**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA655/2024**
**[2025] NZCA 278**

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| BETWEEN | KIRIWAI TAHAU<br>Appellant |
| AND | NEW ZEALAND POLICE<br>Respondent |

**CA656/2024**

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| BETWEEN | PETER MATEHAERE KEEPA<br>Appellant |
| AND | NEW ZEALAND POLICE<br>Respondent |

**CA667/2024**

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| BETWEEN | KOHU AMOHAU PIRIPI<br>Appellant |
| AND | NEW ZEALAND POLICE<br>Respondent |

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| Hearing: | 7 May 2025 |
| Court: | French P, Thomas and Campbell JJ |
| Counsel: | H V Bennett and H C Coutts for Appellants in CA655/2024 and CA656/2024<br>J M Grainger and E K Moore for Appellant in CA667/2024<br>R K Thomson and M J R Blaschke for Respondent |
| Judgment: | 26 June 2025 at 2.30 pm |

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**JUDGMENT OF THE COURT**

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**A The applications for leave to bring second appeals in CA655/2024, CA656/2024 and CA667/2024 are granted.**

**B The appeals in CA655/2024, CA 656/2024 and CA 667/2024 are dismissed.**

**C The disqualification orders of the High Court are confirmed and in relation to the appellants in CA656/2024 and CA667/2024 are to resume from midnight on 27 June 2025.**

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**REASONS OF THE COURT**

(Given by French P)

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## Introduction

[1] On 27 February 2024, the three appellants appeared in the Christchurch District Court for sentencing on charges of driving with excess breath or blood alcohol.[1] Each had previous convictions for drink driving. In the case of Mr Keepa, this was his thirteenth such conviction, Ms Tahau her sixth and Mr Piripi his fourth. All three had breath or blood alcohol readings that were well in excess of the legal limit.[2]

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1 Land Transport Act 1998, s 56(1) and (2).

2 In the case of Mr Keepa and Ms Tahau, the levels were close to double the legal limit.

[2] Despite the appellants' criminal history, the sentencing Judge, Judge Wills, decided to treat each of them as a first offender primarily because of a time gap of over ten years since their last drink driving convictions.[3] Ms Tahau and Mr Keepa were fined and disqualified from driving for a period of six months.[4] In the case of Mr Piripi, he was fined and disqualified for seven months but with the commencement date of the seven month period backdated 28 days to 30 January 2024 to enable him to apply immediately for a limited licence.[5]

[3] The New Zealand Police appealed the sentences to the High Court on the ground that the Judge was required by the provisions of the Land Transport Act 1998 (the Act) to impose a disqualification period of more than one year in each case.

[4] Section 56(4)(b) of the Act provides that if a person is convicted of a third or subsequent offence of driving with excess breath or blood alcohol, the court must order the person to be disqualified from holding or obtaining a driver licence for more than one year (the mandatory disqualification period).

[5] Under the Act, the imposition of the mandatory disqualification period is subject to another provision, s 81.[6] Section 81 allows the court not to order disqualification, or to reduce the length of the mandatory disqualification period, if there are "special reasons relating to the offence".

[6] In imposing the reduced disqualification periods, the Judge purported to rely on s 81.[7] On appeal, the Police however argued that a gap in offending was a reason relating to the offender, not the offence, and therefore the Judge's reliance on s 81 was misplaced.

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3 The respective gaps in time since their last drink driving convictions, and sentencing, were 11 years and 10 months for Ms Tahau, 12 years and 6 months for Mr Keepa and 12 years and 1 month for Mr Piripi.

4 *Police v Tahau* [2024] NZDC 4570 at [5]; and *Police v Keepa* [2024] NZDC 7953 at [7]. However, in Ms Tahau's case, she disputes that these were the terms of the Judge's order. See the discussion at [14]–[24], where we deal with the particular issues that are raised in her case.

5 *Police v Piripi* [2024] NZDC 4702 at [6].

6 It is also subject to s 94, which allows the Court in certain specified circumstances to impose a community-based sentence instead of disqualification.

7 This is disputed by Ms Tahau. Again, see the discussion at [14]–[24].

[7] In the High Court, Harland J accepted that as a matter of law, a gap in offending was capable of amounting to a special reason for the purposes of s 81.[8] However, she also held that on the facts of each of the three cases, the gap in offending was not sufficient to constitute a special reason warranting the exercise of the s 81 discretion.[9] She accordingly set aside the disqualification orders imposed in the District Court and replaced them with an order that each of the appellants was disqualified from holding or obtaining a driver licence for a period of one year and one day, effective from the date of the original orders, being 27 February 2024.[10]

[8] The High Court decision was issued on 10 September 2024. By that time, the disqualification periods imposed by the District Court Judge had expired.

[9] The appellants then filed notices of applications for leave to appeal to this Court.[11] Two of the appellants, Mr Keepa and Mr Piripi, sought and obtained a deferment of the disqualification orders made against them in the High Court, pending the outcome of these appeals.[12]

[10] By order of Ellis J dated 31 October 2024, the applications for leave to appeal were heard together with the substantive appeals. The Police do not oppose leave being given, but seek to defend the High Court decision on an alternative basis relating to the interpretation of s 81.

