28/03; [2003] VSC 369

SUPREME COURT OF VICTORIA

DPP v NORMAN

Kellam J

15 August, 3 October 2003 — (2003) 39 MVR 480

MOTOR TRAFFIC – DRINK/DRIVING – OFFENDER FOUND GUILTY OF DRINK/DRIVING OFFENCES TWICE WITHIN TEN-YEAR PERIOD – PENALTY TO BE APPLIED TO SUBSEQUENT OFFENCE – WHETHER SECOND OFFENCE A "SUBSEQUENT OFFENCE" – CONVICTION NOT IMPOSED FOR SECOND OFFENCE WITH READING OF 0.095% – MINIMUM LICENCE DISQUALIFICATION PERIOD OF 18 MONTHS – DISQUALIFICATION PERIOD OF 6 MONTHS IMPOSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS48(2), 49(1)(f), 50(1A), 50AA.

N. had been found guilty within a ten-year period of two drink/driving offences. On the second occasion N's BAC was 0.095% for which the relevant licence disqualification was 18 months. At the hearing, the magistrate concluded that by not recording a conviction, he was not required to treat the offence to which N. pleaded guilty as a "subsequent offence". The effect of this was that the magistrate found that the mandatory penalties did not apply and then imposed the minimum disqualification of 6 months which is mandatory for a "first offence". Upon appeal by the DPP—

HELD: Appeal allowed. Order of magistrate set aside. Remitted to the magistrate for re-sentencing.
1. The legislative scheme contemplated by s50(1A) of the *Road Safety Act* 1986 ('Act') is that a person who is found guilty of certain drink driving offences is to have his or her driving licence or permit cancelled and is to be disqualified from driving for a period which varies according to the level of blood alcohol concentration and according to whether the offence is a first or a subsequent offence of the same nature.

2. It is quite clear that the intention of the legislation in relation to s50(1A) of the Act is that persons who have previously been found guilty of an offence against s49(1)(b), (f) or (g) (subject to the limitation of ten years from the date of commission of the offence established by s50AA of the Act) are to have their licences or permits cancelled for longer periods than first offenders. To treat the later offence as a first offence is absurd and wholly inconsistent with the intention of the Act.

3. Reading the expression "subsequent offence" as it appears in s50(1A) of the Act in its ordinary sense, it is apparent that N. committed a subsequent offence as contemplated by the section and was required to have his licence cancelled and to be disqualified from obtaining a licence or permit for a minimum period of 18 months. Accordingly, the magistrate was in error in holding that the offence in question was not a "subsequent offence" under s50(1A) of the Act.

KELLAM J:

Introduction

1. On 29 January 2003, at Portland Magistrates' Court, the respondent, Gregory Norman, pleaded guilty to a charge brought against him under s49(1)(f) of the *Road Safety Act* 1996 ("the Act"). The charge to which Mr Norman pleaded guilty was that on 24 February 2002 he had a blood alcohol concentration in excess of .05% within three hours of driving contrary to s49(1)(f) of the Act. The level of blood alcohol concentration was alleged to be .095%.

2. On a previous occasion, on 14 May 1992, Mr Norman had been convicted of an offence under the same section of the Act in relation to a blood alcohol concentration of 0.135%. On this previous occasion Mr Norman was convicted and fined $500. His licence was cancelled and he was disqualified from driving for a period of 13 months.

The Magistrate's Order

3. Having heard the plea and submission made on behalf of Mr Norman the Magistrate ordered, without conviction, that Mr Norman be fined $1,000. The Magistrate further ordered that Mr Norman's driving licence be cancelled and that he be disqualified from driving for a period of six months.

4. It is apparent that the Magistrate considered it appropriate to record no conviction against Mr Norman in order to circumvent the consequences which flow from a conviction for a second or subsequent offence under s49(1)(f) of the Act. The minimum relevant licence disqualification period for such a subsequent offence is 18 months for a blood alcohol reading of .95%. The minimum relevant disqualification period for a first offence, where the blood alcohol concentration is less than .1% is six months. It is clear that the Magistrate concluded (as submitted by Mr Walsh-Buckley of counsel who appeared for Mr Norman both before the Magistrate and upon this appeal) that by not recording a conviction, he was not required to treat the offence to which the defendant had pleaded guilty before him as a "subsequent offence". The effect of this was that the Magistrate found that "the mandatory penalties do not apply". The Magistrate then imposed the period of minimum disqualification which is mandatory for a "first offence".

