IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY **AP 333/99**

BETWEEN **LOUISE BEVERLEY EVAROA**

Appellant

AND **POLICE**

Respondent

Hearing: 17 December 1999

Counsel: S L Baigent for Appellant
C L Mander for Respondent

Judgment: 17 December 1999

ORAL JUDGMENT OF HERON J

Solicitors:

S L Baigent, Wellington for Appellant
Crown Solicitor's Office, Wellington for Respondent

[1] On 9 October 1999 the appellant in this case at approximately 4 am was driving a motor vehicle on Raumati Road, Raumati. She was stopped by the police for a random breath test and was seen to be showing symptoms of drunkenness. An evidential breath test was carried out and it was found to be 990 micrograms well in excess of the 400 allowed by law. She pleaded guilty at the earliest opportunity and was sentenced to nine months imprisonment and her motor drivers licence cancelled for two years.

[2] The appellant is subject to S.56(4) of the Land Transport Act 1998 which came into force on 1 March 1999. It provides that if a person commits a third or subsequent offence of the kind for which she is sentenced, a person commits an indictable offence, and on conviction may be sentenced to a maximum penalty of two years imprisonment or a fine not exceeding $6,000, in addition to the inevitable disqualification.

[3] The appellant in this case had five previous convictions of the description referred to in S.56. The first was on 28 January 1993 and three others on 29 March 1996 and finally on 18 July 1997. The three that were dealt together in March 1996 involved incidents in July 1994, October 1995 and February 1996 and for reasons which are not apparent on the information before me, were dealt with at the one time. In respect of that she was sentenced to six months periodic detention with supervision, and the most recent offending in 1997, she was sentenced to three months periodic detention, with nine months supervision.

[4] The accumulating of the three charges referred to, may have been the result of some attempts for her to undertake treatment for alcoholism and a period of time allowed to elapse to see what the appropriate penalty should be. I am uncertain about this but that was the suggestion that Ms Baigent made, and that appears to be a likely explanation in the circumstances.

[5] When she was convicted on 18 July 1997, she was given a final warning which was recorded on her record and which she herself acknowledges she received.

[6] The sentencing Judge had before him a pre-sentence report which in addition to the matters I have already discussed, indicated that an opportunity that was given to her pending the hearing of this last charge, was not taken up so far as an alcohol assessment was concerned, something the District Court had ordered prior to her appearance on sentencing. The probation officer described the appellant as late for the first interview, which meant the assessment could not be completed and the second appointment was not kept, although the appellant apologised through another person indicating that she could not attend. The probation officer, not surprisingly, questioned whether she was sufficiently motivated to complete a course of counselling under a sentence of supervision.

[7] Sufficient to say, that Ms Baigent before me made submissions that there was indeed a personal difficulty about keeping the appointments, but in my view the Judge was entitled to rely on the assessment of the probation officer, and the practical outcome which was that before her sentencing, there was no such alcohol assessment made.

[8] Before the sentencing Judge was an affidavit by the appellant, setting out the circumstances of the offence, including the fact that she had undertaken a short journey only, to where she was intending to sleep. Her friend was asleep in the car and she took over the driving accordingly. She emphasised that she had co-operated with the police and there is no doubt about that.

[9] There followed a recital of a number of serious events that had occurred to the appellant, including a serious car accident, the death of people close to her, and family difficulties including allegations of sexual abuse in respect of one of her children. The picture she paints is of a person on the knife edge, and clearly in need of considerable assistance. There are financial and other difficulties not made any better I would have thought, by her undoubted alcoholism. She says herself that her mental health is not good and she appears to be hanging onto her sanity by only threads. These were difficult matters for the sentencing Judge to take into account but there can be no doubt that he had all the appropriate information when coming to fix the appropriate term of imprisonment that the appellant should serve.

[10] Ms Baigent did not submit that a prison sentence ought not to have been imposed in this case, it being the sixth appearance before the court for this type of offending. The background of the recent increase in penalties, would have made that submission impossible.

[11] Having regard to the limited time that this section has been in force, there is not a great deal of appellate precedent so far as the appropriate sentence is concerned. However Ms Baigent and Mr Mander have been able to refer me to two authorities. First ***Carolyn Morgan v Police,*** AP 17/99, Wanganui Registry, 18 November 1999. That case had some personal circumstances not dissimilar from the present case. The appellant was a married woman. Her breath test reading was 623. The conviction was her fourth conviction in under nine years and it would seem that she was also charged with driving whilst disqualified. Gendall J referred to what he understood was a tariff emerging in the Wanganui area, but cautioned against sentencing on an arithmetical process. He acknowledged that the District Court Judge had considerable anxiety in fixing the appropriate sentence, having regard to the personal circumstances, but in the end considered that the sentence of two months imprisonment, with leave reserved to apply for home detention should not be disturbed.

