IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 232/99

BETWEEN: HUNT

Appellant

AND: THE POLICE

Respondent

Hearing & Judgment: 29 September 1999

Counsel: Mr Ruthe for Appellant
Ms Feltham for Respondent

ORAL JUDGMENT OF PENLINGTON J

Solicitors: Crown Solicitor, Wellington
Ruthe Denee & Co, Wellington

This is an appeal against a confiscation order.

The appellant was charged with driving a motor vehicle with an excess breath alcohol of 1599 mcgs of alcohol per litre of breath on 24 April 1999 in Park Road, Wellington.

The appellant pleaded guilty. He came before the Court with previous convictions for the same kind of offending: namely an excess breath alcohol of 1122 mcgs per litre of breath on 24 May 1997 and an excess breath alcohol on 8 December 1979.

Prior to the sentencing the appellant completed a declaration of ownership form under s.84 of the Criminal Justice Act. He asserted that the car which was involved in the offence was jointly owned by himself and his wife.

The appellant is a retired Chief Petty Officer in the Navy. He was in the service for 20 years until 1995. He then left the service to take employment as a security officer. At the time of the sentencing on 26 July he was unemployed.

The appellant has had a long history of alcohol problems. Following this offending he embarked on a Salvation Army Bridge programme after an alcohol and drug assessment. After five weeks on the programme he was suspended due to a relapse. At the time of the sentencing, he was about to rejoin the programme.

When the appellant was sentenced his wife, who is a Chief Petty Officer in the Navy and who is still serving was on an overseas tour of duty. The appellant was then looking after the two children of the marriage aged 12 years and 7 years, as well as his invalid mother.

The probation officer recommended a sentence of eight months supervision with a special condition that the appellant pursue a course of alcohol abuse counselling and treatment. The Judge accepted that recommendation. She considered but ultimately rejected an additional sentence of periodic detention because of the question of confiscation.

By virtue of the appellant's previous excess breath alcohol offence committed on 24 May 1997, s.84(2A) and 84(2AA) were in point. They provide:

> (2A) Where, on or after 26 July 1996, a person commits an offence ("the first offence") against any of sections 32 (1) (a), 32 (1) (b), 35 (1) (a), 35 (1) (b), 36 (1), 56 (1), 56 (2), 58 (1), 60 (1), and 61 (1) of the Land Transport Act 1998 (which sections relate to driving offences) and, within 4 years after the date of the commission of that offence, commits a further offence ("the second offence") against any of those provisions of the Land Transport Act 1998, whether or not the second offence is of the same kind as the first offence but being an offence that arises from a different incident than the one that gave rise to the first offence, then, the court by or before which the offender is convicted of the second offence, if satisfied that any motor vehicle owned by the offender (whether solely or as joint tenant or tenant in common with any other person or persons) or in which the offender has any interest (whether under a hire purchase agreement, leasing agreement, or otherwise) was being driven by, or in the charge of, the offender at the material time, must order that the motor vehicle be confiscated unless the making of an order result in extreme hardship to the offender or undue hardship to any other person.
>
> (2AA) For the purposes of this section, a conviction for an offence against a provision of the Transport Act 1962 corresponding to an offence specified in subsection (2A) is to be treated as a conviction for an offence specified in that subsection.]

At sentencing the appellant was represented by Mr Ruthe who also appeared in support of this appeal. He conceded on behalf of the appellant that these provisions applied and that there was a mandatory requirement for the Court to confiscate the motor vehicle registered in the appellant's name or jointly registered unless that would cause undue hardship to any other person, or extreme hardship to the appellant.

The Judge proceeded with the sentencing and made a confiscation order notwithstanding the absence from the New Zealand of the appellant's wife. This appeal was then brought. There was a complaint that the appellant's wife had not been heard.

It was accepted by Ms Feltham for the Crown that in the particular circumstances, because the appellant's wife was overseas at the time the confiscation order was made, this Court should approach the appeal de novo and that it should read the affidavit filed in this Court from the appellant's wife. This course was favoured rather than having the matter remitted to the District Court for consideration by that Court. I propose to proceed on that basis.

The appellant's wife, in her affidavit, confirms that the car involved in this offending was jointly owned by her and the appellant. They paid $22,000 for it. It is unencumbered. Its current retail value is estimated to be about $10,500. She confirms that she was on overseas duty with the Navy until 19 August. The basis of the contention that the confiscation order would cause undue hardship was that the vehicle was required by herself in connection with her duties in the Navy, she being

on 24 hour call; and the needs of her children. They have many extracurricular activities such as such as gym training, swimming, netball, softball, athletics and T-ball.

