IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CRI 2009-488-46

	BETWEEN	CRAIG ALEXANDER RUSSELL Appellant
	AND	NEW ZEALAND POLICE Respondent

Hearing: 15 December 2009

Counsel: D W Hart for the appellant
M B Smith for the respondent

Judgment: 15 December 2009

(ORAL) JUDGMENT OF POTTER J
on sentence appeal

Solicitors: Hammonds, P O Box 16, Dargaville
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Introduction

[1] The appellant was sentenced in the District Court at Dargaville by Judge Duncan Harvey on 6 August 2009 to twenty two months imprisonment. He was disqualified from driving for three years. He appeals the sentence on the following grounds set out in counsel's submissions:

a) The sentence was manifestly unjust;

b) The sentencing Judge was wrong to make a finding pursuant to ss 8(c) and (d) of the Sentencing act 2002 that Mr Russell's offending was near to/is the most serious offending of its kind;

c) The sentencing Judge did not properly account for Mr Russell's personal circumstances in sentencing;

d) There was no credit for Mr Russell's guilty plea entered prior to the time set for the defended hearing.

Background facts

[2] The background facts are set out in the sentencing notes of Judge Harvey from which I summarise. On 17 January the appellant was driving a motor vehicle west along Awakino Point Road where he dropped off a passenger. He was about to drive out of the address when stopped by the Police. Breath testing procedures were carried out. The appellant's breath was found to contain 930 micrograms of alcohol per litre of breath. When spoken to the appellant initially denied he had been the driver. He said his mate had been driving, but he later admitted to being the driver. He said he had only drunk four to five bottles of beer. He also said he had been in prison for drunk driving less than a year ago and only had a few months to go and could then re-apply for his driver's licence.

Sentence appealed

[3] Judge Harvey noted that he had the advantage of reading a full pre-sentence report and considering the list of previous convictions of the appellant. He noted there were fourteen previous convictions for driving with excess breath alcohol, three in 1989, one in 1990, 1991, 1992, 1995, 1996, 1998, four in 2000 and one in 2007.

[4] The Judge referred to the principles and purposes of sentencing. He said that the two most important aspects in sentencing the appellant were deterrence and protecting the community against the appellant because, said the Judge:

> …you are clearly a person who is going to continue to drink and drive.

[5] He said there was a hard core section of the community who continued to drink and drive no matter what the Court does, and that the time had arrived when the Court must take a very hard line.

[6] He noted the alcohol breath reading of 930 and that the appellant was a suspended driver who should not have been on the road.

[7] He said he considered the circumstances called for a penalty that was near the maximum because in his view this was very serious offending "up there with the most serious offending of its type".

[8] He referred to the guilty plea entered on the morning of the defended hearing. He said he understood from counsel the reason for this was that :

> … you simply could not get your head around the fact that drinking just after driving was not going to assist you.

He said the difficulty with that explanation was that the previous plea of not guilty had been entered on the basis as to the identity of the driver and all other matters being at issue. The Judge said he did not accept there was any justification for the very late plea.

[9] The Judge said he was prepared to come back a little from the maximum penalty for the offence because he acknowledged the break in the appellant's offending for a period of about six years (referring no doubt to the period prior to the conviction in 2007). He said in all the circumstances, and noting there were no mitigating factors, the sentence imposed would be twenty two months' imprisonment. He disqualified the appellant from driving for three years.

[10] He said that in relation to the charge of driving whilst forbidden to drive, the penalty was factored into the penalty imposed. He accordingly convicted and discharged the appellant on that charge.

[11] He imposed special release conditions as set out in the pre-sentence report to continue for six months after the expiry of the sentence.

Grounds of appeal

[12] I shall first deal with the grounds of appeal other than the overall ground that the sentence imposed was manifestly unjust, to which I shall return at the conclusion of my remarks.

[13] In relation to ss 8(c) and (d) of the Sentencing Act, I consider it is clear the Judge proceeded on the basis that this was offending near the worst of its kind (s 8(d)). He expressly recognised this, in drawing back from imposition of the maximum penalty of two years that was available to the Court. He acknowledged the gap in the appellant's offending for a period of six years. The pre-sentence report records that prior to that period of non-offending, the appellant had completed a period of five months in Odyssey House in 1997 - whether in relation to his alcohol or cannabis use is unclear. But the intervention programme has ultimately been in-effectual. Certainly the appellant has continued to consume alcohol excessively, and is a recidivist drink driving offender. The approach taken by the Judge in all the circumstances of this case, was open to him.

[14] Under the heading of personal circumstances, counsel for the appellant raised the issue of s 77 of the Land Transport Act. He referred in his written submissions

to the presumption raised by that section, that the proportion of alcohol in the appellant's breath at the time of the alleged offending is the same as the proportion of alcohol in the appellant's breath indicated by the test undertaken by the Police. In that context, he referred to the judgment of this Court in *R v Holland* HC AK CRI 2008-404-000175 11 August 2008, Priestley J which in turn refers to the judgment of the Court of appeal in *Transport Ministry v Sowman* [1978] 1 NZLR 218 (CA). Counsel's submission was that the impact of this presumption imposed what he described as a "draconian outcome", which the appellant apparently could not accept. The appellant's position as presented to the sentencing Judge in submissions, was that after he arrived at his mate's place in Awakino Point Road he had consumed a significant amount of whisky quickly. Apparently, before the guilty plea was entered, it was confirmed that his mate, Mr Ries, could neither confirm nor deny that contention. Mr Hart emphasised that the Crown therefore took a neutral position.

