

28/85

SUPREME COURT OF VICTORIA

McKEON v ANSCHITZ

Nathan J

27 June 1985 — [1985] 3 MVR 96

MOTOR TRAFFIC – DRIVER'S LICENCE – INTERSTATE RESIDENT – HOLDER OF VICTORIAN LICENCE SUSPENDED – ACCUMULATION OF DEMERITS – SUSPENSION – WHETHER DRIVING WHILST LICENCE SUSPENDED – WHETHER INTERSTATE RESIDENT DRIVING WHILST UNLICENSED: MOTOR CAR ACT 1958, S22C, 24, 27A-D, 28(1).

A. was intercepted by Police whilst driving his motor car. After subsequent enquiries it transpired that A. had a New South Wales driver's licence and that his motor car was registered in the State. His employment took him to many Australian States. It was also revealed that A. gave an address in Victoria and that at the time of driving, he "held" a Victorian driver's licence which had been suspended pursuant to the Demerit Points system. Subsequently, A. was charged with driving a motor car during the period of suspension of his licence; however, the charge was dismissed apparently on the ground that A. was not required to be licensed to drive because of his being an interstate resident. On order nisi to review—

HELD: Order absolute, but due to lapse of time, no further action recommended.

(1) An offence against s28 of the Motor Car Act 1958 may be committed by any person – whatever his state of residence – who drives in Victoria whilst a Victorian licence he held or holds has been suspended.

(2) In such cases, the informant carries the burden of proof to displace the driver's honest and reasonable belief that he was not suspended from driving.

Kidd v Reeves [1972] VicRp 64; [1972] VR 563, applied.

(3) As this issue did not arise in the proceedings before the Magistrate, and that some 3½ years had elapsed since the commission of the alleged offence, it was not appropriate to refer the matter back to the Magistrate for adjudication.

(4) By virtue of S27A-G of the Motor Car Act 1958, a person's licence to drive may be suspended by judicial decisions and/or administrative procedures. However, the question whether an interstate resident is guilty of unlicensed driving may depend on whether such person has been disqualified from driving by a Court.

NATHAN J: [1] This is the return of an order nisi to review a decision of the Magistrates' Court at Brighton. An information laid by the applicant that the respondent drove a car on the Nepean Highway during a period for which his licence had been suspended, contrary to section 28(1) of the *Motor Car Act* 1958 (the Act) was dismissed, section 28(1) reads in part:-

... Any person who drives a motor car during the period of any suspension of his licence ... or during any period of disqualification ... shall be guilty of an offence ...

The grounds in the Order nisi raised a single issue: the Magistrate should have convicted Anschitz because his New South Wales licence did not permit him to drive in Victoria while his Victorian licence was suspended pursuant to the demerit system. **[2]** The evidence was a short compass. The applicant swore that he saw the respondent driving a car on the highway; he intercepted him. When asked for his licence, Anschitz produced a New South Wales licence. These are the relevant parts of conversation which ensued:-

Q. "What is your full name and address?"

A. "Wilhelm Anschitz of 13 Northcote Street, Seaford".

Q. "I have information here which says that your Victorian drivers licence was suspended on 28th December 1981 for three months. What do you say to that?"

A. "I don't think so."

Q. "Do you hold a Victorian drivers licence?"

A. "No. I handed it in to the Frankston Police Station."

Further conversation took place at a nearby Police Station:

Q. "Before you told me that the Licence had been handed into the Frankston Police. Why did you do this?"

A. "I received a letter saying to do it."

Q. "Why did you have to hand the licence in?"

A. "Because of your point system I think."

Q. "Would I be correct in saying that you had received a number of traffic notices and the Court suspended your licence because of this?"

A. "I think that is what happened."

Q. "Why were you driving a motor car on a highway if your licence had been suspended?"

A. "Because I had a N.S.W. licence."

Q. "How long have you had that licence for?"

A. "For about six months I think."

Q. "Did you realize that the NSW licence was not valid in Victoria while you are on a period of suspension?"

A. "No, I did not know I thought I could use this one." [3]

Q. "Did you receive a notice from the Chief Commissioner stating that you cannot drive in Victoria for three months?"

A. "I got a letter saying to hand the licence in that's all."

Q. "Did you read the letter completely?"

A. "No."

Anschtz gave evidence on oath that at the time he was intercepted by police he was not a permanent resident of Victoria. However, I note he then gave the Seaford address listed on his suspended Victorian licence. He produced a New South Wales Driver's licence and registration certificate for the car he was then driving. He also produced documents to show that his employment as a cattle buyer took him to many States. Section 22(C) of the Act makes it an offence to drive in Victoria without an appropriate licence:

"A person who drives a motor car upon a highway without being the holder of an appropriate permit or licence ... shall be guilty of an offence ...

The words "appropriate licence" are not limited to the type of vehicle concerned, but also mean a licence appropriate to the circumstances of the driving. Section 24(1) authorizes interstate residents to drive on Victorian roads in specific circumstances, but only if they hold an appropriate licence:-

Any person who ordinarily resides outside Victoria ... may subject to this section drive a motor car in Victoria if holds (a) a licence to [4] drive ... which licence ... was issued in the State ... in which he ordinarily resides or resided at the time of the issue ...

The terms of the section refer to it being subject to section 24 as a whole and being predicated upon the driver being ordinarily resident in some other State or Territory. Sub-section (2) reads:

"Any ... person so driving shall not be guilty of an offence ... in respect of ... driving a motor car upon a highway without being licensed for the purpose ...

However, the enumerated exceptions to the section 22 requirement to hold an appropriate licence contained in section 24(1) and (2) are subject to sub-section (3):-

"The foregoing provisions of this section shall not apply to any person:- (b) ... who by order of a court is for the time being disqualified from driving a motor car ...