The appellant's wife further deposes that she is on an income of $38,000 pa and that she would not be in a position to purchase a replacement vehicle.

The appellant's wife also gives evidence as to the alcohol problem of the appellant. She says that she and the appellant are now in the process of separating because of his latest alcohol relapse and, notwithstanding his attendance at the Bridge programme. She says that once the appellant has completed the alcohol treatment programme in Wellington he is to live in Mt Maunganui and that she is to remain in Wellington. It seems that the appellant's wife extracted a commitment from the appellant to abstain from alcohol while she was on overseas duty. The appellant having broken that commitment (together with his previous poor record with alcohol) it has brought the marriage to an end.

It is common ground that the three pre-conditions to confiscation have been satisfied; namely, (i) two qualifying offences; (ii) the offender having an interest in the vehicle at the time of the offending; and (iii) the offender driving or being in charge of that vehicle at the material time.

Once the three pre-conditions have been satisfied the Court is then required to confiscate the vehicle unless it is satisfied that extreme hardship would be caused to the offender or that undue hardship would be caused to a third party. ***Police v***

Rihari (High Court, Whangarei, AP 10/98, 23 July 1998, Laurenson J), ***Allen v Police*** (High Court Palmerston North, AP 2/99, 17 February 1999, Gendall J).

The onus of satisfying the Court of any excusing hardship is on the defendant – in this case the appellant – and is to the civil standard, that is proof on the balance of the probabilities. See ***Police v McClinchy*** [1997] DCR 898, at p.900.

In this case there is no plea of extreme hardship by the appellant. . The issue is whether it has been established on the probablities that confiscation will result in undue hardship on the appellant's wife has been established on the probabilities.

Hardship is defined in the Shorter Oxford Dictionary as:

> The quality of being hard to bear, painful, difficulty, hardness of fate or circumstance, severe suffering or privation. Also an instance of this: a piece of harsh treatment.

This wide and general meaning was accepted by the Court of Appeal in ***Director General of Education v Morrison*** [1985] 2 NZLR 431 (CA) at 433 per Woodhouse P in relation to the payment of an accommodation allowance. The Court adopted "the quality of being hard to bear" or alternatively "hardness of need or circumstance".

The dictionary definition set out above was also adopted by Moore DCJ in ***Shakespeare v Kirker*** [1997] DCR 1105 at p 1114 in an application for the trimming or removal of trees under s.129C of the Property Law Act 1952.

What then is undue hardship?

There have been two recent Court of Appeal decisions on the meaning of "undue hardship" in another context. In ***W&R Jack Ltd v Fifield*** [1999] 1 NZLR 48 (CA) a tenant sought an extension of time to give notice to the landlord that disputed rent be settled by arbitration. In extending the time the Court held that undue hardship would be suffered noting the hardship "would be out of all proportion to (the appellant's) fault. See p.55.

And in ***Lyall v Solicitor General*** [1997] 2 NZLR 641 CA, a forfeiture case under the Proceeds of Crime Act 1991, the Court of Appeal held that there was no undue hardship in terms of s.15(2) of that Act. Reference was made to ***R v Hadad*** [1989] 16 NSWLR 476. The Court went on to say at p.646:

> There will always be some hardship to an offender and sometimes to a third party when a forefeiture is made. It stems from the operation of the Act and is disregarded ...

The word "undue" adds something more to the concept of hardship. It means an excessive hardship or a hardship greater than the circumstances warrant. ***Jones v Trollope Colls Cementation Overseas,*** The Times, 26 January 1990.

In ***Dalton v Auckland City***; ***Porter v Auckland City*** [1971] NZLR 548, a case involving the granting of a limited licence, Henry J construed the words "undue hardship" as meaning "excessive or greater hardship than the circumstances warranted". He stated that the term should not be given a narrow interpretation.

This definition derived from the judgment of Lord Denning MR in ***Liberian Shipping Corporation v King (A) & Sons Ltd*** [1967 1 All ER 934 (CA), at p 938.

In ***Barbera v Auckland City Council*** (High Court, Auckland, M 393/80, 13 May 1980), Barker J held that undue hardship meant more than pure inconvenience.