**Issues on appeal**

[11] The appeals raise the following issues:

(a) What were the terms of the disqualification order imposed on Ms Tahau in the District Court?

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8 *Police v Piripi* [2024] NZHC 2596 [judgment under appeal] at [67]–[73].

9 At [74]–[85]. On the Judge's analysis of the relevant case law, she considered (at least implicitly) that there needed to be some other mitigating factors relating to the offence, in addition to the gap in offending, before s 81 would be triggered: at [73]. She further considered that a finding of special reasons that included a gap in offending would only be available in very few cases: at [67].

10 At [100].

11 Criminal Procedure Act 2011, s 253(1).

12 Ms Tahau, having been ordered to serve a further disqualification period, for other offending, did not seek deferment of the High Court disqualification order.

(b) What is the scope of the power under s 85 of the Act to backdate the commencement of a mandatory disqualification period?

(c) Did the High Court have jurisdiction to entertain the sentence appeal brought by the Police?

(d) Is a temporal gap in offending capable of amounting to a special reason relating to the offence for the purposes of s 81 of the Act?

(e) Did the imposition of a second longer disqualification period for the same offence, after the first expired, constitute a miscarriage of justice?

[12] As will be apparent, most of the issues raised are of general importance.[13] There is also an issue on which there is a conflict of High Court authority. We are satisfied, therefore, that leave to appeal should be granted, and order accordingly.

[13] We turn now to consider each of the issues. We deal first with the issue that is unique to Ms Tahau's case, namely the exact terms of the disqualification order imposed on her in the District Court, and the related issue of the scope of s 85.

**Issue 1: what were the terms of the disqualification order imposed on Ms Tahau?**

[14] Ms Tahau contends that, correctly understood, the order imposed on her in the District Court was for a disqualification period of 12 months, with the commencement date backdated by six months so that the effective disqualification remaining was six months. If that is correct, the Police are said to have no right of appeal, because the mandatory disqualification period was imposed, and that would be a sentence fixed by law.[14] On this analysis, the only live issue would therefore be whether the Judge erred in backdating the disqualification period, which would be a question of law requiring the Police to have first obtained leave.[15]

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13 Criminal Procedure Act, s 253(3)(a).
14 See the discussion about jurisdiction at [36]–[47].
15 Criminal Procedure Act, s 296(2).

[15] Section 85 of the Act empowers a sentencing Judge to backdate the commencement date of a disqualification period. The section reads:

> **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.
>
> (2) The person disqualified does not commit the offence of driving while disqualified contrary to section 32(1)(a) merely because, on the day of the making of the order, he or she drove a motor vehicle on a road on that day before the making of the order.
>
> (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.

[16] In the High Court, Harland J held that s 85 was not available to be used in the way employed by Judge Wills.[16] There is also a suggestion in the High Court judgment that, in any event, it was uncertain whether Judge Wills had in fact intended to invoke s 85.[17]

[17] In attempting to persuade us that Judge Wills had so intended, Ms Tahau's counsel, Ms Bennett, pointed us to the transcript of the discussions with the Judge that preceded the formal sentencing, as well as the formal sentencing notes themselves.

[18] The transcript of the sentencing hearing shows that the Judge interrupted counsel's submissions to say that she had "read everything" and that in light of the age of the previous drink driving offences (11 years and 10 months) as well as the matters set out in the pre-sentence and cultural reports — such as Ms Tahau's deprived childhood, cultural disconnection and personal trauma — she was happy to treat the index offence as a first offence. The Judge said the "key factor" was the gap in offending, and that what she "was proposing to do was to view s 85 essentially and to treat this as first offending and impose a fine and six months' disqualification". The Judge then turned to Ms Tahau and said she was pleased to hear that Ms Tahau was moving into a better space. The Judge concluded by saying: "You are convicted and

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16 Judgment under appeal, above n 8, at [90]–[91] and [93].
17 At [94].

disqualified from holding or obtaining a driver's licence for six months from today and I'll impose a $500 fine."

[19] In the formal sentencing notes, which have been authenticated, the Judge stated the following:[18]

> [1] Long story short I have read everything. There is a significant history of offending of this kind but the last offence is in 2012.
>
> [2] I can see, Ms Tahau, that you have been through a very difficult time. It is a state of being a lot of women can relate to which is that everything is landing on you and obviously what that has meant is that you have taken some steps and committed this offending as a stress release or outlet for that but what I consider is very encouraging is that you have started some counselling. You are making some efforts to simplify your life and I have not heard about your new job but I am hoping that that is something that is slightly less stressful than what you were doing before.
>
> [3] There are a lot of factors that have come into your offending in terms of your background and upbringing, and it seems to me your whānau has worked through quite a few of those issues but there is also a lot of underlying trauma still remaining.
>
> [4] There was no fault with your driving and a key factor in reaching a sentencing decision is that it has been such a long time since the previous offending. So, what I am proposing to do is, under s 85, essentially to treat this as first offending and impose a fine and six months' disqualification.
>
> [5] Ms Tahau, you have heard all of my thoughts on that. I am pleased to hear that you are moving into a better space. You are convicted and disqualified from holding or obtaining a driver's licence for six months from today and I impose a $500 fine.

