

37/73

SUPREME COURT OF VICTORIA

JOHNS v BENTLEY

Dunn J

27 November 1973

MOTOR TRAFFIC – PERSON DRIVING WHILST UNLICENSED – PLEADED GUILTY – NO EVIDENCE FROM POLICE INFORMANT THAT THE DRIVER HAD EVER HELD A DRIVER LICENCE OR INTERNATIONAL DRIVING PERMIT – MAGISTRATE PERSUADED DEFENDANT TO CHANGE HIS PLEA TO NOT GUILTY – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, SS22C(1)(a), 24.

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrates' Court to be dealt with in accordance with the law.

It would seem to be clear from the language that is used in s22C(1)(a) of the *Motor Car Act 1958* that the responsibility of satisfying the Court under s24 that the defendant was not the holder of a licence or the holder of an international driving permit was upon the defendant.

DUNN J: This is an order nisi to review the dismissal of an information by the Stipendiary Magistrate sitting in the Magistrates' Court at Box Hill on 22 May 1973, when he dismissed an information against the defendant for having driven a motor car on 23 March 1973, along Whitehorse Road, Blackburn, without being the holder of a licence to drive a motor car. The charge was laid under s22C(1)(a) of the *Motor Car Act 1958*. The defendant in fact pleaded guilty but he was induced by the learned Stipendiary Magistrate to change his plea after the witness for the informant, Senior Detective Johns, had given evidence.

The evidence of Senior Detective Johns clearly established that the defendant was the driver of a motor car on the occasion and the date and the place alleged. He also gave evidence of an admission by the defendant that he had never held a motor driver's licence. The learned Stipendiary Magistrate was minded to persuade the defendant to change his plea and to dismiss the information because he held that it was obligatory on the informant to lead evidence that would satisfy him that the defendant had never held a motor driver's licence or an international driving permit. As those questions had not been asked of the defendant in a form which in fact conveyed to the Magistrate that the defendant had never held any of those things, he dismissed the information.

It was decided by my brother Norris in the case of *Peck v De-Saint-Aromain* [1972] VicRp 22; [1972] VR 230 that the burden of proving that he holds a licence to drive a motor car or is otherwise exempt by reason of the provisions of s24 of the *Motor Car Act* lies upon the defendant and it is not upon the informant in the first instance to lead any evidence for the purpose of establishing that the defendant was not the holder of a licence or the holder of an international driving permit within the meaning of s24.

What apparently the Magistrate had in mind was the other part of the decision in *Peck v De-Saint-Aromain*, namely, that it was for the prosecution to prove into which category of persons the defendant fell for the purpose of penalty under s22C. That section established different penalties if the person had previously been the holder of a licence but was not at the time of the offence the holder of one, or if he had never held a licence previously at all. Apparently the amendment which has been effected to that part of s22C(1) was not drawn to the learned Stipendiary Magistrate's attention. That part of the section was amended by the *Motor Car (Amendment) Act* (1972) No. 8279 s5, which came into operation on 7 June 1972 – see the notice published in the *Government Gazette* at p2062.

The effect of that amendment is to leave the penalties the same for the respective classes of drivers but it removes the effect of the decision in *Peck's case* that the burden is on the informant to prove into which category a defendant came. As amended, the section provides for a penalty

of not less than \$100 or more than \$400 or imprisonment for a term not exceeding six months, unless the Court is satisfied that the person has at some time been the holder of the required licence or permit.

It would seem to be clear from the language that is there used that the responsibility of satisfying the Court of that matter is upon the defendant because it attracts a lower penalty, and it would seem that the purpose of the amendment was to overcome the problem which the decision in *Peck's case* had created.

Accordingly, the order nisi will be made absolute on each of the three grounds which have been taken in the order nisi. Having regard to the fact that the defendant pleaded guilty and only changed his plea at the instigation of the Stipendiary Magistrate, I think I should exercise my discretion and make this order absolute without costs. It will be necessary, I think, that the matter be remitted to the Magistrates' Court at Box Hill to be dealt with according to law.

The order is that the order nisi is made absolute and the order dismissing the information in the Court below is set aside and the Information remitted to the Magistrates' Court at Box Hill to be dealt with according to law.
