

46/77

SUPREME COURT OF VICTORIA

FINDLAY v CHIEF COMMISSIONER OF POLICE

Murphy J

31 March 1977

MOTOR TRAFFIC – APPEAL AGAINST SUSPENSION OF LICENCE BY CHIEF COMMISSIONER – DEMERITS POINTS "RECORDED WITHIN LAST PRECEDING 3 YEARS" – MEANING OF – GIVING OF NOTICE WITHIN REASONABLE TIME – APPEAL DISMISSED – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S27B.

F.'s licence was suspended by the Chief Commissioner by notice dated 28th June 1976 on the grounds that 12 or more demerits points were recorded within the last preceding three years. His last offence incurring demerit points was on 10th May 1975 and it appeared that the 3-year period was calculated as ending on that date. The notice of suspension was dated as above. F. appealed unsuccessfully to the Magistrates' Court against the Chief Commissioner's decision. It was argued 1. That the 12 points should be recorded within 3 years of the date of giving the notice; and 2. That the notice must be served within a reasonable time of the last offence. Upon Order Nisi to review—

HELD: Order nisi discharged.

1. The words in s27B of the *Motor Car Act 1958* namely, "recorded within the last preceding three years", are intended to refer to offences recorded within a period of three years preceding the date of and including the date of the last offence. All entries in the Demerits register, whenever made, are to be dated with the date of the offence to which they relate.

2. Provided that the 12 demerit points relate to offences recorded in the Demerits register within a period of three years immediately preceding the date of the last offence registered in the Demerits register, the Notice of Suspension may be given outside that period.

3. As a matter of construction, the duty of the Commissioner under s27B(1) to issue a notice in writing suspending the licence of an offender in the circumstances set out, must be exercised within a reasonable time after the happening of the event giving rise to that duty. However, the Commissioner's duty to suspend only arises "Whenever from time to time there is recorded in the Demerits register against the holder of a licence to drive a motor car a total of 12 or more demerit points".

4. There was no unreasonable delay in giving the Notice of Suspension of driver's licence after the date that the last conviction was obtained, that date being unknown on the evidence presented before the Magistrate. Furthermore, in view of the opinion that the Notice of Suspension should be given within a reasonable time after either the obtaining of the last relevant conviction or the date of entering the last relevant conviction in the Demerits register, there was no evidence before the Magistrate to justify a submission that the time which elapsed between either of those dates and the giving of the Notices of Suspension was not, in all the circumstances, reasonable.

MURPHY J: *[His Honour referred to the fact that s27A(1) requires the points to be recorded in respect of the day on which the offence was committed, and continued]* ... In my opinion the purpose of these words is reasonably clear. It is that the words in s27B namely: "recorded within the last preceding three years", are intended to refer to offences recorded within a period of three years preceding the date of and including the date of the last offence. All entries in the Demerits register, whenever made, are to be dated with the date of the offence to which they relate.

Section 27C also makes it clear, in my opinion, that the total number of Demerit points at any time for the purposes of s27B is to be assessed on this basis. Accordingly, I am unable to accept Mr Phillips' first submission which was that in order to bring s27B into operation, the relevant 12 demerit points should be recorded in the Demerits register within three years of the date of the giving of the Notice of Suspension. For this purpose it is, in my opinion, irrelevant to consider when the actual entry is made in the register. What is important is the date of the offence set out in the register. Provided that the 12 demerit points relate to offences recorded in the Demerits register within a period of three years immediately preceding the date of the last

offence registered in the Demerits register, the Notice of Suspension may be given outside that period.

It will be noted that s27B(1) does not give a discretionary power but imposes a mandatory duty on the Commissioner to give the appropriate Notice. It may be that some difficulties are created by the operation of s27C and s27E of the Act. For example, if, before the Commissioner in fact gives a Notice of Suspension under s27B, the person in question offends again and there is entered in the Demerits register an appropriate record of his conviction for the offence, it could be argued that a Notice of Suspension cannot then be given, in certain circumstances. If, say, a person offends on 1st January 1970 and received 6 points for three offences, and then offends again on 1st January 1972 and receives 4 points, and then offends on 31st December 1973 and receives 2 points, bringing the total to 12, the situation could become complicated. If, before the Commissioner's notice can be sent out, the person in question offends on 3rd January 1973 and receives a further 2 points, which the Commissioner duly records, in this hypothetical case the "latest day from time to time recorded, in the Demerits register" (see s270) would appear to be 3rd January 1973. During the three years immediately preceding that date the holder of the licence has a total of only 8 points awarded against him, which cannot support the suspension. This difficulty, if it be one, arises because of the method of assessment of points which is spelled out in s27C of the Act. However, in the present case, I do not have to deal with this apparent difficulty, and I expressly do not state any opinion upon it.