[20] We acknowledge that the fact the Judge referred to factors that were undeniably personal to Ms Tahau, and not relating to the offence, lends support to the argument that those references were not made with s 81 in mind.[19] We also acknowledge that the Judge made two express references to s 85 and did not use the s 81 phrase "special reasons" or even "special circumstances", as she did during the sentencing of the other two appellants. Their sentencing occurred immediately after Ms Tahau's sentencing. However, we consider that omission was clearly a mistake and that, in relation to what she identified as "the key factor" (the gap in the offending), the Judge meant to refer to s 81.

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18 *Police v Tahau*, above n 4 (citations omitted).

19 For example, the Judge referred to Ms Tahau's work life, family life, background and upbringing, personal trauma, and also stress related issues.

[21] Backdating had not been raised by counsel and, in our view, had the Judge intended to impose on Ms Tahau a mandatory disqualification of 12 months and then backdate it, she would have said so, and would have specifically referred to backdating both during the discussion and, crucially, when making the order itself.

[22] We accept, as submitted by counsel Ms Bennett, that allowance must be made for the fact this sentencing took place in a busy list court where judges do not have the luxury of time. However, no matter how busy, the Judge would have been conscious of the need for precision when it came to articulating the terms of the Court's order. We also do not accept a further submission that significance should attach to the absence of any objection from the police prosecutor. Apart from anything else, the latter may have simply understood the terms of the order to be a six month disqualification period.

[23] What the Judge said in Court was: "You are convicted and disqualified from holding or obtaining a driver's licence for six months from today." This contrasts with the orders that were made in Mr Piripi's case, where backdating was specifically mentioned.[20] Significantly too, Ms Tahau's criminal history records the sentence as "Disqualification From Driving - 27/02/2024 - 6 Months". Contrary to a submission made on behalf of Ms Tahau, we consider the criminal history to be a reliable record with evidential value as to what was said in court.[21]

[24] In light of those matters, we are not persuaded the order made in Ms Tahau's case should be interpreted as meaning anything other than what it says, namely that the disqualification was for six months, and that the six months commenced on 27 February 2024.

**Issue 2: what is the scope of the backdating power under s 85?**

[25] Having found that the disqualification period imposed on Ms Tahau was not the result of a purported exercise of the backdating power in s 85, it is strictly speaking unnecessary for us to go on and consider the further point about the scope of s 85.

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20 *Police v Piripi*, above n 5, at [6].
21 See *R v Muraahi* [2021] NZCA 214, (2021) 29 CRNZ 938 at [63].

[26] However, during the course of argument, we were told by Ms Bennett that in her experience, District Court judges treat s 85 as conferring a wide discretion that allows them to cater for the personal circumstances of defendants. It was said to be common practice in the District Court for significant backdating to occur for that reason. The provision is regarded as providing flexibility for a Judge to manage extenuating personal circumstances and rehabilitation prospects so as to arrive at what the Judge considers the desirable end result.

[27] If s 85 is being commonly used in that way, it would in our view be a misuse of the s 85 power.

[28] We say that because such a general use of the s 85 power is, we consider, contrary to Parliament's clear intentions. The Act provides mandatory minimum disqualification periods with limited prescribed departures from them. Although s 85 does not stipulate any criteria to guide a court in the exercise of the backdating power, the discretion must nevertheless be exercised having regard to the legislative scheme, and the purposes and principles of sentencing, in particular public safety as well as the need for consistency in the sentencing of driving offences.[22] As Harland J put it, it cannot be the case that s 85 operates as an effective "backdoor" to the rule under s 81.[23]

[29] As also indicated by Harland J, the discretion in s 85 is more appropriately reserved for situations where, prior to sentencing, the defendant has been prevented from driving for a lengthy period, usually due to the imposition of a court order, such as a bail condition prohibiting driving, or remand in a mental health facility.[24] Backdating the mandatory disqualification to encompass periods where there has been legal inability to drive thus avoids double punishment.

[30] It was said as recently as 2022, in another High Court judgment, that absent the fact of a pre-sentence non-driving period, courts have shown reluctance to use the backdating power.[25] We consider such restraint to be well-founded. And, while we

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22 *Hood v Police* [2022] NZHC 120 at [27] and [42]; and Sentencing Act 2002, ss 7(1)(g) and 8(e). In *Hood* it was explained that the purposes and principles of sentencing apply to the exercise of discretion under s 81 of the Land Transport Act: at [27].

23 Judgment under appeal, above n 8, at [91].

24 At [91].

25 *Hood v Police*, above n 22, at [35].

do not categorically exclude the possibility of the power being appropriately used in other situations (that is, other than where there is a legal or practical inability to drive during the backdated period) it is difficult to see how that could be done on a principled basis when it would result in a person having driven while retrospectively disqualified. There must be a rational connection between the circumstances the defendant is relying on, and the backdating.