The Question of Law

5. The Director of Public Prosecutions brings this appeal against the decision of the Magistrate. The questions of law stated by the Master (and as amended before me by consent of the parties) to be raised by this appeal are as follows:

> "(a) Was the Magistrate in error in holding that the offence in question was not a 'subsequent offence' under s50(1A) of the *Road Safety Act* 1986, because acting pursuant to s.75 of the *Sentencing Act* 1991, or otherwise, he did not record a conviction in relation to that offence?
> (b) Does the expression 'convicted' where it first appears in s48(2) of the *Road Safety Act* 1986 include sentencing dispositions made pursuant to s75 of the *Sentencing Act* 1991, or otherwise, where a conviction is not recorded?"

6. Upon this appeal coming on for hearing before me, Mr Trapnell of Counsel who appears for the Director informed me that he does not seek to argue the second question and accordingly it does not fall to be decided.

The Relevant Legislation

7. Section 49(1)(f) of the Act provides that a person who within three hours of driving a motor car furnishes a sample of breath for analysis which exceeds the prescribed concentration of alcohol (in this case .05%) is guilty of an offence.

8. Section 49(3) provides that a person who is guilty of an offence under s49(1)(f) of the Act is liable

> "(a) in the case of a first offence, to a fine of not more than 12 penalty units; and
>
> (b) in the case of a subsequent offence, to a fine of not more than 25 penalty units or to imprisonment for a term of not more than three months."

9. Section 50 of the Act contains provisions relating to the cancellation and disqualification of a driver licence or permit held by a person who has been found guilty of an offence under s.49 of the Act. In particular, s50(1A) provides that "on convicting a person, or finding a person guilty" of an offence under s49(1)(f)

> " ... the court must, if the offender holds a driver licence ... cancel that licence ... and ... disqualify the offender from obtaining one for such time as the court thinks fit, not being less than—
> (a) in the case of a first offence, (the period specified in column 2 of schedule 1 of the Act) and
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> (b) in the case of a subsequent offence, (the period specified in column 3 of schedule 1)."

10. By column 2 of Schedule 1 of the Act the minimum period of disqualification for a blood alcohol concentration of .09% or more but less than .10% is six months for a first offence. By column 3 of Schedule 1 the minimum period of disqualification for such a reading is 18 months for a subsequent offence.

The Submissions of the Respondent

11. However, notwithstanding the apparently clear intention of s50(1A) of the Act, Mr Norman, through his counsel, Mr Walsh-Buckley submits that s48(2) of the Act provides that an earlier offence under s49(1)(f) of the Act turns a later offence into a "subsequent offence" only in circumstances where a conviction is imposed on the later offence.

12. Section 48(2) under the heading *Interpretive Provisions* states as follows:

> "If a person who is convicted of an offence against—
> (a) any one of the provisions of s.49(1); or
>
> (b) ...(c) ... has at any time been found guilty of or been convicted of
>
> (d) an offence against the same or any other of those paragraphs or that section; or
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> (e) ... (f) ... the conviction for the offence against that paragraph or section is to be taken to be a conviction for a subsequent offence."

13. Whilst Mr Walsh-Buckley concedes that the opening words of s50(1A) refer to " ... convicting a person, or finding a person guilty, of an offence under s49 ... " he points out that s50(1A)(b) uses the word "subsequent offence" which expression he submits is exhaustively defined by s48(2). In making this submission he relies upon the fact that s48(2) refers only to the words "convicted of an offence" for the establishment of a "subsequent offence". Therein, he submits, lies ambiguity. The Act being, he submits, penal legislation, any ambiguity should be read strictly in favour of Mr Norman.

14. In support of this contention he relies upon *Beckwith v R*[1] and *DPP v Williams*.[2] He submits that the provision in question is a mandatory sentencing provision and thus he submits "any ambiguity whatsoever should be resolved in the respondent's favour".

The Submissions of the Director

15. The Director, through his counsel, Mr Trapnell, submits that the respondent's arguments as to the interpretation of the relevant legislation are fundamentally flawed. Mr Trapnell submits that the relevant legislation is not ambiguous and that the ordinary English language meaning of "subsequent offence" where it appears in s50(1A) means an offence following a previous offence. He submits that s48(2) of the Act does not purport to define the expression "subsequent offence" and that it is apparent both from the language used in s50(1A) and by the history of the legislation that Parliament intended that the commission of a subsequent offence (during the relevant time of ten years established under s50(AA) of the Act) was to result in suspension and cancellation of the driving licence.

