

**IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE**

**CRI-2018-425-000033
[2019] NZHC 209**

BETWEEN

AND

BRADEN KENNETH TRAINOR
Appellant

NEW ZEALAND POLICE
Respondent

Hearing: 4 February 2019

Appearances: K Barker for the Appellant
S N McKenzie for the Respondent

Judgment: 19 February 2019

JUDGMENT OF NATION J

[1] Offenders who commit certain driving offences may be disqualified from driving. For particular offending, disqualification is generally mandatory. The imposition of disqualification and the length of disqualification is all to do with road safety.¹ It has been accepted that the purpose of imposing further periods of disqualification where an offender has driven while disqualified is usually not so much about safety as punitive, to ensure there is a real sanction where an offender has shown a disregard for a sentence imposed by the Court and the order for their disqualification.²

¹ *Leaupepe v Police* [2015] NZHC 1766 at [8].

² *Lambert v Police* HC Rotorua AP 62/90, 11 October 1990, at 7.

[2] Under s 94 Land Transport Act 1998 (the Act), in certain circumstances, the Court has a discretion to impose a community-based sentence in place of a further period of disqualification. In that context, the Court has recognised that:³

It may be inappropriate to order disqualification where a person is caught in a cycle of offending by driving while disqualified for which orders for continued extensions of disqualification orders are imposed.

[3] If s 94 permits the imposition of a community-based sentence instead of disqualification, whether or not a Judge should do so is a matter of discretion. It is an issue on which any two Judges might reach different views. A Judge in the High Court has gone so far as to say “it will usually be better that the penalty [for driving while disqualified] take some form other than an additional disqualification”.⁴ In contrast, it has also been said that there is an advantage to the public understanding that the usual punishment for driving while disqualified will be a further period of disqualification and this effective sanction would be undermined if the discretion against imposing a further discretion is exercised too readily.⁵

[4] On this appeal, I am required to consider whether a further term of disqualification for driving while disqualified should have been imposed. As it has turned out, by reference to s 94(4)(b), I also have to decide whether the sentencing Judge, by law, was even permitted to impose a community-based sentence instead of disqualification.

Factual background

[5] Mr Trainor is aged 32. He has a number of driving-related convictions:

Result date	Offence date	Offence	Sentence
24/05/2018	06/03/2018	Drove a motor vehicle in a dangerous manner	Community detention – 24/05/2018 – 6 months / disqualified from driving – 24/05/2018 – 6 months

³ *Police v Body* [2013] NZHC 1586 at [5], citing *Mitchell v Police* (1989) 5 CRNZ 190 (HC) at 193; *Lambert v Police*, above n 2, at 6 (discussing the predecessor of s 94).

⁴ *Lambert v Police*, above n 2, at 5.

⁵ *Ministry of Transport v Ure* HC Wellington AP 79/91, 9 July 1991 at 9.

Result date	Offence date	Offence	Sentence
24/05/2018	06/03/2018	Failed to stop when required – 3 rd or subsequent offence	Community work (SA) – 24/05/2018 – 180 hours / community detention – 24/05/2018 – 6 months / disqualification from driving – 24/05/2018 – 2 years
24/05/2018	06/03/2018	Drove while licence suspended or revoked	Community work (SA) – 24/05/2018 – 180 hours / community detention – 24/05/2018 – 6 months / disqualification from driving – 24/05/2018 – 6 months
18/01/2018	07/12/2017	2 x drove a motor vehicle in a dangerous manner	For each charge: Community work (SA) – 24/05/2018 – 180 hours / disqualification from driving – 09/03/2018 – 6 months
18/01/2018	07/12/2017	Failed to stop when followed by red/blue flashing lights	Disqualified from driving – 09/09/2018 – 6 months
18/01/2018	07/12/2017	Failing to remain stopped for an enforcement officer	Disqualification from driving – 09/09/2018 – 6 months
19/12/2013	28/09/2013	Operated a vehicle carelessly	Fine \$350 Court costs \$130
28/07/2006	06/05/2006	Driving in a dangerous manner	Disqualification from driving – 28/07/2006 - 6 months / Fine \$400, Court costs \$130.

