



## **Application for leave to appeal out of time**

[3] Mr Balloch's appeal is just out of time. His notice of appeal was filed on 2 November 2018, nine working days after the due date of 22 October 2018. There is a rational explanation for the delay, given Mr Balloch was in custody during this period and his lawyer had difficulty contacting him. The application for leave to appeal is granted.

## **Facts**

[4] Mr Balloch is a 36 year old solo father of two young children. He was unemployed but has a qualification as a site traffic management supervisor. He has been diagnosed with ADHD.

[5] On 4 May 2017, Mr Balloch was disqualified from driving for 15 months for driving with excess blood alcohol on 2 December 2016. That disqualification was due to end on 4 August 2018. He had been sentenced previously for driving while disqualified on 30 June 2005, 1 May 2001 and 9 February 2001.

[6] At around 3.00 pm on 15 May 2018, Mr Balloch was stopped by Police driving on Crawford Street, Invercargill. His explanation was that he was picking his children up from school.

[7] At around 4.00 pm on 14 June 2018, Mr Balloch was stopped by Police driving on Eye Street, Invercargill. He admitted he had driven to the probation office for a pre-sentence report relating to the 15 May 2018 driving offending, and said that after this he was driving to pick up his children.

## **The sentencing in the District Court**

[8] At the time the Judge sentenced Mr Balloch for these two further offences of driving while disqualified, she also had to deal with charges of breaching conditions of a sentence of imprisonment and two charges of breaches of conditions of supervision committed on 7 December 2017 and 7 June 2018, and failure to answer Court bail on 10 May 2018. On those charges, Mr Balloch was convicted and discharged. The sentencing Judge referred to Mr Balloch's significant breach history.

She said he appeared to “thumb [his] nose” at Court orders, as exemplified by his driving to community probation for the purpose of his pre-sentence report. She said that his counsel had initially signalled he would be seeking a community-based penalty (under s 94 Land Transport Act) in lieu of disqualification. She said that would not have had any success given his significant breach history and his then admission to breaching several supervision sentences.

[9] On the charge of driving while disqualified on 15 May 2018, the Judge sentenced Mr Balloch to two months’ imprisonment and disqualified him from holding or obtaining a driver licence for 13 months from 24 September 2018. That would have been until 24 October 2019.

[10] On the charge of driving while disqualified on 14 June 2018, the Judge sentenced Mr Balloch to a further two months’ imprisonment, cumulative on the earlier sentence of imprisonment (until 24 January 2019). She disqualified him from driving for a further 13 months, cumulative on the other term of disqualification. There was an error in her sentencing notes in that the Judge said this would be cumulative from 24 October 2020 and he would thus be disqualified until towards the end of 2021.

[11] The mistake in the Judge’s remarks on sentencing has been reflected in his criminal and traffic history. It records that, on the charge of driving while disqualified on 14 June 2018, Mr Balloch was sentenced to two months’ imprisonment, cumulative on the sentence imposed on the other charge, and disqualified from driving for 13 months from 24 October 2020.

[12] That mistake needs to be corrected.

[13] With that error corrected, the Judge’s intention was obviously that Mr Balloch would be sentenced to two cumulative periods of 13 months’ disqualification so that he would be disqualified until 24 November 2020.

## Principles on appeal

[14] 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

## Submissions

### *Appellant’s submissions*

[15] Mr Mooney, counsel for Mr Balloch, submitted that the total period of disqualification of two years and two months was excessive. He submitted it would have been appropriate to impose two concurrent sentences of disqualification for 12 to 18 months. He submitted that Mr Balloch had come very close to completing a period of disqualification of one year, three months before the offending for which he was being sentenced. He also submitted there was no issue of public safety requiring a lengthy period of disqualification. Mr Mooney submitted the period of 26 months’ disqualification “amounts to an almost insurmountable hurdle that leaves little hope for Mr Balloch and is setting him up to fail”.

[16] Mr Mooney referred to McKenzie J’s observation in *Leaupepe v Police* that the “principal objective of disqualification is public safety”.<sup>5</sup> He referred to a number of cases where the High Court had considered the periods of disqualification imposed on more than one charge of driving while disqualified, third or subsequent.<sup>6</sup> In these cases, the disqualification periods ranged from 12 to 18 months.

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<sup>2</sup> Criminal Procedure Act, ss 250(2) and 250(3).

<sup>3</sup> *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

<sup>4</sup> *Ripia v R* [2011] NZCA 101 at [15].

<sup>5</sup> *Leaupepe v Police* [2015] NZHC 1766 at [8].

<sup>6</sup> *Whitley v Police* [2016] NZHC 1025; *Farrell v Police* HC Tauranga AP31/02, 27 March 2003; *Wilson v Police* [2016] NZHC 506; *Ropiha v Police* [2016] NZHC 839.

### *Respondent's submissions*

[17] Ms McKenzie submitted the imposition of cumulative periods of disqualification was justified where the offences, although similar in kind, were unconnected in time and did not constitute a continuing course of conduct. She submitted the periods of disqualification imposed were within range, having regard to sentences that had been upheld by the High Court in other cases. In that regard, she referred to *Hendry v R* where the High Court had upheld a 36 month period of disqualification where Hendry was being sentenced on three charges of driving while disqualified, being his sixth, seventh and eighth such convictions.<sup>7</sup> She also referred to *Swanston v Police* where two cumulative periods of 15 months' disqualification were held to be justified for two instances of offending occurring within the same week.<sup>8</sup>

### **Analysis**

[18] In *Leaupepe v Police*, McKenzie J discussed the rationale for disqualification where the Court was concerned with driving with excess blood alcohol causing death. The rationale for disqualification will often be different where driving while disqualified is the offence rather than where the nature of the driving is at issue. As was said by the High Court in *Lambert v Police*:<sup>9</sup>

The fact that an offender is driving while disqualified attracts punishment not because there is any fresh dangerous conduct but rather because a Court sanctions are meaningless unless they are obeyed. A penalty is needed to ensure that the earlier sentence is carried out and to maintain respect for the law but not because of any fresh fears for the safety of the public.

