IN THE SUPREME COURT OF NEW ZEALAND

SC 114/2016
[2017] NZSC 7

BETWEEN	DINH TU DO Applicant
AND	NEW ZEALAND POLICE Respondent

Court: William Young, Glazebrook and Arnold JJ

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

Judgment: 13 February 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] In December 2011, the applicant, Mr Do, was convicted and sentenced on a charge of driving with excess blood alcohol. He committed a second drink-driving offence on 29 December 2013, in respect of which he pleaded guilty. On the second offence, Judge Tuohy sentenced him to a fine of $750 and to an eight month period of disqualification. The Judge also made a zero alcohol licence order.[1]

[2] The zero alcohol licence order was made under s 65B of the Land Transport Act 1998, which came into effect on 10 September 2012 (that is, after the commission of the first offence). That provision applies where a person convicted of a drink-driving offence has committed another such offence in the previous five years, for which he or she was convicted. The court must make an order "authorising" the person to apply (following any period of disqualification) for a

1 *Police v Do* [2015] NZDC 7581.

zero alcohol licence, which allows the person to drive on the condition that neither of the person's breath nor blood contains any alcohol. The licence stays in effect for three years. If the person does not apply for a zero alcohol licence, he or she is to be treated as unlicensed.

[3] For Mr Do, Mr Shaw argued in the District Court that Mr Do was not liable to a zero alcohol licence order on conviction of the second drink-driving offence. He submitted that Mr Do should be sentenced on the basis that s 65B did not apply to him because his initial drink-driving conviction occurred before the section's enactment. To apply s 65B when sentencing Mr Do for the second offence would be to give the section retrospective effect, contrary to (among other things) s 7 of the Interpretation Act 1999.[2] Judge Broadmore rejected Mr Shaw's contentions,[3] as did Clifford J on appeal[4] and later the Court of Appeal.[5]

[4] Mr Do seeks leave to appeal only against the making of the zero alcohol licence order. He argues that the Court should grant leave because the order:

(a) infringed the prohibition against retrospective effect, which is an important constitutional protection that the decision of the Court of Appeal "waters down"; and

(b) breached the rule against double jeopardy because Mr Do was effectively punished again for his original drink-driving offence.

[5] Under s 259(2) of the Criminal Procedure Act 2011, a person seeking to appeal against a decision of the Court of Appeal on a second appeal against sentence may only appeal on a question of law. This imposes an additional requirement to those set out in s 13 of the Supreme Court Act 2003. Crown counsel accept that the issues raised by the applicant can be framed as questions of law and that they may well affect other cases. However, counsel submit that the proposed appeal does not meet the "general or public importance" test as the law in relation to the prohibition

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2 Section 7 provides: "An enactment does not have retrospective effect."
3 *Police v Do* DC Wellington CRI-2014-085-2689, 13 November 2014.
4 *Do v Police* [2015] NZHC 2235.
5 *Do v Police* [2016] NZCA 420, [2016] NZAR 1354 (Miller, Cooper and Winkelmann JJ).

on retrospective effect and in relation to double jeopardy is well settled and there is no basis to suggest that this Court might apply the law differently in this case.

[6] In addition to s 7 of the Interpretation Act, ss 25(g) and 26 of the New Zealand Bill of Rights Act 1990 (NZBORA) and s 6 of the Sentencing Act 2002 are relevant. NZBORA provides:

> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> …
>
> (g) 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:
>
> …
>
> **26 Retroactive penalties and double jeopardy**
>
> (1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.
>
> (2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

The Sentencing Act provides:

> **6 Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) An offender 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.
>
> (2) Subsection (1) applies despite any other enactment or rule of law.

[7] While there is an issue as to whether a zero alcohol licence order is a "penalty" for the purpose of these provisions, we will assume that it is. Proceeding on that assumption, we note that the enactment of s 65B did not change the legal character of Mr Do's 2011 conduct – it was an offence when committed. Nor did it

change the legal consequences of his conduct in the sense that the penalty which he faced for the 2011 offending was not increased between the time of his offending and the time of his sentencing for that offence. Rather, the fact that he had offended in 2011 was relevant to the consequences which followed from his re-offending in 2013 because it affected the type of licence he could hold following conviction. This does not mean that s 65B had retrospective effect – it only applied to offending committed after it came into force and so was prospective in effect When Mr Do committed the 2013 offending, s 65B was in force and publicly accessible, so that, like everyone else, Mr Do had the ability to discover the jeopardy he faced.

[8] Moreover, the fact that previous offending is relevant to sentencing for subsequent offending is not per se objectionable as being double punishment. We note that s 9(1)(j) of the Sentencing Act requires a sentencing court to take into account as an aggravating factor "the number, seriousness, date, relevance, and nature of any previous convictions of the offender". We acknowledge, however, that some care must be taken in this context.[6]

[9] The application for leave to appeal is accordingly dismissed.

Solicitors:
Ord Legal, Wellington for Applicant
Crown Law Office, Wellington for Respondent

[6] See, for example, the discussion in *Beckham v R* [2012] NZCA 290 at [81]–[85].