[6] On Wednesday 15 August 2018 at approximately 12.30, Mr Trainor was driving a vehicle on John Street, Invercargill when it was stopped by Police. He admitted being disqualified and stated this was the stupidest thing he had ever done.

[7] In a provision of advice to Courts, Corrections advised that Mr Trainor had said it was a “spur of the moment decision to drive”, knew immediately when caught it was “irresponsible and stupid” and said he took responsibility for his actions and was prepared to face the consequences. Because of his consistent offending history, he was assessed as a moderate risk of reoffending and a moderate risk of harm to others, given previous violent-related offending. Corrections reported that Mr Trainor believed he had taken steps to reduce his risk of reoffending in a similar way by selling his vehicle and considering alternative travel arrangements. Corrections confirmed he

had engaged with a counsellor at Nga Kete Matauranga Pounamu Charitable Trust to address his acknowledged poor decision making and the way previously and currently this was problematic for him. Corrections recommended a sentence of community work to hold Mr Trainor to account for his offending and, if the Court deemed appropriate, a rehabilitative sentence of supervision to give him the opportunity to attend a departmental programme which would address his poor decision making and lifestyle choices which continued to see him reoffend.

District Court decision

[8] Judge Callaghan recognised that while this offending “would seem to be an innocuous breach (if they ever can be said to be that)”, when looking at his history Mr Trainor “obviously [had] some serious issues with driving”. The Judge referred to Mr Trainor being on a sentence of community detention and Corrections’ recommendation of community work.

[9] The Judge said:

[6] It is a bit of an enigma to sentence you because of the length of the disqualification that has already been imposed. However, you need to know that you are not allowed to drive, and while you say you have disposed of the motor vehicle, you are living in a remote location which might be a temptation to you.

[7] I am not minded to invoke s 94 on this occasion. I am going to deal with you by way of sentence of community work, and also a disqualification which will be on top of the disqualification that you are already under.

[10] The Judge then ordered Mr Trainor to do 140 hours of community work and said:

[9] You are disqualified for nine months, taking into account the fact that it is your second driving whilst you were not permitted to do so within a relatively short space of time (May 2018 and now in August 2018). That disqualification will commence on 25 May 2020.

Principles on appeal

[11] Appeals against sentence are allowed as of right by s 244 of the Criminal Procedure Act 2011, and must be determined in accordance with s 250 of that Act. An appeal against sentence may only be allowed by this Court if it is satisfied there has

been an error in the imposition of the sentence *and* that a different sentence should be imposed.⁶ As the Court of Appeal indicated in *Tutakangahau v R*, an appellate court will not generally intervene where the sentence is within the range that can properly be justified by accepted sentencing principles.⁷ It is only appropriate for this Court to intervene and substitute its own views if the sentence being appealed is “manifestly excessive” and not justified by the relevant sentencing principles.⁸

Submissions

[12] In his notice of appeal, Mr Trainor asserted the sentencing Judge had erred in refusing to exercise his discretion to substitute a community-based sentence, pursuant to s 94(1).

[13] In written submissions for the Police, Ms McKenzie submitted the Court could not substitute a community-based sentence for disqualification because of the prohibition in s 94(4)(b) that applied where a person was subject to disqualification for dangerous driving for example, committed within five years of another such offence. She submitted that Mr Trainor was sentenced on 31 October 2018, when he was subject to a sentence of six months’ disqualification imposed on 24 May 2018 for dangerous driving that had occurred on 6 March 2018. He had also been convicted of two charges of driving dangerously for offences committed on 7 December 2017.

[14] Ms Barker submitted the restriction on the application of s 94 in s 94(4)(b) does not apply to the disqualification commencing on 25 May 2020 which is the subject of the appeal “because that was a disqualification for driving while disqualified alone and not for dangerous driving”. She accepted that Mr Trainor would have been prohibited from making applications under s 94 for the imposition of a community-based sentence instead of disqualification for dangerous driving offences.

