

19/77

SUPREME COURT OF VICTORIA

KUZMA v DEMMLER

Harris J

2 March 1977 — [1977] VicRp 41; [1977] VR 337

MOTOR TRAFFIC – SPEEDING OFFENCE – COMMITTED WHILST HOLDER OF A LEARNER'S PERMIT – OFFENDER HAD PROBATIONARY LICENCE WHEN CONVICTED OF OFFENCE – MANDATORY CANCELLATION OF PROBATIONARY LICENCE ISSUED AFTER DATE OF OFFENCE – WHETHER MAGISTRATE IN ERROR IN NOT CANCELLING PROBATIONARY LICENCE: MOTOR CAR ACT 1958, S22B(3A).

Defendant convicted of exceeding 60 km/h. At time of conviction he held a probationary licence to drive a motor car — at time of offence he did not hold such licence but drove on a learner's permit. Question arose as to whether s22B of the *Motor Car Act* 1958 ('Act') imposed a mandatory obligation to cancel a probationary licence issued after date of offence. Defendant was convicted of the charge but the Magistrate refused to cancel the defendant's driver licence. Upon Order Nisi to review—

HELD: Order absolute.

1. **The language of s22B of the Act was clear. It was drafted in the present tense. It referred to a "person who is the holder of a licence issued on probation under this Part". That was plainly speaking of a person who was the holder of such a licence at the time when the person was convicted.**

2. **Consequently, the position was that the Magistrates' Court was obliged to cancel the probationary driver's licence of the person holding such a licence at the time of conviction unless, notwithstanding the actual words of the section, something was to be read into them which reduced their scope.**

3. **The Magistrate was in error in taking the view that he had a discretion as to whether or not he had to cancel the defendant's probationary licence. By virtue of the provisions of s22B(3)(a) of the Act it was mandatory for the Magistrate to have cancelled the defendant's licence in this case.**

HARRIS J: On 9 August 1976 Rodney Telford Demmler was the defendant to an information in which Stanley Peter Kuzma was the informant. The information was heard in the Magistrates' Court at Geelong. There were two informations before the Court but the one with which this Court is concerned is the one in which the defendant was charged with having driven in a built-up area at a speed exceeding 60 kilometres per hour on a highway, to wit, The Esplanade and Lunar Avenue. The defendant was present in Court on the hearing of the information. He was not represented. He pleaded guilty to the information. He was convicted by the Magistrate and fined \$12 in default 24 hours' imprisonment.

There was a discussion between the informant, who acted as prosecutor, and the Magistrate with respect to the course that the Magistrate should take with respect to the informant's licence to drive a motor car. At the close of the prosecution's case the Magistrate said he found both informations proved and asked if anything was known against the defendant. The informant then informed the Magistrate that the defendant was the holder of a probationary licence to drive a motor car. The Magistrate then asked whether it was necessary for him to cancel the probationary licence. The informant submitted that where the holder of a probationary licence was convicted as in the present circumstances, the licence should be cancelled. The Magistrate then stated that in his opinion this was not so and declined to make any order cancelling the defendant's licence. As appears from the answering affidavit of the defendant, the defendant also informed the Magistrate that he needed his driving licence as he was a trotting driver and he explained the reasons why he needed his driving licence. I might just add that the defendant also says in his answering affidavit that he had obtained his probationary licence on 11 June 1976.

It is the refusal of the Magistrate to cancel the probationary driving licence of the defendant which is the subject of this order to review.

The order nisi was granted on 6 September 1976 and the grounds are as follows:—

"A. That the Magistrate was wrong in holding (if he so held) that on the conviction of a person who was the holder of a licence issued on probation of an offence referred to in the Fourth Schedule of the *Motor Car Act* 1958 the Court had a discretion as to whether or not it would cancel the licence of such person; and

"B. That the Magistrate should have held that subs(3)(a) of s22B of the *Motor Car Act* 1958 required the Court on convicting the respondent of the said offence to cancel the licence issued to the respondent pursuant to subs(1) of that section notwithstanding that the offence had been committed before that licence had been issued to him..."

On the return of the order nisi Mr Meagher has appeared as counsel to move the order nisi absolute and Mr Leckie of counsel has appeared for the defendant to show cause why it should not be made absolute. I am indebted to both counsel for the clarity of the arguments which they have presented to me.

