IN THE COURT OF APPEAL OF NEW ZEALAND

CA600/2015
[2016] NZCA 420

BETWEEN	DINH TU DO Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 24 August 2016

Court: Miller, Cooper and Winkelmann JJ

Counsel: A Shaw for Appellant
A M Powell and E J Devine for Respondent

Judgment: 8 September 2016 at 2.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Miller J)

[1] This is an application for leave to bring a second appeal. The Court previously ordered that the merits would be argued with the leave application.[1]

[2] The point is a narrow one, concerning the application of s 65B of the Land Transport Act 1998. That provision requires the District Court to authorise an

[1] *Do v R* CA600/2015, 12 November 2015 (Minute of Harrison J) at [2].

offender convicted of driving with excess alcohol to apply for a zero alcohol licence, which has a term of three years from the date of issue. As its name suggests, a zero alcohol licence prohibits the holder from driving with any alcohol in his or her system.[2] If the offender does not apply for such licence, any existing licence is deemed ineffective.[3] Thus a zero alcohol licence is the only means by which the offender can drive after his or her disqualification from holding or obtaining a licence has expired.

[3] Section 65B applies where the offender has been convicted for a second or subsequent offence, having previously committed a drink-driving offence within the previous five years. It was enacted during the period between the appellant's first and second offences. He contends that he ought to have been sentenced as if s 65B had not been enacted, for to apply it would give the section retrospective effect and amount to double punishment.

[4] The facts are not in dispute. In October 2011 the appellant drove with excess blood alcohol and was subsequently sentenced to a fine of $500 and disqualification for a period of six months, the minimum for a first or second offence.[4] In September 2012 s 65B came into effect. On 29 December 2013 he again drove with excess blood alcohol. He pleaded guilty and was sentenced to a fine of $750 and eight months' disqualification.[5] Judge Tuohy made a zero alcohol licence order.[6]

[5] Sentencing was delayed because the appellant disputed whether a zero alcohol licence might be ordered. Judge Broadmore rejected that contention, stating that:[7]

> [11] The punishment in prospect in this case is the punishment prescribed by the Act for repeat drink driving. Mr Do is not facing punishment for drink driving in October 2011, but for drink driving in December 2013. Not for drink driving in the first instance, but for doing it again. The 2011 offence does no more than satisfy the qualifying criteria for sentencing Mr Do for his December 2013 offence. At the time he committed this

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2 Land Transport Act 1998, s 2, definition of "zero alcohol licence".
3 Section 65B(4).
4 Section 56(3).
5 *Police v Do* [2015] NZDC 7581 at [7].
6 At [8].
7 *Police v Do* DC Wellington CRI-2014-085-2689, 13 November 2014.

> offence, the penalty for repeat drink driving was clear: it included the discretionary prospect of an order being made for a zero alcohol licence.
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> …
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> [14] In my opinion the section is clear on its face and was obviously intended as a road safety measure designed to encourage repeat drink driving drivers not to further offend.
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> [15] It is therefore my opinion that s 65B does not infringe s 7 of the Interpretation Act or any legal principle governing retrospectivity cited to me by Mr Shaw.

[6] The appellant appealed the resulting zero alcohol licence order.[8] Clifford J carefully reviewed the legislation and the arguments advanced, before dismissing the appeal.[9] He observed there is a presumption that enactments do not have retrospective effect,[10] and that anyone charged with an offence has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty,[11] but he reasoned that the imposition of the zero alcohol licence order did not infringe any proscription against a retrospective increase in penalties, nor was the appellant exposed to double jeopardy in respect of his 2011 offending. A previous offence was necessary for the s 65B penalty, so that the legislation affected the appellant's expectations as to the significance of his past offending, but that did not make the legislation retrospective. Notably, when he reoffended he could have foreseen the varied significance of his earlier offending:

> [31] In my view the mandatory imposition of the zero alcohol licence order on Mr Do was not contrary to s 6 of the Sentencing Act, s 25(g) of NZBORA or the second and third sentences of art 15(1) of the ICCPR. The penalty for the offence Mr Do committed on Sunday 29 December 2013 had not been varied in any way between that date and the date of his sentencing by Judge Tuohy on 11 March 2015.
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> [32] It had not been increased, the effect of which s 6 would have protected Mr Do from. Nor had it been decreased, the benefit of which s 6 would have entitled Mr Do to. At the time at which Mr Do's conduct gave rise to liability for the offence and attendant consequences the law mandated

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8 Section 244 of the Criminal Procedure Act 2011 provides a right of appeal against sentence "unless the sentence is one fixed by law". Arguably the imposition of a zero alcohol licence is fixed by law under s 65B but as the issue was not taken we will assume without deciding that the High Court had jurisdiction to hear the appeal.

9 *Do v New Zealand Police* [2015] NZHC 2235 [High Court judgment].