It was next submitted that the Commissioner must send his Notice of Suspension pursuant to s27B within a reasonable time after the date of the last offence going to make up the 12 demerit points, and that, since the date of the last offence, as shown on the Notice of Suspension, was 10th May 1975, and the Notice of Suspension was dated 28th June 1976, more than a reasonable time was said to have elapsed, and it was argued that the Notice was therefore of no effect.

No authorities were referred to by either counsel in support of, or in opposition to, this submission. In s27B(1) the opening words: "Whenever from time to time there is recorded in the Demerits register" spell out the circumstances in which the Commissioner is required to act by sending a notice in writing suspending the person in question's licence. Those words "Whenever from time to time" would seem to mean in this context "as often as"; cf. *Shepherd v Berger* (1891) 1 QB 597 and *Boulter v Kent Justices* (1897) AC 556.

The submission which is made by the appellant is that it would be unreasonable if the Commissioner could give a Notice of Suspension under s27B as long as several years after the last offence going to make a total of 12 demerit points has been recorded. If that is correct, then it was submitted that he must give the Notice within a reasonable time of the last offence recorded in the register. This submission was apparently not accepted by the Magistrate.

Where, by a statute, a power is given to perform some act "upon" a specified event or set of circumstances arising, it has been held that the power need not be exercised immediately upon, but may be validly exercised after the said event or circumstances occur, but only within a reasonable time thereafter: See *Ex Parte Lesiputty; re Murphy* [1947] NSWStRp 25; (1947) 47 SR (NSW) 433; 64 WN (NSW) 113; *Koon Wing Lau v Calwell* [1949] HCA 65; (1949) 80 CLR 533 at 559, 573 and 4, and 588 to 590; [1950] ALR 97 and *Folkhard v Metropolitan Railway Co* (1873) LR 8 CP 470. In *Koon Wing Lau's* case, Dixon J said at pp573 and 4:

"But in accordance with the ordinary rule, that must be taken to mean within a reasonable time after the expiration and cancellation of the certificate of exemption. What is a reasonable time will depend upon all the facts, including the conduct of the person named in the certificate. It does not necessarily mean that by successfully evading the authorities for a long period of time he can escape from the operation of subsection (4). But the operation of sub-section (4) is limited to a reasonable time after the expiry or cancellation of the certificate".

I have in the present case considered whether a distinction should be drawn between the application of this principle to the exercise of discretionary powers following the happening of a specified event and its application to the carrying out of a mandatory duty such as appears to be imposed upon the Commissioner by s27B(1) of the *Motor Car Act* 1958. I can see no essential difference between the two.

As a matter of construction, it appears to me that the duty of the Commissioner under s27B(1) to issue a notice in writing suspending the licence of an offender in the circumstances set out, must be exercised within a reasonable time after the happening of the event giving rise to that duty. I agree, however, with the learned Magistrate that the Commissioner's duty to suspend only arises "Whenever from time to time there is recorded in the Demerits register against the holder of a licence to drive a motor car a total of 12 or more demerit points".

There is no evidence before me to show when the entry in the Demerits register dated 10th day of May 1975 was in fact made, nor, so far as I am aware, was any such evidence before the Magistrate. Nor is there any evidence one way or the other on the question whether it was "the latest day from time to time recorded in the Demerits register as the day upon which the holder of the licence committed an offence referred to in the Fifth Schedule". There is no evidence to show when the conviction against the holder of the licence for the offence committed on 10th day of May 1975 was in fact recorded.

The maxim *omnia praesumuntur* applies, and I am prepared to presume that the entry in the Demerits register was made within a reasonable time after the recording of the conviction and that the notice of the Commissioner was given within a reasonable time of the recording in the Demerits register of the conviction. I see nothing to suggest that, this presumption is unwarranted. A period of something approaching 12 months is not even an inordinate delay to occur between the actual commission of an offence and the successful prosecution of the offence in a Magistrates' Court. The administrative action of recording the conviction in the Demerits register and the formulation and sending of the Notice of Suspension would, in addition, presumably take some time.

Accordingly, I see nothing to suggest there was any unreasonable delay in giving the Notice of Suspension of driver's licence after the date that the last conviction was obtained, that date being unknown on the evidence presented before the Magistrate or on the evidence presented before me.

Furthermore, if I am correct in the opinion expressed earlier to the effect that the Notice of Suspension should be given within a reasonable time after either the obtaining of the last relevant conviction or the date of entering the last relevant conviction in the Demerits register, there was no evidence before the Magistrate to justify a submission that the time which elapsed between either of those dates and the giving of the Notices of Suspension was not, in all the circumstances, reasonable. In my opinion the order nisi should be discharged with costs, which I fix at \$200.