[15] Ms Barker submitted the Judge thus could have exercised the discretion available to him in s 94 to substitute a community-based sentence for a further period of disqualification, and had failed to have regard to the factors he was required to

⁶ Criminal Procedure Act, ss 250(2) and 250(3).

⁷ *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

⁸ *Ripia v R* [2011] NZCA 101 at [15].

consider under s 94(1)(b) and (c). She submitted that, having regard to all those factors, a sentence of community work would have been a more effective and appropriate form of punishment for his driving while disqualified. She submitted this Court should impose a sentence of 40 hours' community work in addition to the 140 hours' community work imposed in the District Court in substitution for the further period of 9 months' disqualification.

Analysis

[16] Section 94 states:

94 Substitution of community-based sentences

- (1) This section applies if—
 - (a) the offender has previously been ordered on conviction for an offence to be disqualified from holding or obtaining a driver licence; and
 - (b) the court, having regard to—
 - (i) the circumstances of the case and of the offender; and
 - (ii) the effectiveness or otherwise of a previous order of disqualification made in respect of the offender; and
 - (iii) the likely effect on the offender of a further order of disqualification; and
 - (iv) the interests of the public,—

considers that it would be inappropriate to order that the offender be disqualified from holding or obtaining a driver licence; and
 - (c) the court considers that it would be appropriate to sentence the offender to a community-based sentence in accordance with Part 2 of the Sentencing Act 2002.
- (2) Despite any provision of this Act that requires a court (in the absence of special reasons relating to the offence) to order a person convicted of an offence to be disqualified from holding or obtaining a driver licence, the court may instead make an order referred to in subsection (3) if this section applies.
- (3) If the court sentencing an offender determines under this section not to make an order of disqualification,—
 - (a) the court must impose a community-based sentence on the offender; and

- (b) the imposition of such a sentence does not limit or affect the power of the court to impose any other sentence for the offence that, in accordance with the provisions of the Sentencing Act 2002, it may impose in addition to the community-based sentence; and
 - (c) in determining the appropriate sentence to be imposed on the offender in respect of the offence, the court must take into account the gravity of the offence and the fact that the offender would otherwise have been liable to disqualification from holding or obtaining a driver licence.
- (4) This section does not apply if—
- ...
- (b) the offender is prohibited from applying for a limited licence under section 103(2)(a), (b), or (d).

[17] Relevantly, s 103 provides:

103 Persons who may apply to court for limited licence

- (1) Unless prevented by subsection (2), the following persons may apply for an order under section 105 authorising the grant of a limited licence:
 - (a) persons who are disqualified by an order made under this Act from holding or obtaining a driver licence:
 - ...
- (2) The following persons may not apply under this section for an order under section 105 authorising the grant of a limited licence:
 - ...
 - (c) a person who is disqualified from holding or obtaining a driver licence by an order made on his or her conviction for an offence against section 32(1) (which relates to driving while disqualified or contrary to a limited licence):
 - (d) a person who is disqualified by an order made on his or her conviction—
 - (i) for an offence against any of sections 35, 36, 38, and 39 (which relate to reckless or dangerous driving, careless or inconsiderate driving causing injury or death, and failing to stop after an accident);
 - ...

committed within 5 years after the commission of any other offence specified in this paragraph and arising from

a different incident (whether or not both offences are of the same kind, regardless of when convictions were entered for those offences):

Jurisdiction to exercise the s 94 discretion

[18] The discretion given to the Court to impose a community-based sentence rather than order a period of disqualification, provided for in s 94(2), is not available if the offender is prohibited from applying for a limited licence under s 103(2)(d)(i) for an offence against s 35(1)(b), i.e. driving a motor vehicle at a speed or in a manner which is dangerous, where any such offence was committed within five years of that same offence or any other offence specified in s 103(2)(d).

[19] Here, as Ms McKenzie submitted, Mr Trainor was disqualified on 24 May 2018 for dangerous driving, committed on 6 March 2018. That dangerous driving was committed within five years of his earlier dangerous driving on 7 December 2017 for which he was also convicted. He was subject to six months' disqualification for these earlier dangerous driving offences at the time he came to be sentenced on 31 October 2018 for his driving while disqualified on 15 August 2018.