[31] It follows that, had it been necessary to consider whether it was an error for Judge Wills to have exercised the s 85 power in Ms Tahau's case, we would have agreed with Harland J that it was.

[32] While there is some uncertainty as to whether the Judge backdated the disqualification period imposed on Ms Tahau, there is no doubt that there was an element of backdating involved in Mr Piripi's sentence. As mentioned, his disqualification period was set at seven months but then backdated by one month for the purpose of enabling him to avoid the one month stand down period that would otherwise have prevented him from being able to obtain a limited licence immediately.[26] The High Court did not address the propriety of this backdating.

[33] There have been at least three other High Court decisions where backdating for this purpose has been noted without adverse comment.[27] We did not hear argument on the point. Our provisional view however is that this too would appear to be a misuse of the backdating power under s 85.

[34] In the context of limited licences, we are supported in that view by the combined effect of ss 104 and 105 of the Act. Section 105 empowers the Court to make orders authorising the grant of a limited licence "immediately or after the expiration of such period as the court may specify". The scope of this power is however expressly limited by s 104(1)(c). Significantly for present purposes, s 104(1)(c) states that no order may be made under s 105 that authorises a person to

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[26] *Police v Piripi*, above n 5, at [6]. See s 104(1)(c) of the Land Transport Act which provides that a person disqualified on conviction for a drink driving offence cannot obtain a limited licence before the expiration of 28 days from the commencement date of the disqualification period.

[27] *Judd v Police* [2023] NZHC 1001 at [12] and [24]; *Roberts v Police* [2022] NZHC 1439 at [9]; and *Fyfe v Police* [2022] NZHC 3065 at [3].

obtain a limited licence before the expiration of 28 days from the date the order of disqualification takes effect if the person is disqualified on conviction for certain offences involving alcohol or drugs. It is, in our provisional view, unlikely that Parliament would have intended s 85 to be used as a means of circumventing that specific prohibition.

[35] Finally for completeness we note that in addition to s 81 and the right to apply for a limited licence, another sentencing option available to sentencers to ameliorate the potential harshness of the mandatory disqualification periods in appropriate cases can be found in s 94. Section 94 empowers a court in certain specified circumstances to impose a community-based sentence instead of disqualification. Section 94 did not feature in the present cases.

**Issue 3: did the High Court have jurisdiction to consider the Police's appeals?**

[36] The police appeals to the High Court were brought as sentence appeals under s 246 of the Criminal Procedure Act 2011. Section 246(1) confers a right of appeal on a prosecutor against a sentence imposed for an offence unless the sentence is one "fixed by law".

[37] As mentioned, we have rejected Ms Tahau's argument that there was no right of appeal because the disqualification imposed on her was the (backdated) mandatory period.

[38] However, independently of the backdating argument, Ms Tahau and Mr Keepa contend that a mandatory disqualification order under s 56(4) of the Act is in any event a sentence fixed by law. Accordingly, the right of appeal afforded to the prosecution by s 246 of the Criminal Procedure Act did not apply.

[39] In their submission, correctly interpreted, s 246 is directed at appeals against the sentence itself. That is, appeals about whether the sentence is manifestly inadequate, or out of range. It is not, they submit, intended to permit the prosecutor to appeal in cases where the only issue is whether the sentencing judge made an error of law. As mentioned, in such a case they argue the correct course of action is not to file a sentence appeal, but rather invoke the provisions under the Criminal Procedure

Act relating to appeals on questions of law, in particular s 296. That would, so the argument goes, have resulted in stricter oversight by the High Court.

[40] The appellants further submit that the Police's failure to follow the correct appeal pathway undermines the legislative scheme, and the principles relating to the Crown's restricted rights of appeal, the finality of sentences and judicial discretion.

[41] We do not accept these submissions. In our view, the imposition of a disqualification period falls within the definition of "sentence" contained in s 212 of the Criminal Procedure Act. Like s 246, s 212 is contained in pt 6 of the Act which relates to appeals. Section 212 states that for the purposes of pt 6:

> …
>
> **sentence**—
>
> (a) includes any method of disposing of a case following conviction; but
>
> (b) does not include—
>
> (i) a decision, on conviction, to make or decline to make an order against the convicted person for the payment of costs under section 364 or under the Costs in Criminal Cases Act 1967; or
>
> (ii) a decision, on conviction, to make or decline to make an order under any of sections 200, 202, or 205 (suppression orders); or
>
> (iii) a decision, on conviction, under section 208 to vary or revoke an order under any of those sections specified in subparagraph (ii).

[42] None of the specified exclusions involve disqualification orders imposed under s 56(4) of the Act.

[43] Although other definitions of "sentence" can be found,[28] given that we are concerned with a right of appeal under pt 6 of the Criminal Procedure Act, the applicable definition must, we consider, be the one contained in pt 6.

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[28] Counsel for example relied on s 10A of the Sentencing Act, and the distinction it draws between an order and a sentence.

