06/90

SUPREME COURT OF VICTORIA

KENNAN v MEARS

O'Bryan J

25 January 1990

STATUTORY INTERPRETATION – "SUBSEQUENT OFFENCE" – PENALTY FOR – GENERAL RULE OF CONSTRUCTION – TWO DRINK/DRIVING OFFENCES HEARD TOGETHER – WHETHER SECOND OFFENCE A "SUBSEQUENT OFFENCE": *ROAD SAFETY ACT* 1986, SS48(2), 49, 50(1).

1. As a general rule of statutory construction in relation to penalty, a second or subsequent offence must be subsequent to a conviction for a first offence.
***Bell v Feehan* [1985] VicRp 82; [1985] VR 841; (1985) 2 MVR 341, applied.**

2. Notwithstanding the provisions of ss48(2), 49 and 50(1) of the *Road Safety Act* 1986, the general rule of construction has not been excluded in relation to penalties for drink/driving offences. Where an offender pleaded guilty to two drink/driving offences committed six days apart, it was not open to the magistrate to treat the second charge as a "subsequent offence". However, given the offender's continuing disobedience of the law, a penalty in excess of the minimum was warranted.

O'BRYAN J: [1] This is an order nisi to review a decision given in the Magistrates' Court at Dromana on 1st May 1989. On that date, the learned Magistrate determined two informations for offences against s49(1) of the *Road Safety Act* 1986 in which the plaintiff in this Court was the defendant, and the defendant in this Court was the informant.

By information dated 29th March 1989, the plaintiff was charged that on 21st October 1988, he drove a motor vehicle while more than the prescribed concentration of alcohol was present in his blood, to wit .15 grams of alcohol per 100 millilitres of blood, contrary to s49(1)(b). I shall refer to this information hereafter as the "First information". By information dated 14th March 1989, the plaintiff was charged that on 27th October 1988, within three hours after driving a motor vehicle, a sample of his breath furnished for analysis by a breath analysing instrument recorded more than the prescribed concentration of alcohol present in his blood, to wit .145 grams of alcohol per 100 millilitres of blood, contrary to s49(1)(f). I shall refer to this information hereafter as the "Second information".

The two informations came on for hearing on 1st May 1989 and were heard together. When the offence alleged in the first information was read in court, the plaintiff pleaded guilty. When the offence alleged in the second information was read in court, the plaintiff also pleaded guilty. **[2]** After hearing a plea for leniency, the learned Magistrate imposed the following penalties. In respect of the first information, the plaintiff was fined and his licence cancelled. The plaintiff was disqualified from obtaining another licence for 15 months.

The proceeding in this court is not concerned with the penalty imposed in respect of the first information. In respect of the second information, the plaintiff was fined and his licence cancelled. He was also disqualified from obtaining a further licence for a period of 28 months. The learned Magistrate acceded to a submission made by the defendant that the second information was "A subsequent offence" within the meaning of s50(1)(f) of the Act and attracted the minimum period of disqualification specified in column 3 of Schedule 1 of the Act, namely, 28 months. Counsel for the plaintiff had submitted in the court below that the relevant minimum period of disqualification was 14 months, being the relevant minimum period of disqualification in the case of a first offence [s50(1)(d)]. The grounds of the order nisi are:-

> (1) That the Magistrate erred in finding that the offence committed by the defendant on 21st October 1988 should be treated as a prior offence for the purpose of determining the period of time that the defendant should be disqualified from obtaining a licence.

(2) That the Magistrate erred in ordering that the defendant's licence shall be cancelled, and the defendant disqualified from obtaining a licence for a period of 28 months.

[3] Provisions about cancellation and disqualification are provided in s50 of the Act as amended. The relevant provisions for the purposes of an offence against s49(1)(b), or s49(1)(f) are as follows:-

> "S50(1)(d) In the case of a first offence against s49(1)(b), (f), or (g) the period specified in column 2 of Schedule I ascertained by reference to the concentration of alcohol in the blood of the offender as specified in column 1 of that schedule; and
>
> (e) not relevant;
>
> (f) in the case of a subsequent offence against s49(1)(b), (f) or (g), the period specified in column 3 of Schedule 1 ascertained by reference to the concentration of alcohol in the blood of the offender as specified in column 1 of that Schedule."

(Underlining for emphasis).

The point at issue here is whether the expression "subsequent offence" means an offence allegedly committed following an earlier offence in respect of which the offender has not been convicted. There is considerable authority for the proposition that where increased penalties are prescribed for a second, or third, or subsequent offence, an offence is not ordinarily to be considered a second, or third, or subsequent offence unless it is proved that the alleged second, or third, or subsequent offence was carried out after a prior conviction for a former offence (Cf. *Knox v Bible* [1907] VicLawRp 87; [1907] VLR 485 at 494; 13 ALR 352; 29 ALT 23; *O'Connor v Bini* [1908] VicLawRp 79; [1908] VLR 567 at 572; 14 ALR 537; 30 ALT 74; *Farrington v Thomson and Bridgland* [1959] VicRp 49; [1959] VR 286 at 288; [1959] ALR 695). In *O'Connor*, Hodges J said:-

> "It has been held – and as far as I know invariably held since Lord Coke's time – to be a general rule in regard to Statutes of this kind, that where the Statute fixes one penalty for a first offence **[4]** and another penalty for a second offence the accused must have been convicted of the first offence before the commission of the second offence in order to justify a conviction and penalty as for a second offence."