I think it is convenient to deal at the outset with one point which was raised by Mr Leckie as a reason why, in any event, the order nisi should be discharged. Mr Leckie submitted that before the Magistrate could cancel any licence it was necessary for the Magistrate to have had proper proof that the defendant was the holder of such a licence. As the material which I have already read from the affidavit discloses, the informant did not prove that the defendant was the holder of the licence by the production of an appropriate certificate. What he did was to state to the Magistrate that the defendant was the holder of a probationary licence. It is unnecessary for me to say what the situation would have been if the matter had rested there. It did not rest there.

The defendant obviously heard what the informant had said and made a submission to the Magistrate as to why his licence should not be taken away from him. In my opinion, the evidence as to what happened shows quite clearly that the defendant admitted that he was the holder of a probationary driving licence at the time when the Magistrate was dealing with the question of penalty. Therefore, I do not find that the order nisi should be discharged, whatever the position is as to the construction of the relevant section. I may also add that the fact that the defendant had such a licence is clear by the answering affidavit. The Magistrate, of course, was aware from the fact that there were two informations that the position on 8 March 1976, which was the date of the alleged offence, was that the defendant did not then have a probationary licence, because the other information related to his conduct while he was the holder of a learner driver's permit.

I turn then to the question of the construction of the relevant provisions of the *Motor Car Act* 1958. This is what is raised by the order nisi. The relevant provision is contained in s22B(3). That reads:—

"Where any person who is the holder of a licence issued on probation under this Part is convicted of any offence referred to in the Fourth Schedule to this Act in respect of a motor car or of an offence against subs(4B) of section eleven A of the *Road Traffic Act* 1958—

(a) the licence shall be cancelled by the court by which the offender is convicted..."

The language of that section is clear. It is drafted in the present tense. It refers to a "person who is the holder of a licence issued on probation under this Part". That is plainly speaking of a person who is the holder of such a licence at the time when the person is convicted. In my opinion, that is just what the section says. Consequently, the position must be that the Magistrates' Court is obliged to cancel the probationary driver's licence of a person holding such a licence at the time of conviction unless, notwithstanding the actual words of the section, something is to be read into them which reduces their scope.

Mr Leckie submitted that that was the case. He submitted that the words should be read so that the section only applied to the case of a person who was the holder of a probationary licence at the time when he committed the offence. Of course, it would have to follow that the person would also have to be the holder of such a licence at the time when he was convicted.

Mr Leckie referred to the decision of Newton J, in *Hyde v Dunbar* [1971] VicRp 66; [1971] VR 550. In that case, his Honour had to consider a question with respect to the construction of this very section. The question was a different one. The defendant in that case had been convicted of an

offence of driving a motor cycle at an excessive speed. He held a probationary licence to drive a motor car and a probationary licence to drive a motor cycle. The Magistrate cancelled his licence to drive the motor cycle but not the licence to drive the motor car. The contention for the informant was that the section obliged the Magistrate to cancel both licences. His Honour rejected that contention. He did so after considering how subs(3) should be construed. To solve the problem that was before him his Honour had subs(5) to guide him; indeed, this sub-section controlled the interpretation of subs(3). Subs(5) expressly provided that in subs(1), subs(2) and subs(3) of s22B "licence" meant "licence to drive a motor car other than a motor cycle or to drive a motor cycle". As his Honour's reasons show, he held that when those words were applied to subs(3), as subs(5) requires them to be, it produced the result that you had to read that sub-section so that the licence to be cancelled related to the licence to drive the kind of motor vehicle in respect of which the defendant had been convicted. Hence his Honour held that the Magistrate in that case was correct in the course which he adopted.

His Honour's reasons include a passage in which he stated his view that when the section was construed in the way in which he held that it should be, it fulfilled an intelligible purpose and operated in a logical manner (see p557). His Honour illustrated this by taking as one example the case of a person who held a probationary licence and who was convicted of exceeding the 35 miles per hour speed limit while driving an ordinary motor car. His Honour said:

"...s22B(3) says that he has abused his privilege as the holder of a probationary car licence and must be disciplined by the cancellation of his probationary car licence for at least three months." (The section has been altered now so that there is no question about the time for which the licence is to be cancelled.)

Mr Leckie sought to rely upon that passage as indicating that his Honour indicated that he was referring to a person who had held a licence at the time that he abused it. There is, I think, some substance in that point as a matter of the construction of the sentence, but it has to be borne in mind that his Honour was there only illustrating the consequences of the interpretation which he adopted and was not there adverting to the temporal problem that arises in this case. I do not consider that there is to be read into his Honour's words an expression of opinion that he was adopting the view that the situation had to be one in which the defendant had a licence and therefore a privilege to abuse at the time when the offence took place if he was to be subject to the penalty of having that licence cancelled under subs(3)(a).

