54/79

SUPREME COURT OF VICTORIA

BAKKER v STEWART; WILSON v KERR

Lush J

30 July 1979 — [1980] VicRp 2; [1980] VR 17 [Special Leave refused by High Court – see [1980] VR 25 (note)]

PRACTICE AND PROCEDURE – MOTOR TRAFFIC – DRINK/DRIVING – STATUTORY INTERPRETATION – VERB OMITTED FROM STATUTORY PROVISION – WHETHER VERB TO BE IMPLIED – DEFENDANT RELEASED ON GOOD BEHAVIOUR BOND – WHETHER MAGISTRATE ACTED UNDER POWER TO IMPOSE A COMMON LAW BOND – ACT AMENDED IN RELATION TO PENALTY FOR DRINK/DRIVING – POWER TO RELEASE PERSON ON A GOOD BEHAVIOUR LIMITED BY PARLIAMENT – WHETHER SECTION TO BE GIVEN A RETROSPECTIVE OPERATION: *MOTOR CAR ACT* 1958, SS81A, 89A; *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S150; *STATUTE* 34 ED. III c 1 (1361); *ACTS INTERPRETATION ACT* 1958, S7(2).

1. Where s89A of the *Motor Car Act* 1958 ('Act') used the terms "(a) in the case of a person previously convicted of any such offence — exceeded .05 per centum; or (b) in any other case — .1 per centum", it is common English usage to omit a verb or any other word which, if included in the sentence would be a repetition of the same word previously appearing in close proximity to the position of its possible second use. Accordingly, the word to be implied in s89A was "exceeded".

2. The contention that the Magistrate should be regarded as acting under any power available to him and release the defendant on a good behaviour bond, and that the power given by the statute of 1361 would support the order made was incorrect. The power to make a common law bond was not appropriate in the present case. Binding over is a power to be exercised on the basis of apprehension of specific future offences. The common law bond, or the bond contemplated by s80 of the Act, is given in substance to afford a person charged with a specific offence a chance to avoid sentence if the defendant demonstrates, during the period of the bond, that he is of good character. The Magistrate in the present case not only had no intention of exercising the power given by the 1361 Act, but there was no case of apprehended unlawful conduct made or suggested which would justify its exercise.

3. In relation to the question whether the amending section should be given a retrospective operation, in a case of amendment to penalty the section has the effect of providing that in the absence of a contrary intention liability and penalty already incurred, in the sense that the event attracting them has already occurred, are not affected unless it appears that the intention of the amending legislation is otherwise. Two questions then have to be answered. Does s89A of the Act deal with liabilities and penalties, or is it to be classed as procedural only? Does it show a contrary intention so as to exclude the operation of s7(2) of the *Acts Interpretation Act* 1958?
***Byrne v Garrisson* [1965] VicRp 70; (1965) VR 523 at p528, followed.**

4. While it is true that s80 of the *Magistrates (Summary Proceedings) Act* 1975 refers to adjournment, the substance of the new s89A must be looked at. It was inserted into the *Motor Car Act* 1958 which already contained s81A(2) which made cancellation of licence and disqualification mandatory in some cases. Cancellation and disqualification are part of the direct penalties for offences under s81A of the Act; and s89A cannot be classed as a procedural section, nor can it be classed as merely operating in future upon situations originating in the past. In effect, it increases the penalties for the relevant offences by terminating the only known method of avoiding an imposition of the mandatory penalties and, accordingly, it deals with both liability and penalty. It is, therefore, not to be applied to offences committed before it came into operation.

LUSH J: Each of the two cases before me is an order to review a decision of a Magistrates' Court. Each raises for consideration a question of the interpretation of s89A of the *Motor Car Act* 1958 which was inserted it that Act by Act No. 9243, proclaimed to operate as from 20th December 1978. The second case raises an additional question concerning the application of the amended legislation to offences which occurred before the 20th December 1978 but which came for hearing in a Magistrates Court at a date later than that. Both cases are cases in which the informant obtained the Order nisi.

In the first case the offence of the respondent was committed on 1st January 1979. The respondent was brought before the Magistrates' Court at Maffra on 28th February. Upon that date the Stipendiary Magistrate found that at the time of the offence his blood alcohol percentage within the meaning of the *Motor Car Act* was .160 and accordingly would, if the proceedings had gone so far, have convicted him of an offence under s81A of that Act. It was, however, put to the Magistrate that the new s89A, to the terms which I shall refer soon, was so confusing that it remained possible for the Magistrate to exercise the power given to him by s80 of the *Magistrates (Summary Proceedings) Act* 1975 and adjourn the further hearing of the matter upon allowing the respondent to enter into a recognisance pursuant to that section. The Magistrate followed this course, and adjourned the case and the respondent entered into a recognisance. The Magistrate's disposal of the case included a direction that the respondent pay $100 into the court poor box.