[44] Certainly both before and after the enactment of the Criminal Procedure Act, appeals regarding disqualification orders have always been treated as sentence appeals, including appeals brought by prosecutors.[29] That said, the vast majority of appeals are appeals brought by defendants. Thus, although the case law may demonstrate an accepted meaning of "sentence" in relation to disqualification orders, it may be a stretch to say that for the purposes of a prosecutor's appeal, the case law demonstrates a common or universal understanding that it is not a sentence fixed by law.

[45] At first blush, disqualification might be thought to be a sentence fixed by law and so preclude the Police from bringing a sentence appeal because of its mandatory nature. Indeed, *Adams on Criminal Law*, in its commentary on s 246, cites the mandatory disqualification period imposed under s 56 of the Act as an example of a sentence fixed by law.[30]

[46] However, that is counter-balanced in our view by consideration of the fact that the sentence of disqualification under s 56 is for a minimum period and is subject to ss 81 and 94. As discussed, those provisions confer discretions which can impact on both the length of the disqualification, and whether any disqualification is imposed at all. The existence of those provisions means, in our view, that disqualification is not a sentence fixed by law for the purposes of s 246.[31] That phrase — sentence fixed by law — is, in our view, intended to capture cases where the prescribed sentence must automatically, and without exception, be imposed upon conviction.[32]

[47] It follows that we are satisfied the appeals before the High Court were properly brought by the Police under s 246 of the Criminal Procedure Act, and that the High Court and in turn this Court have jurisdiction to determine them.

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29 See, for example, *Police v Smith* [2012] NZHC 2346, (2012) 25 CRNZ 808 at [1] and [4]; and *Police v Noblett* [2024] NZHC 2195 at [27].

30 Mathew Downs (ed) *Adams on Criminal Law — Criminal Procedure* (online looseleaf ed, Thomson Reuters) at [CPA246.02].

31 *Herron v Kent* 1976 SCCR Supp 147 (HCJAC) at 148.

32 See also *R v Leadbeater* [1953] NZLR 840 (CA) at 841.

**Issue 4: is a temporal gap between qualifying offences capable of amounting to a special reason relating to the offence for the purposes of s 81(1) of the Act?**

[48] This issue turns on the correct interpretation to be afforded the phrase "relating to the offence", as it appears in s 81.

[49] There can be no doubt that in using those words, Parliament has chosen to make a deliberate distinction between reasons related to the offending, and reasons related to the offender, in order to limit the availability of s 81. No matter how special the reasons, if they relate to the offender they will not qualify as an operative reason. That is not disputed. What is disputed is whether the nature of a defendant's criminal convictions, and a temporal gap in those convictions, relate to the offence.

[50] There is a conflict of High Court authority on this issue. The majority of the decisions have held that a defendant's criminal history is a matter relating to the offender, and not the offence, and is therefore outside s 81.[33] This line of authority draws a distinction between personal matters pertaining to the offender, and factual circumstances connected with the actual commission of the offence on the day, such as the reason for driving, or the reasons for the defendant's consumption of alcohol. Because the offence is one of strict liability, such matters will usually not provide a defence, and the driver will be convicted. However, if the reasons in question are sufficiently special, s 81 may then apply — not to provide a defence, but to ameliorate the penalty of disqualification.

[51] Four other decisions however (including the judgment under appeal) have held that a gap in offending relates to the offence.[34] The primary reasons advanced in these latter decisions have been twofold: first, that previous convictions are an aggravating factor of the offending and therefore must relate to the offending; and secondly, that given the purpose of the legislative regime is public safety and the deterrence of recidivist drink drivers, a gap in offending should be considered a special reason.

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33 *Maranui v Police* HC Whanganui CRI-2009-483-9, 1 April 2009 at [15]; *Merry v Police* HC Nelson CRI-2009-442-7, 19 May 2009 at [15]–[19]; *Police v Tuhou* HC New Plymouth CRI-2010-442-9, 12 May 2011 at [11]–[13]; *Woodward v Police* HC Wellington CRI-2011-485-67, 31 August 2011 at [12]; and *Woolston v Police* [2013] NZHC 3225 at [16].

34 Judgment under appeal, above n 8, at [68]; *Maniapoto v Police* HC Rotorua CRI-2008-463-1, 18 April 2008 at [20]; *Rewi v Police* [2021] NZHC 1950 at [40]; and *Police v Noblett*, above n 29, at [48].

[52] In our view, neither of those reasons is compelling. The second renders the qualifying words "relating to the offence", and the distinction between offence and offender surplusage. And, the first is contrary to general sentencing principles and methodology that regard relevant previous convictions as a personal factor relating to the offender, and not the offence.[35] In order to displace that general principle, it would in our view be necessary for previous qualifying convictions for drink driving to be specified by the Act as an element of the offence charged. That is to say, the previous convictions would need to be something the prosecution must prove in order to secure a conviction for the index offence, as distinct from being relevant to the punishment that is imposed on conviction.

[53] Insofar as the appellants have sought to invoke in aid the obligation under the Sentencing Act to impose the least restrictive outcome that is appropriate in the circumstances,[36] we acknowledge the existence of that obligation, but it can only apply where the sentencing option is available as a matter of law to the sentencer. It is that latter point that must logically be the focus of the inquiry.