I now consider whether the proviso applies to a person whose licence has been suspended by the operation of the demerits system. The demerits system was introduced by Act No. 7915 [1970]. So far as is relevant it reads:

Section 27A. "Where the holder of a licence to drive ... is convicted for an offence ... in the Fifth Schedule or expiates such an offence ... the Authority shall record ... in the Demerits Register ... the

number of demerit points ... referred to in the Schedule ..."

Section 27B(1). "Whenever ... there is recorded in the Demerits Register a total of twelve ... demerit points incurred within any period of three years the Authority shall by notice in writing ... suspend for a period of three months the licence ..."

[5] Section 276(2). "A person whose licence to drive a motor car is suspended by notice under this section shall be deemed not to be licensed to drive ... during the whole of the period of the suspension ..."

Section 276(4). "The notice of suspension ... may be served personally or by registered post ... at the address shown in the licence ..."

Section 27D. "Where a licence to drive ... is suspended ... the holder of the licence shall forthwith deliver ... the licence to the police station ..."

The points are recorded in the Register kept by the Road Traffic Authority against an individual and not a particular class of licence: *R v Magistrates' Court at Melbourne; Ex parte Chief Commissioner of Police* [1982] VicRp 24; [1982] VR 268. The two avenues by which demerit points are awarded are thus clearly defined. The first is by conviction recorded by way of Court Order in respect of one of the offences listed in the Fifth Schedule (offences under the *Motor Car Act*, the *Road Traffic Regulations* etc.). These points accrue as a concomitant result of conviction additional to any penalty the Court may impose. The second avenue is expiation of an offence by payment of the appropriate fine (e.g. section 11 *Road Traffic Act* 1958 and *Road Traffic (Infringements) Regulations* 1978). The demerit point is earned and finds its way onto the Register when the driver accepts an "on the spot ticket" and pays the stated penalty. The Register records demerit points accumulated by both judicial decisions and administrative procedures.

Upon establishing that the required number of demerit points have accumulated the Authority shall, by notice in writing, suspend the licence. The person whose licence is suspended by action of the Authority is deemed not to be licensed to drive (section 27B(2)). [6] Section 24(3) (b) of the *Motor Car Act* is also clear; the permission of interstate residents to drive in Victoria does not extend to a person "who by order of a court is for the time being disqualified ... from driving a motor car". There is no punctuation between the phrase, "order of a Court" and from driving a car", therefore sub-section 3 operates to incriminate persons, whatever their place of residence, who drive in Victoria if their Victorian licence has been suspended or they are disqualified from obtaining one pursuant to Court Order(s). The use of the word "suspension" of licences in section 27A-G and the word "disqualified" in section 24(3)(b) "... for the time being disqualified from driving ..." is without significance. Disqualified carries its ordinary meaning, that is, not being possessed of the qualifications which permit a person to drive. If the authority or permission to drive is temporarily withheld i.e. suspended, the person at the time is disqualified. The distinction between the temporary abeyance of an existing licence connoted by suspension, and disqualification whereby a person is excluded from holding any licence whatsoever is not pertinent in respect of these sections.

In summary, then, a person's licence to drive a motor car may be suspended by the operation of section 27B(1) of the *Motor Car Act* either because the person has accumulated twelve demerit points by having convictions recorded against him in court proceedings, or by administrative action through his expiation of offences by the payment of "on the spot" fines, or by some combination of the two. The provisions of section 24(3), however, [7] relate only to those whose licences have been suspended, and who have therefore been disqualified from driving, by order of a Court. The production before the Magistrate of a certificate certifying Anschitz's Victorian licence had been suspended would not disclose whether that followed Court orders or resulted from the accumulation of points through administrative action. It may be that sub-section 3 did not apply to him. However, for the following reasons that is of no assistance to the respondent. He was not charged with driving whilst unlicensed but pursuant to the provisions of section 28 which create a different offence, namely driving whilst his licence was suspended or whilst disqualified.

The legislation intended a distinction and made that manifest in the more severe penalties attaching to driving whilst suspended or disqualified than those attaching to unlicensed driving (see also *Deans v Cursio* [1974] VicRp 78; [1974] VR 640). Section 24 relates to persons temporarily visiting Victoria or in the process of taking up residence. Sub-section 1 defines the circumstances

in which such persons may drive, that is while holding a valid licence for their State or origin. However, sub-section 2 is specifically confined to "such persons who have not been guilty of an offence under this part by driving without being licensed for that purpose". I am satisfied the specific reference to the lack of a licence refers to the unlicensed driving offence in section 22(C). Section 28 which employs the terms any person driving during a period of suspension of his licence", means any individual whatever his [8] State of residence who drives in Victoria whilst a Victorian licence he held or holds has been suspended. The section attaches to the person who drives whilst his licence is suspended. It is nominative. Whether Anschtz' belief that he was entitled to drive under the New South Wales licence was reasonable under the circumstances was not an issue before the Magistrate. He must have accepted that Anschtz was a New South Wales resident and thus entitled to the exculpatory provisions of section 24. I observe that the inference that Anschtz believed his Victorian licence has been suspended under the demerits system is very strong. The effect that inference may have had upon whether his belief that he could drive using his New South Wales licence was reasonable in the circumstances is an untried issue. The ultimate burden of displacing the belief, if reasonable of the respondent, would lie with the informant. (see *Kidd v Reeves* [1972] VicRp 64; [1972] VR 563). As three and a half years have passed since the commission of the offence it is not appropriate to refer this matter to the Magistrate for adjudication on what may only possibly be disputed issues of fact. The order nisi will be made absolute on Ground a. Grounds b and c become redundant.