In the second case the date of the offence was 10th December 1978. An information was laid on 6th January 1979, and the matter came before the Magistrates' Court at Hamilton on 23rd March 1979. The evidence in that case was that the blood alcohol percentage of the respondent at the time of the offence was .245 per cent. She was a middle-aged woman of good character, looking after her mother, and the Stipendiary Magistrate found in the circumstances grounds for exercising the power to adjourn given to him by the *Magistrates (Summary Proceedings) Act* s80. The new s89A of the *Motor Car Act* is in these terms:

> "The provisions of s80 of the *Magistrates (Summary Proceedings) Act* 1975 with respect to the adjournment of an information without proceeding to conviction shall not apply with respect to any information for an offence against s80B, s81A or s82 where it appears to the court before which any such information is being heard that at the time of the alleged offence the percentage of alcohol in the blood of the person charged with the alleged offence,
> (a) in the case of a person previously convicted of any such offence — exceeded .05 per centum; or
>
> (b) in any other case — .1 per centum."

The contention was and this was the argument put in the court at Maffra and repeated here, that paragraph (b) of this section was obscure, and that it was so because it was not possible to detect what word was to be implied before the final figure and words ".1 per centum", and it was not impossible that the section upon its true construction ought to be read so that paragraph (b), if it were given any application at all, could apply only to cases in which it was proved that a percentage of .1 exactly was present.

It is common English usage to omit a verb or any other word which, if included in the sentence, would be a repetition of the same word previously appearing in close proximity to the position of its possible second use. In s89A I do not think that without the paragraphing, there could be any doubt about the meaning. For my part, I would not even say that a word was omitted, but only that a word is to be implied. If I need to spell the matter out further, the word to be implied after the dash and before the words and figures ".1 per cent" is "exceeded".

What I have said would dispose of the first case, except for a point taken by Mr Ross who appeared for the respondent in that case. The point was that the power to take a recognisance to keep the peace or to be of good behaviour given to justices by the statute 34 Ed. III c.1, passed in the year 1361, was still operative, and that recent English decisions showed that this power can be exercised to bind over any person who is before justices at any stage of proceedings. The argument was that s150 of the *Magistrates (Summary Proceedings) Act* 1975, which directs that the power to bind over shall be exercised "by an order upon complaint made" applies only to cases in which a person is brought before the court by someone seeking such an order and to cases where the binding over is to keep the peace or to be of good behaviour towards a particular person, and does not limit the old power.

The contention here was that the Stipendiary Magistrate should be regarded as acting under any power available to him, and that the power given by the statute of 1361 would support the order made. In my opinion it will not. The power was not appropriate to the case. Binding over is a power to be exercised on the basis of apprehension of specific future offences. The common law bond, or the bond contemplated by s80, is given in substance to afford a person charged with a specific offence a chance to avoid sentence if he demonstrates, during the period of the bond, that he is of good character. The Stipendiary Magistrate not only had no intention of exercising

the power given by the 1361 Act, but there was no case of apprehended unlawful conduct made or suggested which would justify its exercise.

The second case raises the further question whether, since the offence was committed before 20th December 1978, s89A had any application at all. The argument raises the all too familiar questions whether the construction contended for involves giving the section a retrospective action.

In the first place, in my opinion, the introduction of s89A was an amendment of the *Motor Car Act* and probably of the *Magistrates (Summary Proceedings) Act* within the meaning of the *Acts Interpretation Act* 1958 s7(2). Further, I follow with respect the views expressed by Gowans J in *Byrne v Garrisson* [1965] VicRp 70; (1965) VR 523 at p528, that "liability" in s7(2)(c) includes liability under a penal law, "liability incurred" in that paragraph does not mean liability as determined by judgment, and that "penalty incurred" in ... paragraph (d) is also an expression which does not refer to a situation after judgment.

Byrne v Garrisson was a case of complete repeal of relevant provisions, and His Honour's language is adapted to that situation. In a case of amendment to penalty the section has the effect of providing that in the absence of a contrary intention liability and penalty already incurred, in the sense that the event attracting them has already occurred, are not affected unless it appears that the intention of the amending legislation is otherwise. Two questions then have to be answered. Does s89A deal with liabilities and penalties, or is it to be classed as procedural only? Does it show a contrary intention so as to exclude the operation of s7(2)?

While it is true that s80 of the *Magistrates (Summary Proceedings) Act* 1975 refers to adjournment, in my opinion the substance of the new s89A must be looked at. It was inserted into the *Motor Car Act* 1958 which already contained s81A(2) which made cancellation of licence and disqualification mandatory in some cases. In the case of the *Motor Car Act*, the course open under s80 of the *Magistrates (Summary Proceedings) Act* offered a way of avoiding the imposition of the mandatory penalties in cases where its use was considered appropriate. Section 89A reflects the view of Parliament that such a course was undesirable in the cases to which the section refers, and ended it. The intention of the amending Act, therefore, was to ensure that the cancellation and disqualification penalty was automatic in all second and subsequent offence cases, and in first offence cases where the blood alcohol reading exceeds .1 per cent. It is, in addition, to be observed that Act No. 9243 introducing s89A also amended, by increasing, the penalties provided in s81A for offences against that section.

In my opinion cancellation and disqualification are part of the direct penalties for offences under s81A; and s89A cannot be classed as a procedural section, nor can it be classed as merely operating in future upon situations originating in the past. In effect, it increases the penalties for the relevant offences by terminating the only known method of avoiding an imposition of the mandatory penalties and, accordingly, in my opinion, it deals with both liability and penalty. It is, therefore, not to be applied to offences committed before it came into operation.