[54] We therefore begin the analysis by setting out s 56 of the Act, being the section that creates the offence committed by each of the appellants. It relevantly provides:

> **56 Contravention of specified breath or blood-alcohol limit**
>
> (1) A person commits an offence if the person drives or attempts to drive a motor vehicle on a road while the proportion of alcohol in the person's breath, as ascertained by an evidential breath test subsequently undergone by the person under section 69, exceeds 400 micrograms of alcohol per litre of breath.
>
> …
>
> (2) A person commits an offence if the person drives or attempts to drive a motor vehicle on a road while the proportion of alcohol in the person's blood, as ascertained from an analysis of a blood specimen subsequently taken from the person under section 72 or section 73, exceeds 80 milligrams of alcohol per 100 millilitres of blood.

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35 In finding that previous convictions are an aggravating feature of the offending and therefore relate to the offending, rather than the offender, for the purposes of s 81, the High Court in *Rewi v Police*, above n 34, at [38] relied on *Samson v Police* [2015] NZHC 748. However, the Judge in *Samson* was not purporting to address s 81. Nor, for the purposes of the case law analysis he was undertaking, was it necessary to analyse whether it was more correct to treat relevant previous convictions in the orthodox way.

36 Sentencing Act, s 8(g).

…

(3) If a person is convicted of a first or second offence against subsection (1) or subsection (2),—

(a) the maximum penalty is imprisonment for a term not exceeding 3 months or a fine not exceeding $4,500; and

(b) the court must order the person to be disqualified from holding or obtaining a driver licence for 6 months or more.

(3A) The mandatory disqualification in subsection (3)(b) does not apply if—

(a) an order is made under section 65; or

(b) an alcohol interlock sentence is ordered under section 65AC(1).

(4) If a person is convicted of a third or subsequent offence against subsection (1) or (2) or any of sections 57A(1), 57B(1), 57C(1), 58(1), 60(1) or 61(1) or (2) (whether or not that offence is of the same kind as the person's first or second offence against any of those provisions),—

(a) the maximum penalty is imprisonment for a term not exceeding 2 years or a fine not exceeding $6,000; and

(b) the court must order the person to be disqualified from holding or obtaining a driver licence for more than 1 year.

(4A) The mandatory disqualification in subsection (4)(b) does not apply if—

(a) an order is made under section 65; or

(b) an alcohol interlock sentence is ordered under section 65AC(1).

(5) For the purposes of this section, a conviction for an offence against a provision of the Transport Act 1962 corresponding to an offence specified in subsection (4) is to be treated as a conviction for an offence specified in that subsection.

(6) The imposition of a mandatory disqualification under this section is subject to section 81 (which allows a court not to order disqualification for special reasons relating to the offence).

[55] The legal elements of the offence created by s 56(1) are driving or attempting to drive a motor vehicle on a road, and doing so while the proportion of alcohol in the

breath or blood exceeds the maximum legal limit, as ascertained by testing procedures conducted in accordance with the Act.[37] The offence is one of strict liability.

[56] Section 56(4) is the provision that imposes mandatory minimum disqualification for a third or subsequent offence. At first blush, s 56(5), with its reference to "an offence specified in subsection (4)", could be seen as supporting the existence of a distinct offence, comprising repeat drink driving, in the same way as the value of items stolen has been viewed as an element of the various forms of offences constituting theft.[38]

[57] However, such an interpretation of s 56(4) ignores the express words which begin the subsection, and which state when it applies. It is expressed to apply when the conviction triggering the mandatory disqualification is for "an offence against subsection (1) or (2)". Section 56(4) is not framed as an offence, and it does not, in our view, purport to create an offence that is distinct from the offences created in s 56(1) and (2). Rather, it is purporting to impose escalating penalties for those who commit those offences on more than two occasions. To put it another way, it simply states that defendants will be liable to a greater penalty because of their past record.

[58] That interpretation can be tested by asking whether, if these appellants had pleaded not guilty to the offence with which they were charged, would the prosecution have been required to prove their previous convictions in order for them to be found guilty and convicted. The answer is clearly no. What the prosecution would have been required to prove was that they were driving, and that the proportion of alcohol in their breath or blood exceeded the specified legal limit, as tested.

[59] Support for this interpretation can be found in the decision of this Court in *R v Cameron*.[39] It only appears to have been considered in one of the four High Court judgments.[40]

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37 *R v Livingston* [2001] 1 NZLR 167 (CA) at [6].
38 See *R v Koura* [1996] 2 NZLR 9 (CA) at 12.
39 *R v Cameron* CA329/02, 29 November 2002 at [3].
40 *Police v Noblett*, above n 29, at [40].

[60] In *Cameron*, the appellant had been convicted of driving in contravention of the legal breath or blood alcohol limit. It was his third such conviction, meaning that s 56(4) was triggered. He sought leave to bring what would be a second appeal in this Court. The proposed ground of appeal was that, because the first of his relevant previous convictions occurred 25 years before the index offence, it was time barred by s 10B of the Crimes Act 1961, and therefore could not be relied upon for the purposes of s 56(4). Section 10B (which was repealed in 2013) prohibited any steps being taken in a proceeding after the expiration of 10 years from the date the offence was committed, unless prior consent was obtained from the Attorney-General.