The notions which have emerged in the cases so far cited have been readily apparent in two cases concerning s.84(2A).

First, in ***Wheeler v the Ministry of Transport,*** (High Court, Palmerston North, M 125/85, 11 October 1985), Greig J considered the phrase "undue hardship" for the purposes of s.84(2A) after citing ***Dalton*** (supra):

> ...hardship is to be anticipated and has to be accepted whether by the applicant himself, his employer or other person with whom he is associated. Undue hardship must be something less than extreme hardship but more than hardship simply. The adjective "undue" has, I think a comparative connotation, whereas the adjective "extreme" has a superlative or absolute connotation. Therefore there has to be something more, something greater, something excessive to bring it within the term "undue.

And more recently, Gendall J in ***Allen v Police*** (supra) also considered the phrase "undue hardship" for the purposes of s.84(2A). His Honour cited ***Dalton*** (supra) and held that while "undue hardship" is of a lesser degree than "extreme hardship":

> ...it still requires that the hardship be excessive or greater than the circumstances warrant.

In ***Allen***, the appellant submitted that there was undue hardship for his de facto partner because of her need for a car to transport the children to and from

school and for access visits. Reference was also made to the need to drive to the doctor for check ups and for essential shopping purposes. Gendell J rejected the argument that that amounted to undue hardship. At p.6 Gendall J said:

> The task of the Court is to weigh the consequences as against the fault and the Court must not lose sight of the fact that confiscation of a vehicle is intended to be part of the punitive process. Obviously, persons other than the offender are not subject to a "punitive process" but it cannot follow that confiscation is avoided because it leads, inevitably as must always be the case, to some inconvenience and hardship to an offender's family. For the mandatory confiscation, envisaged by 84(2A) to be avoided it has to be shown that the hardship to the offender's family is undue so as to be greater than all the circumstances warrant.

And a little later, His Honour continued:

> It is an inevitable consequence of an order for confiscation that an offender's family or partner will suffer but that is no more than a normal or usual consequence of the offending. The considerations of specific deterrence to the offender, as well as general deterrence to other offenders, together with the vital consideration of public safety has to be weighed and placed in balance with the untoward effects that will flow to an offender's family ypon confiscation. It is only where the hardship or the suffering of others is excessive or unreasonable in all the circumstances that relief can be given.

The Court's approach to what amounts to "undue hardship" must be determined in a commonsense way and in relation to the facts of the particular case. It is to be determined objectively and not on the basis of how the particular person may perceive the extent of the hardship. Compare Laurenson J's approach to the determination of what amounts to "extreme hardship" in ***Police v Rihari*** (supra).

Approaching the matter in this way, I must ask myself:

- Will the confiscation cause hardship to the appellant's wife which is excessive or greater than the circumstances warrant?
- Will the hardship to the appellant's wife be disproportionate or go beyond what is warranted?

The appellant's wife's plea of undue hardship principally relates to the effect of the confiscation on the activities of her children and her ability to get to and from her work in the Navy.

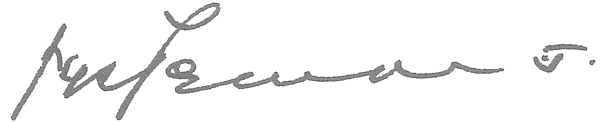
Plainly, the marriage is faltering and the parties are likely to live separate and apart in the future. It is clear from the terms of s.87 of the Criminal Justice Act that the nett proceeds of sale in the event of the confiscation order being confirmed are payable to those persons who had the beneficial interest in the confiscated vehicle. Here, this vehicle was unencumbered.

There is also a further factor which I must bring into the scales. The appellant has executed a deed of assignment of his interest in the car. So far it has not been signed by the appellant's wife. In it the appellant transfers his interest to her. This document was placed before me by the appellant's counsel.

Taking all the circumstances into account and applying the principles which I have set out above, and bearing in mind especially that once the vehicle is sold (if confiscation is ordered) the whole of the nett proceeds of sale will go to the appellant's wife (assuming she signs the deed), I am not persuaded on the balance

of probabilities that the confiscation will cause hardship to the appellant's wife which is excessive or greater than the circumstances warrant.

Accordingly, approaching the matter on a de novo basis, I find that a proper case has been made out for confiscation and that it will not cause undue hardship to the appellant's wife. I therefore confirm the order made in the Court below.



P.G.S. Penlington J