10/70

SUPREME COURT OF VICTORIA — FULL COURT

VINE v EHRNHOLM

Smith, Adam and Little JJ

27 April 1970

SENTENCING – DRIVING WHILST DISQUALIFIED – CHARGE FOUND PROVED – DEFENDANT SENTENCED TO THE RISING OF THE COURT – THE COURT ROSE ABOUT THIRTY SECONDS LATER – NO WARRANT ISSUED – WHETHER SENTENCE WAS MANIFESTLY INADEQUATE: *MOTOR CAR ACT* 1958, S28.

HELD: Order nisi absolute. Case remitted to the Magistrate to impose a sentence consistent with the Court's judgment.
1. It must be borne in mind that the offence of driving during a period of disqualification is a very grave one and that if persons who cannot point to strong circumstances of extenuation are allowed to commit it without substantial punishment, then the effort of the community to control improper driving by withdrawal of licences will break down. There should be strong circumstances present before purely nominal penalties are imposed for this offence. That is obviously the intention of the legislature which had taken away the option of imposing fines for this class of offence.

2. The evidence showed that the defendant, when he drove his car, was not forced by any pressure of circumstances to do it. Further, he was driving at the time when he was, in the words of one of the witnesses, semi-drunk, and on his own account he had recently been drinking. He was further in a state of belligerent excitement which led him to behave in an extremely violent manner.
3. If one cast round for circumstances of extenuation which might have moved the magistrate, it was difficult to see what they could have been, except that the area where the driving occurred may have been a quiet one and that the defendant's speed was not excessive, and that he was a man of previous good character.

4. Those considerations, however, were quite inadequate to warrant the imposition by way of sentence of what was only a nominal or token punishment.

5. Accordingly, the magistrate's discretion clearly miscarried.

SMITH J: This is the return of an order nisi to review an order made in the Court of Petty Sessions at Ferntree Gully, on 14 December 1969. In that court on that day one, Sven Hjalmar Ehrnholm, was tried on two informations, the first for driving a motor car during a period of disqualification imposed by the Court of Petty Sessions and the other for assault. The stipendiary magistrate, after hearing evidence for the informant and for the defendant, held both charges proved, but in relation to the assault he placed the defendant on a good behaviour bond and in relation to the charge of driving during a period of disqualification he sentenced the defendant "to the rising of the court". The court, in fact, rose about thirty seconds after the pronouncement of this sentence, and in consequence no warrant was issued. The informant seeks to review the magistrate's order in relation to the charge of driving during a period of disqualification and two grounds are stated in the order nisi. They are as follows;

> 1. That the stipendiary magistrate was in error in that, having convicted the defendant of an offence under s28 of the *Motor car Act* 1958 (as amended by s10 of Act 7593) he did not adjudge that the defendant serve a term of imprisonment in accordance with that Section.
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> 2. That in any event the stipendiary magistrate was in error in that, if he did adjudge that the defendant should serve a term of imprisonment in respect of the said conviction, such term was so manifestly inadequate in the circumstances as to amount to a failure by the stipendiary magistrate properly to exercise his discretion.

The section under which the defendant was convicted, s28 of the *Motor Car Act* as amended, does not provide for the alternative penalty of a fine; it provides only for a penalty in the form of a term of imprisonment. Furthermore, the provisions of s74 of the *Justices Act* 1958, which

authorise the imposition of a fine as an alternative to imprisonment, have, by Statute, been expressly excluded from application in the case of offences under the Section of the *Motor Car Act* here in question.

The magistrate, it seems clear, decided that the case was not an appropriate one for a common law bond or for probation. His only course, therefore, was to impose what the Section refers to as a term of imprisonment. The first ground in the order nisi is directed to a contention that when the magistrate said that the defendant was sentenced to the rising of the court he did not, within the meaning of the Section, impose a term of imprisonment. The second ground is intended to raise the point that even if what the magistrate did amounted to imposing a term of imprisonment, his discretion as to the duration of that term was obviously not lawfully exercised; that what he did was so manifestly inadequate in the circumstances that the conclusion was irresistible that his discretion had in some way miscarried.

It appears to me to be unnecessary to express any view about the first ground because I consider that the second ground has been made out. The evidence showed that the defendant, when he drove his car, was not forced by any pressure of circumstances to do it. Further, he was driving at the time when he was, in the words of one of the witnesses, semi-drunk, and on his own account he had recently been drinking. He was further in a state of belligerent excitement which led him to behave in an extremely violent manner. And if one casts round for circumstances of extenuation which might have moved the magistrate, it is difficult to see what they could have been, except that the area where the driving occurred may have been a quiet one and that the defendant's speed was not excessive, and that he was a man of previous good character. Those considerations, however, were quite inadequate to warrant the imposition by way of sentence of what was only a nominal or token punishment. In my view, therefore, the magistrate's discretion has here clearly miscarried.

It must be borne in mind that the offence of driving during a period of disqualification is a very grave one and that if persons who cannot point to strong circumstances of extenuation are allowed to commit it without substantial punishment, then the effort of the community to control improper driving by withdrawal of licences breaks down.

In my view it was an altogether unreasonable course that was taken here, the magistrate imposing a nominal penalty in a case which called for a substantial one. Accordingly, I consider that the order nisi should succeed on the second ground.

ADAM J: I agree. I feel so strongly that the second ground has been substantiated that in view of the difficulties raised by the first ground, which I may say raise an interesting problem, I prefer not to express any opinion at this stage on that ground. Let it wait until it is necessary for determination of a particular case, partly due to the long-standing practice of imposing sentences of this sort. I think one should be cautious unless it is necessary to express a conclusion, as to whether what was done here amounts to the imposition of a term of imprisonment or not. So I would leave that entirely open at this stage. But I agree with what my brother, the presiding judge, said, as to the second ground and I think that there should be strong circumstances present before purely nominal penalties are imposed for this offence. That is obviously the intention of the legislature which has taken away the option of imposing fines for this class of offence. We have not got the benefit of the Magistrate's reasons for acting as he did in imposing this nominal penalty in regard to such a driving licence charge, so we are left with what he did and the evidence on which it must have been based. It appears to be a case where, without knowing precisely where the magistrate went wrong, the result of what he did indicates that in his reasoning he could not have taken into account all the relevant circumstances, or has admitted irrelevant circumstances. My view is that his direction has in some way miscarried. In the result I agree with the presiding judge that the second ground of the order nisi succeeds.

LITTLE J: I agree that this order should be made absolute on the second ground and I agree with the reasons given for that course that have been already expressed by the learned presiding judge and by my brother Adam. I think I cannot usefully add anything further.

SMITH J: The order of the court is that the order nisi is made absolute. The sentence below is set aside and the case remitted to the stipendiary magistrate to impose a sentence consistent with

the reasons stated by this court. Counsel for the informant having undertaken that the Crown will not enforce the order for costs in case there has been prejudice to the defendant through the Court not having had put before it the terms of the applicable provisions of the *Appeal Costs Fund Act* it is ordered that the defendant pay to the informant $120 costs.

APPEARANCES: For the complainant/respondent Gates: Mr RM Johnstone, counsel. Kiddle, Briggs & Willox, solicitors. For the defendant/applicant Heron: Mr HH Ednie, counsel. James Kelleher, solicitor.
