s. 7 of the Summary Proceedings Act 1957 and I have heard no argument as to whether that Act was in a similar form at the time of the earlier decisions. It is unlikely that it was because one would have expected both the experienced Judges involved to have relied upon the clear language of s. 7 of the Summary Proceedings Act 1957 rather than a strained interpretation of the meaning of the words "conviction on indictment". It is unnecessary for present purposes to pursue that aspect of the matter any further.

It can be noted that in any event, even if the reasoning adopted in those older decisions were applied, the result would be no different from the application of s. 7 of the Summary Proceedings Act 1957 to a second offence of driving whilst disqualified where the charge is laid summarily and not indictably.

I would note further that before Cartwright J in Nepia the unsuccessful appellant sought to rely upon the language of s. 30AA(2)(b) of the Act as supportive of the conclusions reached by Fisher J and myself in Wilson and the present case. I agree with her that that subsection of the Act relates only to the particular additional penalty referred to within it and certainly does not endeavour to limit the clear language of ss 6 and 7 and the First Schedule of the Summary Proceedings Act 1957.

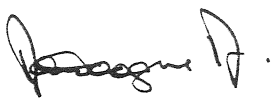
I am accordingly clear that the decision reached by me in the present case was per incuriam and wrong and that there is no question of law deserving of reference to the Court of Appeal. I find it difficult to imagine that Fisher J would have come to any different conclusion if he had been presented with the

relevant statutory provisions of the Summary Proceedings Act 1957 or had had full argument.

The only issue that remains is whether it is desirable to have the question referred to the Court of Appeal because of the apparent conflict between the decisions in this Court. I cannot see any justification for that course when on the face of it there is a clear legislative provision under the Summary Proceedings Act 1957 answering the question and there is no conflict of judicial authority in this Court as to the application of that section. Otherwise I would have granted leave to appeal.

While the appellant has not opposed the application, I would in any event have regarded it as improper to permit the Crown to appeal on a basis not argued in this Court if the outcome could have been to affect the sentence of the appellant. This is the second time in less than a month where I have been asked to grant leave to the Crown to appeal to the Court of Appeal on a question of law where the point had not been argued before me at first instance: see Brydon v Police (unreported, High Court, Wellington Registry, AP 36/97, 14 May 1997). In that case, which was different from the present but related to appropriate penalties under the Act for other offences, I granted leave to appeal upon condition "that the respondent does not actively promote the substitution of the original sentence imposed upon the appellant for the sentence imposed in this Court on appeal as in this Court the respondent did not argue the point which it at present seeks to appeal". If I had been of a different view in respect of the present application for leave to appeal, I would have attached an identical condition.

The application is accordingly dismissed.



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