I am further fortified in that view by the circumstance that the facts of *Hyde v Dunbar* [1971] VicRp 66; [1971] VR 550, did raise the problem which arises in this case and that the problem was the subject of argument before his Honour. His Honour did not find it necessary to decide the point. What he said (at pp558-9) about the point is this:

"I should perhaps add that even if the interpretation placed by counsel for the informant on s22B(3) were in general correct, it might be arguable (and indeed counsel for Dunbar so submitted) that since Dunbar's probationary car licence was issued after the date of the offence in question, s22B(3) did not require the stipendiary magistrate to cancel it. And however this may be, it appears to me..."

Then his Honour went on to deal with another point which was that the car licence had not been proved or even sought to be proved before the stipendiary magistrate and then he concluded by saying:

"...I find it unnecessary to express a concluded view upon any of these matters."

Thus his Honour, as I understand him, left it completely open as to whether the fact that the defendant did not hold the probationary licence at the time of the offence was a reason why the probationary licence which he held at the time he was convicted should not be cancelled. I therefore do not find anything in that decision which requires me to depart from what in my opinion is the plain meaning of the words actually used in subs(3).

I am not persuaded by the argument of Mr Leckie that there is anything in the situation which requires such an implication to be read into subs(3) so that its scope is cut down. Indeed, in my opinion, when one adverts to some other relevant provisions in the Act, they fortify the conclusion which I think is the correct one.

I turn to s26 which is the broad provision in the Act giving a discretionary power to Magistrates'

Courts to cancel driving licences. Amongst other things it provides in subs(1):—

"Any magistrates' court before which a person is convicted of an offence under this Act or of any offence in connection with the driving of a motor car— (a) may, if the person convicted holds any licence to drive a motor car under this Act...cancel the licence..."

Now, that, in my opinion, plainly speaks of a situation existing at the time of the conviction. It is true that the language is a little different in the sense that the word "holds" is used as distinct from the expression "is the holder of". But, in my opinion, the language in each section is to exactly the same effect.

Then by way of contrast one might turn, for example, to s22B(2A). That provides:—

"Any person being the holder of a licence issued on probation under this Part who within a period of twelve months after the date of issue of such licence drives a motor car at a speed exceeding 80 kilometres per hour shall be guilty of an offence against this Part and liable to a penalty of not more than \$100."

There the statute makes it equally plain that, in that case, for the offence to be committed the person must hold the probationary licence at the time he drives the motor car at the excessive speed. That section immediately precedes subs(3) and the difference in the language is very obvious.

For the reasons which I have given I am of the opinion that the Magistrate was in error in taking the view that he had a discretion as to whether or not he had to cancel the defendant's probationary licence. I hold that by virtue of the provisions of s22B(3)(a) it was mandatory for the Magistrate to have cancelled the defendant's licence in this case. No other challenge is made to the correctness of the conviction for the offence, which was laid under the *Road Traffic Regulations*.

It was submitted to me by Mr Meagher that if I made the order nisi absolute I should amend the order of the Magistrates' Court so that it included an order cancelling the probationary licence. If the situation was one in which there was still some question of discretion to be exercised, then the matter would have to be remitted to the Magistrates' Court because, as the answering affidavit shows, the defendant relies upon certain matters as being a basis for exercising any discretion in his favour. As I have found that it is mandatory for the licence to be cancelled it is not open to the Court to take into account those matters and if the matter were remitted it would be an automatic matter for the Magistrate to cancel the licence. There is obviously no reason for doing that because it is in the power of this Court to amend the order below so that the proper order is made and that is what I will do in this case.

The order is: order nisi made absolute on grounds A. and B. Order of the Magistrates' Court at Geelong made on 9 August 1976 amended by adding to the said order, "Order that the licence issued to the defendant on probation under Pt 3 of the *Motor Car Act* 1958 be cancelled." Order that the defendant pay the informant the sum of \$200 costs. I grant an indemnity certificate to the respondent pursuant to the provisions of s13 of the *Appeal Costs Fund Act*. Order absolute.

Solicitor for the informant: EL Lane, Crown Solicitor.

Solicitors for the defendant: Campbell and Shaw.