[20] The appropriate time for considering whether s 94 might apply is at sentencing, when the Court was considering whether there should or had to be a further period of disqualification. It is clear from the wording of ss 94(1)(c) and 94(3) that s 94 is about what a Court might do when sentencing an offender. In this instance, that time was 31 October 2018.

[21] On 31 October 2018, Mr Trainor was subject to a sentence of six months' disqualification imposed on 24 May 2018 on the charges of driving in a dangerous manner. He was also subject to disqualification from driving for two years from 24 May 2018 for failing to stop when that was his third offence.

[22] The Judge said the nine months' disqualification he was imposing for driving while disqualified was not to start until 25 May 2020, i.e. when the two year period of disqualification, to which he was already subject, ended. The fact the further period of disqualification was not to begin until 25 May 2020 does not change the fact that, at the time the Judge had to consider whether s 94 permitted the imposition of a

community-based sentence rather than a further period of disqualification, Mr Trainor was already disqualified from 24 May 2018 for dangerous driving, an offence that was committed within five years of an earlier such offence.

[23] It is correct that s 94, in combination with s 103, permits a defendant to apply for a community-based sentence instead of further disqualification when a Judge has to sentence him for driving while disqualified. That is not so when the offender *is disqualified* by an order made on his conviction:⁹

... for an offence against any of sections 35, 36, 38 and 39 (which relate to reckless or dangerous driving, careless or inconsiderate driving causing injury or death, and failing to stop after an accident ... committed within 5 years after the commission of any other offence specified in this paragraph and arising from a different incident (whether or not both offences are of the same kind, regardless of when convictions were entered for those offences).

[24] Ms Barker's submission requires me to interpret the words in s 103(2)(d) as if it begins "a person *who is liable to be* disqualified by an order made on his or her conviction" for the specified offences. I cannot interpret s 103(2)(d) in that way.

[25] I thus accept the submission for the Police that on 31 October 2018 the Judge could not have exercised a discretion under s 94 to impose a community-based sentence in lieu of further disqualification.

Merits of the s 94 appeal

[26] In any event, I would also not have held that the Judge was in error in not considering all matters in s 94(1)(b) if the discretion under s 94 had been available to him. It is clear from his sentencing remarks that s 94 had been brought to his attention. I thus infer that he would have had drawn to his attention the matters referred to in s 94(1)(b)(i)-(iv). Thinking that the discretion under s 94 was available to him, what weighed most significantly with him was the deterrent aspect of sentencing and the need for a penalty by way of disqualification so that Mr Trainor knew he was not allowed to drive. These matters were important to the Judge because Mr Trainor had breached his disqualification within a relatively short period after the disqualification had been imposed in May 2018.

⁹ Land Transport Act, s 103(2)(d).

[27] The sentences imposed, as expressed in the Judge’s remarks, mean that, as a result of the sentences imposed on 24 May 2018, Mr Trainor is disqualified from driving for two years from 24 May 2018 (for failing to stop) and for a further nine months from 25 May 2020. He is thus disqualified from driving until 24 February 2021. This was understandably of some concern to the Judge, hence his comment that it was “a bit of an enigma to sentence you because of the length of the disqualification that has already been imposed”.

[28] During the hearing, I enquired of counsel as to whether under the Act it was mandatory that any further period of disqualification had to begin at the conclusion of any period of disqualification which had already been imposed.

[29] Ms Barker later referred me to s 85:

85 When disqualification starts

(1) If an order is made by a court under any Act disqualifying a person from holding or obtaining a driver licence, the period of disqualification starts on the day the order is made unless the court otherwise directs or that Act otherwise provides.

...

(3) In the case of a person who is at the time of the order already disqualified from holding or obtaining a driver licence, the period of disqualification ordered starts when the order or the last of the orders to which the person is already subject ceases to have effect.