[12] The other case is ***Te Awhe Morgan v Police***, AP 195/99, Wellington Registry, 15 July 1999, again a decision of Gendall J. There the appellant had a breath test reading of 460 micrograms. He had received a final warning, similar to the one given in this case. He had three previous convictions for breath and blood alcohol offences in 1992, and then twice again in 1997. He also faced a charge of driving whilst disqualified. The Judge said:

> Mitigating factors of course are taken into account. So are questions such as youth of the offender, the likely response to a suspended sentence, other options for rehabilitation, a previous blameless record, positive responses to previous sentences or Court orders. The question of general deterrence to other members of the public is also a significant factor to be placed in the balance. It is clear that Parliament regards multiple drink driving as a grave social evil and it is because of the carnage that it causes. General deterrence to other members of the public must in some circumstances prevail over personal circumstances of an individual offender, particularly if it is that the individual offender's past record and response to other

> Court's sanctions is questionable. In this case there was an aggravating feature in terms of the blood alcohol offence, namely driving whilst disqualified which was the fourth occasion that the appellant was convicted of such a charge in less than two years.

[13] There the case proceeded on the basis that six months was an appropriate sentence if it was suspended but that a shorter sentence would be appropriate if in fact a full time sentence was imposed. The Judge thought that the danger to the public and the fact that he had not responded to three orders for disqualification, and his driving after consuming alcohol, placed him as a risk to the public. The Judge declined to interfere with the sentence of six months.

[14] In this case there can be no doubt that the events from 1999 in particular require the court to have more than some sympathy for the position she was in, and as had proved in the past, her resort to alcohol as a crutch which she freely conceded did occur when personal difficulties emerged.

[15] Ms Baigent emphasised the fact that the earlier convictions were at a time when she was in a violent relationship and arose out of those circumstances rather than anything else. I personally am not sure that that is a correct analysis, although undoubtedly it would have played a part. However, as is relative common knowledge these days, people who have multiple offending in this area generally have a serious drinking or alcohol problem, and this is undoubtedly the case here. That problem will have to be addressed however difficult it may be. It is only when near rock bottom that changes for the better are made. That position has been reached it seems to me, by the events that I have just described.

[16] Uppermost in the policy behind the increase in the maximum sentence is undoubtedly the need to deter drivers from driving after consuming alcohol. Whilst there is a measure of public protection, in imprisonment, it cannot be said that short sentences in themselves, carry very much effect so far as the protection of the public is concerned. For obvious reasons sentences under two years will mean that the person is back in the community in a relatively short time and unless the basic problem is addressed, they will resort to driving again, or will take the risk of that, irrespective of the period which they have served.

[17] Focusing then on the deterrent aspect of the sentence, in many cases, and this is one of them, first time in prison will have the appropriate effect and impact following the briefest of periods in custody. But for deterrence to have effect on the other hand, a realistic term of imprisonment has to be imposed.

[18] Ms Baigent also mentioned that the Judge pursuant to S.21(D) of the Criminal Justice Amendment Act 1999, gave leave to the appellant to apply to a District Prison Board for release to home detention. In the event, Ms Baigent was informed by the Probation Service that for administrative reasons home detention was not available to this particular appellant, due to her place of residence. Having regard to that, the Judge, she said, may have imposed a lesser sentence knowing that it would be served in prison and not elsewhere. In my view, such matters are irrelevant. The administration of the sentence is a matter for the prison authorities and the Judge merely gives leave to the District Prison Boards to consider whether in the circumstances of the cases they should allow the same to occur. In doing that they have regard to the nature and seriousness of the offence and any relevant matters pertaining to victims.

[19] It seems as if the appellant will serve her sentence in prison. For my part there may be some real difficulties about allowing home detention in cases such as this, where there are alcohol problems and confinement within the home. Home detention may be questionable in those circumstances, but it will depend on the facts of each individual case, and I am making no pronouncement about the matter at this time.

[20] Having regard to the two cases that I have referred to, and having discussed the matter briefly with other Judges in the Wellington High Court, it would appear that the range of sentencing is as suggested in ***Morgan***, between three and six months. It is early days however, and the efficacy of sentencing at that level may yet come under question. Judges must of course, not loose sight of the overall requirement contained in S.7(2) of the Criminal Justice Act, relating to the length of any sentence.

[21] Taking all those matters into consideration I take the view that nine months is manifestly excessive, and the appeal against sentence is allowed. The sentence of nine months is quashed and in its place a sentence of six months imprisonment is imposed.