[19] In *Police v Body*, Mallon J agreed that, in situations where an offender is habitually driving in breach of an order for disqualification, the object of sentencing for disqualified driving is purely to punish and not to remove an offender from the roads for the safety of the public.<sup>10</sup> This was relevant to Mallon J in considering whether the discretion in s 94 had been properly utilised when a sentencing Judge had

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<sup>7</sup> *Hendry v R* [2018] NZHC 884.

<sup>8</sup> *Swanston v Police* HC Christchurch CRI-2008-409-057, 19 June 2008.

<sup>9</sup> *Lambert v Police* HC Rotorua, AP62/90, 11 October 1990 at [6], cited by Mallon J in *Police v Body* [2013] NZHC 1586 at [10].

<sup>10</sup> *Police v Body*, above n 9, at [12].

imposed a community-based sentence rather than a further period of disqualification. There is no suggestion in this case that the sentencing Judge should or could have applied s 94 in this way.

[20] The personal circumstances of an offender and his previous offending may also mean that concerns as to public safety may properly influence the length of a disqualification imposed for driving while disqualified.

[21] The Judge here would have been entitled to take safety into account, given the information in the pre-sentence report that prison notes recorded Mr Balloch as having admitted he had been smoking methamphetamine for the past two years and as recently as the morning of 19 June 2018. That was just five days after the latter driving while disqualified offence for which he was being sentenced. The report to the Court identified that drug use was a possible factor in relation to his non-compliance and questionable behaviour, as had been detailed in the application to cancel his supervision sentence.

[22] Mr Mooney referred to various cases where disqualification periods ranged from 12 to 18 months when the offender was being sentenced on more than one charge of driving while disqualified (third or subsequent). Although the periods of disqualification imposed in those cases were shorter than here, the periods of imprisonment in those cases ranged from eight months to two years and four months, significantly longer than the four months imposed on Mr Balloch.

[23] On an appeal, the focus is on the end sentence that has been imposed. Where a period of disqualification has been imposed in addition to a sentence of imprisonment, it is appropriate to look at both the sentence of imprisonment as well as the period of disqualification in deciding whether or not the sentences imposed were manifestly excessive.

[24] It is well recognised that cumulative periods of disqualification can be justified where, although offences are similar in kind, they are unconnected in time and do not constitute a continuing course of conduct.<sup>11</sup>

[25] Here, there were two distinct and separate offences of driving while disqualified, each committed in different circumstances. The offence of driving while disqualified on 14 June 2018 was committed while he was on bail for the offence of driving while disqualified on 15 May 2018 and in breach of a condition of bail that he had been granted on the charge for that earlier offence.

[26] Given the way Mr Balloch appeared to “thumb [his] nose” at Court orders and his disqualification through his admitted offending, little credit could be given to him for the fact that his then period of disqualification would come to an end in August 2018. He had also filed an affirmation in support of an anticipated s 94 application. In that he referred to his driving one night on 2 December 2016 when he said he “made a silly decision to drive with a lady [he] had just met to get some fast food”. As to the driving while disqualified on 15 May, he had told the Police he was driving to collect his children from school. In his affirmation he said that he had initially travelled (which must have been through driving his car) to a friend’s house when it was a cold day. He explained his driving to an appointment with a probation officer on 15 June by saying that he needed to drive to avoid being late for an appointment and so he could then go from the appointment to collect his children from school.

[27] As a result of his sentencing on 24 September 2018, Mr Balloch was going to be subject to sentences of imprisonment for a total of four months of the 26 months’ disqualification period to which he had been sentenced.

[28] Part of the reality before me too is that Mr Balloch, on 25 January 2019, was sentenced to imprisonment for one year and eight months on various charges. These included receiving committed on 26 April 2018, theft on 13 May 2018, burglary by night on 14 May 2018 and burglary by night on 23 May 2018. He also received that sentence for unlawfully taking a motor vehicle on 13 May 2018 and 22 May 2018.

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<sup>11</sup> *Hendry v R*, above n 7, at [12]; citing *Schruba v Police* HC Dunedin, CRI-2008-412-30, 25 September 2008, at [13]; *R v Wallace* [1983] NZLR 758 (CA).

These last two offences must have been further instances of his driving while disqualified after the disqualification imposed on 4 May 2017. Mr Balloch will be subject to that current prison sentence until September 2020, by which time there will be only approximately one month to run on the periods of disqualification that he is now appealing.

[29] It is hoped that Mr Balloch will address the factors which have led to all his offending, including driving while disqualified, while he is in prison and is subject to the release conditions that were imposed with that sentence. He should have an opportunity to do so. Only through addressing those issues will he be ultimately able to care for his children and obtain gainful employment, as he said he wanted to do.

[30] I have not been persuaded there was any error in the sentencing which Mr Balloch appeals, apart from the slip earlier referred to. I have not been persuaded that the sentence was manifestly excessive, or that a different sentence should otherwise have been imposed.

[31] Mr Balloch's appeal against the sentence of disqualification is allowed but only to correct the slip already referred to. As a result, on the charge of driving while disqualified on 15 May 2018, Mr Balloch remains disqualified from holding or obtaining a driver licence for 13 months from 24 September 2018.

[32] On the charge of driving while disqualified on 14 June 2018, Mr Balloch is disqualified from holding or obtaining a driver licence for 13 months from 24 October 2019.

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