[61] Although *Cameron* is not about s 81, the issue raised did require the Court to consider whether s 56(4) creates a separate offence of which the previous drink driving convictions are an ingredient. It held that was not Parliament's intention, and that s 56(4) simply concerned the "level of penalty" available for a s 56(1) offence in the circumstances postulated.[41] The two earlier qualifying convictions were not part of the actus reus of the instant offending.[42]

[62] In seeking to challenge *Cameron*-type reasoning, counsel for the appellants referred us to various provisions in the Criminal Procedure Act. These provisions were said to mean that decisions which pre-date the Criminal Procedure Act should no longer be relied upon. In counsel's submission, it was said to be significant that the four High Court decisions which have held that a gap in offending relates to the offence are the most recent, and all decided after the Criminal Procedure Act came into force.

[63] We have carefully considered the various provisions relied upon by counsel, but are not persuaded they lend any support to the appellants' interpretation of s 81. Rather, they are consistent with the view advocated by the Crown that mandatory disqualification, triggered by the fact of previous convictions, is a penalty independent of the offence, and not an ingredient of it.

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41 *R v Cameron*, above n 39, at [5].
42 At [4].

[64] The first provisions drawn to our attention relate to the particulars required in a charging document,[43] and the different offence categories under s 6 of the Criminal Procedure Act. Whether an offence is categorised as category one, two or three depends on the maximum punishment applying to the particular offence. Counsel pointed out that the "offence description" in the appellants' charging documents includes the fact of the previous convictions and that it is a category three offence.

[65] However, reliance on the charging document for the purposes of interpreting s 81 of the Act overlooks s 6(3) of the Criminal Procedure Act which expressly distinguishes between offence and penalty. It states:

> If an offence is punishable by a greater penalty where the defendant has previously been convicted of that offence, or of some other offence, the offence is in the category that applies to offences punishable by that greater penalty only if the charge alleges that the defendant has such a previous conviction.

[66] The same distinction between penalty and offence is also made in s 22 of the Criminal Procedure Act:

> **22 Certain charges to disclose range of penalties and previous convictions**
>
> (1) This section applies if a defendant is charged with an offence for which the penalty is greater if the defendant has previously been convicted of that offence, or of some other offence.
>
> (2) The charge must disclose—
>
> (a) the range of penalties available on conviction for the offence; and
>
> (b) the existence of any previous conviction or convictions which, if admitted by or proved against the defendant, would make the defendant liable to a greater penalty.
>
> (3) To avoid doubt, if a charge discloses the existence of a previous conviction or convictions in accordance with this section, and as a result the offence is a category 3 offence in accordance with section 6(3), the provisions of section 50 apply in the ordinary way.
>
> (4) A charge must not be dismissed solely on the grounds that it does not comply with subsection (2).

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[43] Criminal Procedure Act, s 16.

(5) Nothing in this section or section 142 affects the right of a court, when sentencing the defendant, to take any previous convictions into account.

[67] That conviction for the index offence is not dependent on proof of a previous conviction that will increase the range of penalties is further reinforced by s 142:

> **142 Dealing with charge that fails to disclose range of penalties and previous convictions when required**
>
> (1) This section applies if a charge that is required by section 22 to disclose the range of penalties available on conviction, and any relevant previous convictions of the defendant, does not do so.
>
> (2) The charge may be amended before or during the trial in accordance with section 133.
>
> (3) If the charge is amended before the trial to disclose a previous conviction, and the offence becomes a category 2 or 3 offence in accordance with section 6(3),—
>
> (a) the proceeding must otherwise continue as if the defendant were originally charged with the charge as amended; and
>
> (b) section 134(5) and (6) applies as if the charge was amended to substitute one charge for another.
>
> (4) If the charge is not amended, and the defendant is convicted, then the maximum penalty to which the defendant is liable for the offence is the penalty to which he or she would be liable if he or she did not have previous convictions for the same or any other specified offence.

[68] Finally there are ss 44, 108(1) and 145. Section 44 provides that where a charge contains an allegation that a defendant has been previously convicted he is not required to plead to that allegation, while s 108 stipulates that the allegation of the previous conviction must not be mentioned to the jury. Under s 145, it is only *after* the defendant has pleaded guilty or been found guilty of the index offence that the alleged previous conviction must be proved.

[69] In our view, the provisions of the Criminal Procedure Act do not detract in any way from the pre-Criminal Procedure Act authorities on s 81 which have held that the phrase "relating to the offence" means reasons relating to the elements of the offence. As discussed, in the case of a strict liability offence like drink driving that essentially means reasons directly relating to the actual conduct or actions that comprise the

offence. The provisions of the Criminal Procedure Act are entirely consistent with that approach.