[30] Section 85(1) is subject to s 85(3) so that, if Mr Trainor had to be disqualified for driving while disqualified, his period of disqualification had to begin when the last of the orders for disqualification to which he was already subject had ceased to have effect.¹⁰ The further period of disqualification thus had to begin on 25 November 2020.

[31] I can understand why Mr Trainor’s situation posed something of an enigma for the presiding Judge.

¹⁰ *Police v Rihari* HC Whangarei CRI-2010-488-11, 26 April 2010.

[32] In commenting on the rationale for s 94, the authors of *Becroft and Hall's Transport Law* recognised that it is:¹¹

... of little benefit to the community or the offender for that person to continue to be disqualified for what young people (as the bulk of those disqualified inevitably are) recognise as impossibly long periods, with the consequence of breach upon breach, conviction upon conviction, and disqualification upon disqualification and, secondly, that in appropriate cases the alternative of a community-based sentence is more likely to be complied with by the offender and is therefore likely to be a more effective punishment.

I agree with those comments.

[33] The purpose of a further period of disqualification for driving while disqualified is primarily punitive. Here, a punitive sentence could have been imposed and was imposed in part through a sentence of community work.

[34] It seemed from the Department of Corrections' advice to the Court that some progress had been made by Mr Trainor in recognising the error of his ways, in selling his car and taking advantage of the counselling that was available to him to reduce his risk of reoffending. The further period of disqualification was likely to cause him some particular hardship through the fact he lived in what the Judge described as a "remote location". Counsel told me Mr Trainor has a young family, including a child born in December 2018. Mr Trainor would not be able to apply for a limited licence on the basis the disqualification would result in extreme hardship to him or undue hardship to anyone else in relation to the further period of nine months' disqualification, because that disqualification relates to the offence of driving while disqualified.¹²

[35] The driving which was in breach of the disqualification was described by the sentencing Judge as "innocuous". I infer this was said to contrast the offending for which he was being sentenced to much of his earlier driving offences which involved dangerous driving and failures to stop when required to do so. It was not "innocuous"

¹¹ Andrew Becroft and Geoff Hall *Becroft and Hall's Transport Law* (online ed, LexisNexis) at [LTA94.2], endorsed by Asher J in *Emani v Police* HC Auckland CRI-2009-404-235, 28 September 2009.

¹² Section 103(2)(c).

in that it involved a wilful disregard of the orders for disqualification made by the Court.

[36] Because Mr Trainor was already subject to two years' disqualification that was not going to end until 24 May 2020, the imposition of a further term of disqualification meant that he would be unable to drive until 2 February 2021, about 28 months after he was sentenced on 31 October 2018.

[37] In these circumstances, with the imposition of the nine months' disqualification on top of the two years' disqualification to which Mr Trainor was already subject, there was an increased risk that Mr Trainor would get onto the treadmill of reoffending which, if available, the use of s 94 might have avoided for the benefit of both him and the public.

[38] Thinking that he could exercise a discretion available to him under s 94, the Judge decided, on all the information before him, it was not appropriate to impose a sentence which would avoid disqualification, particularly so having regard to the way in which he had breached his disqualification so soon after it was imposed. The decision involved the exercise of a discretion. It was a conclusion reasonably open to him. It is not necessary or appropriate for me to make a separate determination on the point.

[39] The Land Transport Act provides that, if a person commits a first or second offence for driving while disqualified, the Court must order the person to be disqualified from holding or obtaining a driver licence for at least six months.¹³ In the particular circumstances of this case, for the reasons discussed, s 94 could not be used to allow the Court to impose a community-based sentence instead of a period of disqualification. Pursuant to s 85(3), the further period of disqualification the sentencing Judge imposed had to begin at the end of the two year period of disqualification for which Mr Trainor was already subject. By law, the Judge had to impose a disqualification period of at least six months in the way that he did.

¹³ Section 32(3)(b).

[40] The Judge considered a disqualification period of nine months was appropriate. Having regard to Mr Trainor's driving history and the proximity of his driving while disqualified to the time that disqualification was imposed, it cannot be said a disqualification for nine months rather than six months was manifestly excessive.

[41] The appeal is dismissed.

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