[15] The Court of Appeal in *Sowman* said at 223:

> But if there is cogent evidence which leaves the magistrate satisfied that there was a material difference, in favour of the defendant, between the deemed and actual level then we see no reason why this should not be taken into account in determining the culpability of the commission of this somewhat unique statutory offence.

[16] The Court considered the magistrate was not precluded from taking into account the post accident drinking of the appellant when deciding whether or not in his discretion to impose an additional period of disqualification above the mandatory six months, nor in deciding what other form of discretionary penalty he should impose.

[17] Mr Russell has filed an affidavit in the appeal, dated 12 December 2009. He states that he consumed alcohol prior to driving and when he got to Mr Ries's house he went directly to Mr Ries's beer fridge and helped himself to a series of generous shots of Jamison's Whisky. That apparently was the information provided in submissions to the Judge, though it was not sworn evidence.

[18] It is a far cry, in my view, from the type of "cogent evidence" that in terms of Sowman might have satisfied the Judge to exercise his discretion in favour of the appellant on sentencing. It also needs to be noted that even if the appellant's contention is correct, he was prepared to get into his car again and drive after consuming the claimed additional amount of alcohol, which was when the Police intervened.

[19] Mr Hart further submitted there had been insufficient consideration by the Judge of the principles in *Clotworthy v New Zealand Police* HC WANG CRI 2003-483-13, 25 September 2003, Wild J. He referred in particular to the judgment in *R v Fair* [2007] NZCA 282 where the Court held that Mr Fair's offences were near the most serious of cases but considered that a starting point of twenty months' imprisonment was the most the Court considered justifiable. The Court in that case took into account that Mr Fair had had no drink driving offences since 1999, a period of seven years before the offending for which he was sentenced. That is not the position of Mr Russell. Although there was a hiatus of six years referred to by the sentencing Judge, he has a conviction in 2007 for driving with excess breath alcohol for which he was imprisoned and granted leave to apply for home detention. He was disqualified from driving for one year three months. Mr Hart submitted that Mr Fair had a recent conviction for driving while disqualified which was not the situation with Mr Russell but it is fair to say that both had a serious number of offences for driving while disqualified – in the case of Mr Russell ten previous such offences. I consider there is a distinction between the case of Mr Fair as considered by the Court of Appeal in the judgment to which I have referred, and that of Mr Russell.

[20] I do not propose to deal in detail with the ten *Clotworthy* factors listed at [20] of the judgment. Mr Smith for the respondent went through them in his oral submissions. In summary, consideration of each of these factors yields a net result that is neutral or unfavourable in relation to the appellant.

[21] I turn to consider the ground that there was no credit given for Mr Russell's late plea of guilty. The guilty plea was indeed entered very late. In terms of the judgment in *R v Hessell* [2009] NZCA 450, the appellant would not have been entitled to a discount for his late guilty plea. Mr Hart acknowledged that, but noted

this offending pre-dated the judgment in *Hessell*. However, the principles stated in that case in relation to delayed guilty pleas at [43]-[44] are relevant. Mr Russell cannot have his cake and eat it too. He maintained a stance up to the morning of the hearing that all issues were at large, which he was perfectly entitled to do. He then entered a late guilty plea. In my view the Judge was perfectly correct not to allow any discount for such a late plea.

[22] Finally, when I stand back and ask the question, was the sentence imposed manifestly excessive, the answer must be that it was not. It was a stern sentence but given that the appellant had fourteen previous convictions for driving with excess breath alcohol and ten previous convictions for driving while disqualified (which were not referred to by the Judge), the sentence cannot be regarded as manifestly excessive.

[23] I need to refer briefly to the disqualification period which was the subject of written submissions and also referred to by Mr Hart in oral submissions. Mr Hart referred to the case of *Walters v New Zealand Police* HC NAP CRI 2007-441-000010, 11 and 12, 11 June 2007 where in the circumstances of that case – fourteen drink driving convictions and twenty five driving while disqualified convictions – a disqualification period of five years was reduced to two years. It is interesting to refer to the decision of the Court of Appeal in *R v Stone* [2009] NZCA 539 where the Court looked at trends in periods of disqualification imposed for recidivist EBA offending and concluded at [21]:

> The upshot of all this is that we are satisfied no correlation can be drawn between the number of EBA convictions and the period of disqualification imposed.

[24] There is a graph at [15] of the judgment which limits statistics of previous convictions for driving with excess breath/blood alcohol to eleven, but it is clear that the number of considerations the District Court must take into account, including the ability of the District Court to disqualify a third or subsequent EBA offender indefinitely, prevents any definitive conclusions being drawn.

[25] In the circumstances of this very serious offending the disqualification of three years, while again stern, cannot be regarded as manifestly excessive.

Result

[26] In the result leave to appeal is granted, but the appeal is dismissed. The overall sentence imposed was not manifestly excessive.