Conclusion

16. In my view, the intention of the legislature in relation to the issue before the court is clear. The provisions referred to above are to be found in Part 5 of the Act. The offences set out in this part of the Act are strict and have severe consequences for those who are found to be in breach of them. The policy behind Part 5 of the Act is stated in s.47 and includes the purposes of reducing the number of motor vehicle collisions of which alcohol is a cause and reducing the number of drivers whose driving is impaired by alcohol. As stated recently by both the High Court of Australia,[3] and the Court of Appeal of this Court,[4] the plain purpose of the Part is to "deal with a major social problem".

17. The legislative scheme contemplated by s50(1A) is that a person who is found guilty of certain drink driving offences is to have his or her driving licence or permit cancelled and is to be disqualified from driving for a period which varies according to the level of blood alcohol concentration and according to whether the offence is a first or a subsequent offence of the same nature.

18. The clear intention of s50(1A) is confirmed by a reading of the section and by a consideration of the legislative history of the section. The precursor to the current s50(1A) was inserted into the Act by s8 of the *Road Safety (Miscellaneous Amendments) Act* 1989. The then Attorney-General in his Second Reading Speech said:

> "The Bill provides a streamlined procedure for dealing with first offenders, that is persons who have not been previously convicted in Australia of any kind of drink driving offence. ... The Bill does not affect the power of the courts to release offenders on bond without recording a conviction. This discretion is exercisable where a first offender's reading does not exceed .1".

19. In consequence of the amendments produced by the *Road Safety (Miscellaneous*

Amendments) Act 1989, s50(1A) provided as follows:

> "On conviction for an offence under s49(1)(b), (f) or (g) ... the court must, if the offender holds a driver licence or permit, cancel that licence or permit, and ... disqualify the offender from obtaining one for such time as the court thinks fit, not being less than
> (a) in the case of a first offence (the period specified in column 2 of schedule 1)
>
> (b) in the case of a subsequent offence (the period specified in column 3 of schedule 1)."

20. Thus it can be seen that at that time, only conviction for an offence under s49(1)(b), (f) or (g) brought the consequences of the section into effect.

21. However, by the enactment of the *Road Safety (Licence Cancellation) Act* 1992, s.50(1A) was further amended to its current form by the insertion of the words " ... on convicting a person, or finding a person guilty of ... ". The amending legislation provides by s1 that its purpose is

> "To require a court, on finding a person guilty of a drink driving offence without recording a conviction, to cancel his or her driver licence and disqualify him or her from obtaining one for the same period as it would have been required to if it had recorded a conviction. A discretion not to do so is granted to the court in certain limited circumstances."

22. It should be noted that the discretion, "in certain limited circumstances", not to disqualify a driver for the same period as would have been required if a conviction had been recorded, resulted from the insertion of s50(1AB) into the Act by the amending legislation of 1992 referred to above. That section permits a court not to cancel a driver's licence if a person has been previously found guilty of an offence under s49(1) (b), (f) or (g) of the Act where his or her blood alcohol concentration was not more than 0.5%, or in circumstances where the person has not previously been found guilty of such an offence, where the blood alcohol concentration was not more than .10%. Mr Norman of course had been previously convicted of an offence under s49(1) (f) of the Act with a concentration of blood alcohol of .135% and thus the legislative discretion is irrelevant in his circumstances.

23. The Second Reading Speech of the Minister in relation to the *Road Safety (Licence Cancellation) Act* 1992, stated as follows:

> "The main purpose of the Bill is to ensure that a court must cancel a driver's licence if the driver is found guilty of a drink driving offence involving a high blood alcohol reading or if the driver has previously been found guilty of a serious drink driving offence. Honourable Members will be aware of the ongoing efforts by Parliament to ensure that the laws of this State express the community's concern about the evils of drink driving. Those efforts have been directed particularly at drivers who have prior drink driving offences – repeat offenders – and also to first offenders who have high blood alcohol readings. For many years the legislation has provided that a driver must lose his or her licence on conviction for a drink driving offence. The legislation has also declared that the power of the courts to release the offender on a bond without recording a conviction cannot be exercised in cases where the driver has been found guilty and the reading is above .10 for a first offence or .05 for a subsequent offence. ... With that background, it was a matter of considerable concern and disappointment to the Government to find shortly after the new *Sentencing Act* 1991 came into force last month that a magistrate thought it proper to circumvent the requirements by deciding not to record a conviction in the case of a solicitor who pleaded guilty to an offence involving a blood alcohol reading of .12%, that is, more than twice the legal limit. ... The Government considers that the matter is of such importance that the legislation should be amended immediately to give the courts explicit directions in such cases. ... The Bill has the effect that if a court finds a person guilty of a drink driving offence, but exercises its discretion under the *Sentencing Act* in such a way as to not record a conviction, the court must still apply the mandatory licence cancellation requirements of the *Road Safety Act*."

24. Accordingly, it is quite clear to me that the intention of the legislation in relation to s50(1A) of the Act is that persons who have previously been found guilty of an offence against s49(1)(b), (f) or (g) (subject to the limitation of ten years from the date of commission of the offence established by s50AA of the Act) are to have their licences or permits cancelled for longer periods than first offenders.

25. Section 48(2) is an interpretative provision but it does not purport to define the expression

"subsequent offence" appearing in s50(1A) of the Act. Indeed, the section does not define anything exhaustively, let alone the expression "subsequent offence". Although it deals with what may constitute "a conviction for a subsequent offence" in circumstances where there has been a previous finding of guilt, or a conviction for a variety of offences, including culpable driving, s50(1A) is a provision of specific application dealing with offences under s49(1)(b),(f) or (g). Whatever arguments might be advanced about the meaning of s48(2) in relation to other offences, it is beyond argument in my view that Mr Norman has committed two offences under s49(1)(f) within the relevant time frame of ten years.

26. The effect of the submissions made by Mr Walsh-Buckley, both before the Magistrate and before me, is that the offence to which Mr Norman pleaded guilty before the magistrate is to be treated as a "first offence". It will be observed that the Magistrate imposed the minimum disqualification of six months relevant for a "first offence" under Schedule 1 of the Act. However, logically, there can be only one "first offence". Mr Walsh-Buckley, of course, does not submit directly that the offence in question is a "first offence" but he submits that it is not a "subsequent offence". The consequence of acceptance of that submission is that the later offence is to be treated as a first offence. In my view, such a result is absurd and wholly inconsistent with the intention of the Act. Furthermore, if the submission made by Mr Walsh-Buckley is correct then, logically, a person who has a prior conviction for a drink driving offence could be brought before the Magistrates' Court on a number of occasions without the penalty relevant under the Act for a "subsequent offence" being imposed. Such a consequence would fly in the face of the clear purpose of Part 5 of the Act.

27. In the circumstances before the Magistrate, Mr Norman had been convicted of an offence under s49(1)(f) of the Act on 14 May 1992. The offence, the subject of this appeal, was committed less than ten years later, on 24 February 2002. Thus Mr Norman committed the same offence (ie an offence against s49(1)(f) of the Act) twice within a ten year period. In my view, reading the expression "subsequent offence" as it appears in s50(1A) of the Act in its ordinary sense, it is apparent that Mr Norman committed a subsequent offence as contemplated by the section and was required to have his licence cancelled and to be disqualified from obtaining a licence or permit for a minimum period of 18 months.

28. It follows that the answer to the question required to be answered by this appeal is that the Magistrate was in error in holding that the offence in question was not a "subsequent offence" under s50(1A) of the Act. It follows further that the appropriate order is that the appeal should be upheld and that the matter should be remitted to the Magistrate for re-sentencing according to law.

29. I will hear submissions as to the appropriate order as to costs.

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[1] [1976] HCA 55; (1976) 135 CLR 569; (1976) 12 ALR 333 at 339; 51 ALJR 247; 28 ALT 39.
[2] [1998] VSC 119; 104 A Crim R 65 at 74-75; (1998) 28 MVR 521.
[3] *Thompson v His Honour Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141 at 150; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27.
[4] *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643 at 645-646; (1999) 104 A Crim R 426; (1999) 29 MVR 365.

APPEARANCES: For the plaintiff DPP: Mr D Trapnell, counsel. Solicitor to the Office of Public Prosecutions. For the defendant Norman: Mr W Walsh-Buckley, counsel. Graham Sharkey, solicitors.