This principle has been applied recently to motor car legislation in other States similar to the *Road Safety Act* (Cf. *O'Hara v Harrington* [1962] Tas SR 165 at 167; *Carter v Denham* [1984] WAR 123). In the present case, the plaintiff did not commit a subsequent offence after an actual conviction for the first offence, because he was simply charged with a subsequent offence, when the first offence was extant. Mr Thomas, who appeared for the defendant, relied upon s48(2) for the proposition that the legislature intended to, and did, exclude Coke's rule of construction that, as to penalty, the second, or subsequent offence, must be subsequent to a conviction for a first offence. Cf. *Bell v Feehan* [1985] VicRp 82; [1985] VR 841 at 843; (1985) 2 MVR 341 where Gobbo J refers to the principle "as well established".

Section 48 in Part V of the *Road Safety Act* has a heading "Interpretative Provisions". Sub-section (2) provides:-

> "If a person who is convicted of an offence against any one of the paragraphs of s49(1) has at any time been convicted of an offence against any other of those paragraphs, or any previous enactment corresponding to any of those paragraphs, or any corresponding law, the conviction for the offence against that paragraph is to be taken to be a conviction for a subsequent offence."

Mr Thomas submitted that the expression "has at any time been convicted" should be construed to mean the legislature intended that a person is to be regarded as a subsequent offender for the purposes of statutory **[5]** escalations in penalty, provided the conviction for the first offence is recorded at any time before the conviction for the subsequent offence. Therefore, so the argument proceeded, on 1st May 1989, the plaintiff was convicted first of an offence committed on 21st October 1988, and a few minutes later of a subsequent offence, committed later in time, on 27th October, and the subsequent offence attracted an escalated penalty.

In my opinion, this construction should not be given to s48(2) of the Act. The purpose of sub-section (2) is not to exclude the well-established Coke's rule of construction, but simply to

extend the escalation penalty provisions enacted in the *Road Safety Act* 1986 to a conviction of an offence under corresponding repealed legislation. Immediately before the *Road Safety Act* 1986 was enacted, motor vehicle offences involving alcohol or other drugs, were enacted in Part VI of the *Motor Car Act* 1958.

Problems of the kind considered by Pape J, in *Davison v Plum* [1960] VicRp 50; [1960] VR 321 at 323, in relation to prior convictions were overcome when the *Penalties and Sentences Act* 1981 was enacted, because s4 of the 1981 Act provided, in essence, that proof of a conviction under a previous provision had the same force and effect as proof of a conviction under a corresponding reenacted version. Section 4 of the 1981 Act had a wide application to convictions for offences against previous enactments, which had been repealed or substantially re-enacted. However, in 1985, when Parliament enacted a new *Penalties and Sentences Act*, s4 of the 1981 Act was omitted.

But, s48(2) of the *Road Safety Act* reproduced s4(1) in the 1981 Act. **[6]** I am satisfied that in order to preserve, or continue convictions of offences recorded under previous enactments, corresponding to offences against s49(1), for the purposes of escalation penalty provisions, s49(2) was enacted. Sub-section (2) was not enacted to exclude Coke's rule of construction. Further, s47 of the *Road Safety Act*, which specifies the purposes of Part V of the Act, does not specify a purpose to exclude Coke's rule of construction. In *O'Hara*, Burbury CJ, observed at 169:-

> "This three century old canon of construction of penal provisions of this kind is broadly based on principle, and does not depend upon the precise language used in a statute. It ought not to be excluded unless the legislature has plainly said so".

I agree, with respect, that the rule may not be excluded in the absence of plain and precise language, which is not to be found in s49 of the *Road Safety Act*. Accordingly, I uphold Ground 1 of the order nisi. The penalty imposed for the second information will be set aside, and the matter remitted to the learned Magistrate to impose an appropriate penalty in accordance with the law. The minimum disqualification period for the second information, specified in column 2 of Schedule 1, is 14 months. It may, of course, be relevant for penalty purposes, that the offender manifested in his commission of the offence on 27th October, a continuing attitude of disobedience of the law, having regard to his apprehension on 21st October. In which case, retribution, deterrence, and protection of society may all indicate that a more **[7]** severe penalty of disqualification than the minimum period is warranted. See *Veen v R [No. 2]* [1988] HCA 14; (1988) 164 CLR 465 at 477; (1988) 77 ALR 385; 33 A Crim R 230; 62 ALJR 224. What is not warranted, however, is the relevant minimum disqualification period specified in column 3 of Schedule 1, for a subsequent offence. Accordingly, the order nisi will be made absolute with costs.

APPEARANCES: For the applicant Kennan: Ms J Elleray, counsel. Roberts & Roberts, solicitors. For the respondent Mears: Mr G Thomas, counsel. Victorian Government Solicitor.