10 At [11], citing s 7 of the Interpretation Act 1999.

11 At [12], citing s 25 of the New Zealand Bill of Rights Act 1990 and s 6 of the Sentencing Act 2002.

> the imposition of a zero alcohol licence. … Mr Do could have foreseen the imposition of the zero alcohol licence. Those provisions are not, therefore, engaged by this appeal.
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> (footnote omitted)

[7] Clifford J also held that an uplift for the purpose of deterrence or protection of the public does not involve punishing a person again for an offence that has already been expiated and s 65B is a "reasonably orthodox" application of those principles:[12]

> [42] Repeat drink-driving offending clearly engages the proposition that a greater, particular, deterrent response may be called for. More significantly in my view, given the risks to the general public from drink-driving offending, a zero alcohol licence order provides additional protection to the public from the risks of such offending.

[8] On further appeal, two questions are posed:

(a) Did s 65B apply retrospectively to the appellant?

(b) Did s 65B cause the appellant to be punished again for his offending in 2011?

Retrospectivity

[9] Mr Shaw did not contend that s 25(g) of the New Zealand Bill of Rights Act 1990 or s 6 of the Sentencing Act 2002 applied, recognising that there was no change in penalty between the date of the second offence and the date of sentence for that offence. That being so, the first question turns on s 7 of the Interpretation Act 1999, which provides that an enactment does not have retrospective effect. We accept, as Mr Shaw submitted, that the Interpretation Act must itself be construed in a rights-friendly matter to the extent that it engages protected rights. But as noted, s 25(g) is not engaged.

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[12] High Court judgment, above n 9. See also [39].

[10] We observe that a statute is not retrospective merely because it founds a new consequence on a past act. It must effect some change to the legal nature or consequences of the past offence. As this Court put it in *Waitakere City Council v Bennett*:[13]

> Whether or not a statute has retrospective effect in a way which engages s 7 is not necessarily easy to discern and, as noted in *Bennion on Statutory Interpretation* (5th ed, 2007), p 317:
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> > … the mere fact that a change is operative with regard to past events does not mean that it is objectionably retrospective. Changes relating to the past are objectionable only if they alter the legal nature of a past act or omission in itself. A change in the law is not objectionable merely because it takes note that a past event has happened, and bases new legal consequences upon it.

[11] The premise of the rule against retrospectivity is that Parliament does not intend statutes to cause unfairness. In *Secretary of State for Social Security v Tunnicliffe*, Staughton LJ explained the rule:[14]

> In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.

[12] In this case, s 65B did not alter the legal character or consequences of the first offence and we agree with the Judges below that it caused no unfairness in the appellant's case. He was taken to know the law when he chose to reoffend.

[13] Mr Shaw invoked the three strikes sentencing regime,[15] emphasising that it is an essential premise of liability for the second or third strike penalty that a warning was given at sentencing for the qualifying offences. By analogy, he submitted, it was necessary that the appellant know at the time of sentencing for his first offence of the consequences he would face for a second.

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13 *Waitakere City Council v Bennett* [2008] NZCA 428, [2009] NZRMA 76 at [52].
14 *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 (CA) at 724.
15 Sentencing Act, ss 86A–86I.

[14] The analogy does not hold. To be effective, the appellant would have to know of the enhanced penalty at the time he committed the first offence, not at the time of sentencing for it. In the three strikes regime Parliament recognised a need for warnings not because offenders must be given express notice of the law in advance but because the penalty that would follow for a second or third offence, as the case may be, is very likely to be disproportionate but for the warning, and because the catchment or list of qualifying offences is very broad. It did not see fit to include such a regime in s 65B, presumably because it cannot possibly be said that a zero alcohol licence is a disproportionate penalty for a repeat offender.

[15] For these reasons we conclude that s 65B cannot be held to have worked retrospectively in the appellant's case.

Double jeopardy

[16] Turning to the second question, Mr Shaw submitted that the zero licence order amounted to additional punishment for the first offence.[16] He referred to *R v Casey* and *Beckham v R*.[17] These cases are authority for the proposition that a sentencing judge must be careful to ensure that a sentence for a recidivist is not increased merely because of previous convictions. It may be increased for relevant previous convictions, as s 9(1)(j) of the Sentencing Act provides, but that is only permissible provided it is done for a proper sentencing purpose, such as recognition of the failure of past deterrence or a need for public protection, and provided the uplift is not disproportionate.

[17] Had the sentence passed in this case been a matter of discretion for the sentencing Judge, it could not be said to have offended against this principle. Indeed, a zero alcohol licence arguably is not a penalty at all, but rather a rehabilitative and public safety mechanism. And that being so, we cannot see that it makes any difference that the additional penalty was imposed by the statute rather than as a matter of sentencing discretion. Put another way, the sentence does not engage double jeopardy principles so as to require the Court to interpret s 65B in the manner contended for. At its core, the double jeopardy submission amounts to a

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16 Prohibited by s 26(2) of the New Zealand Bill of Rights Act.

17 *R v Casey* [1931] NZLR 594 (CA) and *Beckham v R* [2012] NZCA 290.

contention that the legislation is unfairly retrospective, and we have already addressed that point.

[18] For these reasons, which accord with those of both of the Judges below, we grant leave to appeal but dismiss the appeal.

Solicitors:
Crown Law Office, Wellington for Respondent