[70] For all these reasons, we conclude that a gap in offending is not capable in law of being a special reason relating to the offence for the purpose of s 81. That conclusion makes it unnecessary for us to consider the High Court finding that on the facts of each of the three cases, the gap in qualifying offending was not sufficient to constitute a special reason.

**Issue 5: does the imposition of a second longer disqualification period for the same offence after the first has expired constitute a miscarriage of justice?**

[71] It will be recalled the disqualification periods imposed by the District Court in this case had already expired before the High Court issued its decision allowing the Police's appeals. In those circumstances, counsel for the appellants argue that to avoid a miscarriage of justice, the High Court should have refrained from imposing what it considered was the correct sentence. Instead, the Judge should have dismissed the appeals.

[72] In support of that contention, counsel referred us to a number of authorities where on a Solicitor-General's appeal, appeal courts have not quashed an impugned sentence despite finding it was manifestly inadequate, or based upon wrong principles.[44]

[73] However, in our view, those authorities are in a different category to the present appeals. The vast majority involve situations where by the time of the appeal decision, the offender had already successfully served all or part of a community-based sentence, and sentencing them to prison was considered harsh and involving "an element of inhumanity".[45]

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44 See the discussion in *R v Donaldson* (1997) 14 CRNZ 537 (CA) at 550; and *R v Cowen* HC Christchurch CRI-2009-409-50, 25 June 2009 at [44]–[53]. See also *McCaslin-Whitehead v R* [2023] NZCA 259 at [29]–[32] for a useful summary of the general principles relating to Solicitor-General appeals.

45 *R v Donaldson*, above n 44, at 550.

[74] The one case cited by counsel where an appeal court refrained from imposing the correct sentence in circumstances that would not have involved replacing a community-based sentence with a prison sentence, is the High Court decision of *Police v Smith*.[46]

[75] In *Smith*, the defendant's driver licence had been suspended for 28 days for speeding. He drove during the suspension period, was stopped at a police checkpoint, and was charged with driving a motor vehicle while suspended, in breach of s 32(1)(c) of the Act. Section 32(3)(b) stipulates that, on conviction, the court must order the person to be disqualified from holding a driver licence for six months.

[76] The District Court Judge had sentenced Mr Smith to community work under s 94 of the Act and did not order disqualification. At sentencing, the Police accepted the Judge had jurisdiction to impose that sentence, relying on what transpired to be an incorrect interpretation by a High Court decision.[47] It was common ground on appeal that if community work had been an available sentencing option, it would have been an appropriate sentence.[48] It was not in itself inadequate.[49] The problem was that the pre-requisites to making an order under s 94 were not satisfied.[50] By the time of the appeal hearing, however, Mr Smith had served the community-based sentence.[51] The Police accepted that even if the appeal Judge accepted its submissions on jurisdiction, it would be open to him to decline the appeal in the exercise of his residual discretion.[52]

[77] The appeal Judge found it would be unjust to allow the Police's appeal, and to interfere with the sentence, because the necessary consequence of that would be the imposition of a considerably greater penalty than would have been imposed otherwise, and thus there would have been "an element of double punishment".[53] The initial sentence of community work was intended to be the whole penalty, and it would not have been ordered in addition to disqualification.[54]

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46 *Police v Smith*, above n 29.
47 At [3].
48 At [4].
49 At [31].
50 At [10].
51 At [11].
52 At [38].
53 At [39].
54 At [39].

[78] In our assessment, the facts of the present cases are very different. There is no element of "double punishment". The six months the appellants have already spent being disqualified will count towards the one year and one day period. The suggested prejudice of having to reinstate their licences by re-qualifying is an inherent part of the mandatory sentence, and not an undue hardship in the circumstances. Nor is the payment of the relatively modest fee that will be required.

**Summary of conclusions**

[79] The disqualification order imposed on Ms Tahau in the District Court did not include any backdating of the commencement date of the disqualification period.

[80] The appeals brought by the Police in the High Court were properly brought under s 246 of the Criminal Procedure Act because an appeal against a disqualification order is an appeal against a "sentence" that is not "fixed by law".

[81] Our views regarding the scope of the power under s 85 to backdate a mandatory disqualification period are not determinative of the appeals. However, we find that backdating for reasons relating to an offender's general personal circumstances is not a proper use of the s 85 power.

[82] Correctly interpreted, the phrase "special reasons relating to the offence", as it appears in s 81 of the Act, cannot include a gap in the offender's criminal history. To be an operative reason under s 81, the reason must relate to an element of the offence. A defendant's previous convictions for drink driving are not an element of the offence. They are a personal circumstance of the defendant that bears on the range of penalties on conviction.

[83] On the facts of each of the appeals, the imposition on appeal of a second longer disqualification period for the same offence, after the first period has expired, does not constitute a miscarriage of justice.

**Outcome**

[84] The applications for leave to bring second appeals in CA655/2024, CA656/2024 and CA667/2024 are granted.

[85] The appeals in CA655/2024, CA 656/2024 and CA 667/2024 are dismissed.

[86] The disqualification orders of the High Court are confirmed and in relation to the appellants in CA656/2024 and CA667/2024 are to resume from midnight 27 June 2025.

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