

02/02; [2001] VSC 434

SUPREME COURT OF VICTORIA

DPP v D'AMICO

Eames J

8 November 2001 — (2001) 34 MVR 573; (2001) 128 A Crim R 301

MOTOR TRAFFIC – SPEEDING MOTOR CYCLE – 147km/h IN A 100km/h ZONE – SPEEDING ADMITTED BY MOTOR CYCLIST – CHARGE FOUND PROVED – MOTOR CYCLE LICENCE SUSPENDED – NO ORDER MADE IN RELATION TO MOTOR CAR LICENCE – OBLIGATION TO SUSPEND ALL DRIVER LICENCES – WHETHER MAGISTRATE IN ERROR IN LIMITING SUSPENSION ORDER TO MOTOR CYCLE LICENCE – “DRIVER” INCLUDES “RIDER”: ROAD SAFETY ACT 1986, S28(1)(a), (b); ROAD RULES (VICTORIA) 1999, Rule 19.

Section 28(1)(a) of the *Road Safety Act* 1986 ('Act') provides:

“(1) If a court convicts a person of, or is satisfied that a person is guilty of, an offence against this Act ..., the court—
 (a) in the case of an offence of driving a motor vehicle at a speed—
 (i) of 130 kilometres per hour or more; ...
 must suspend for such times as the court thinks fit ... all driver licences and permits held by that person”

D'A. admitted to riding his motor cycle on a road at a speed of 147km/h in a 100km/h zone. The magistrate suspended D'A. from driving for a period of 4 months but limited the order to a motor cycle and purported not to suspend D'A.'s motor car licence. Upon appeal—

HELD: Appeal allowed. Decision set aside. All driver licences and permits held by D'A. suspended for four months.

1. **Having regard to the provisions of s28(1)(a) of the Act, there was no power for the magistrate to suspend only the motor cycle licence. Subsection 1(a) required that all licences be suspended.**

2. **The definition of “Motor vehicle” in s3 of the Act is sufficiently broad as to include “motor cycle”. The expanded definition in the *Road Rules (Victoria)* 1999, Rule 19 of “driver” to include “rider” may be taken to apply to s28(1) of the Act.**

EAMES J:

1. This is an appeal brought by the Director of Public Prosecutions pursuant to s92(2) of the *Magistrates' Court Act* 1989, against a decision of a Magistrate made in the Magistrates' Court at Ringwood on 25 May 2001. On that day the respondent pleaded guilty to an offence under Rule 20 of the *Road Rules (Victoria)* 1999. Rule 20 provides that a driver must not exceed the speed limit applying on the road on which he or she is travelling. Rule 21 provides that the speed limit is that shown on the speed limit sign applicable to that road.

2. The respondent admitted that he had ridden his motor cycle at a speed in excess of 100 kph on Eastern Freeway, Box Hill North, on 7 December 2000. The speed alleged, and admitted, was 147 kph. The respondent was unrepresented before the magistrate. He submitted to the magistrate that were he to lose all licences, his job would be in jeopardy. The respondent, who appeared in person before me, seems a sensible young man, notwithstanding this offence, and he obviously impressed the magistrate. The learned magistrate convicted the respondent and ordered that his licence to ride a motorcycle in the state of Victoria be suspended for a period of four months, effective from 25 May 2001.

3. The precise terms of the order of the magistrate, as appears from the certified extract, are as follows:

"Order that the defendant be suspended from driving in the State of Victoria for a period of 4 months. Order is limited to motorcycle. Order on licence effective from 25 May 2001. With conviction, fined \$300, stayed to 22 June 2001 on the fine."

4. In the "Remarks" column, it is recorded by the magistrate that a plea of guilty was entered and a speed of 147 kph in a 100 kph zone was admitted by the then defendant, now respondent. The respondent at the time these orders were made was also the holder of a licence to drive a motor car, in addition to a licence to ride a motorcycle, and the order, as I have noted, purported not to suspend the motor car licence.

5. This appeal is brought by the Director of Public Prosecutions to address what is said to be an error in the interpretation of the relevant legislation by the magistrate, specifically in his interpretation of the terms of s28 of the *Road Safety Act* 1986. The Director contends that having regard to the admitted speed of 147 kph, the court's power as to suspension of licences was governed by the terms of s28(1)(a) of the Act, and that provision made it mandatory that all licences be suspended for a period of at least four months. The period of suspension of four months is the minimum applicable period specified under Schedule 5 of the Act, having regard to the fact that the speed was between 40 to 50 kph in excess of the relevant speed limit.

6. I was told in the course of argument that the same magistrate had made a similar order in another case, in the week prior to this occasion, and I was also told that some other magistrates had made similar orders, although that was not a frequent occurrence. Counsel for the appellant said that the majority of magistrates interpret the legislation in the same way that the Crown now contends to be the correct interpretation.

7. No stay was sought by the Director when this appeal came before the Master, and the period of suspension has now expired. I considered whether I was therefore being asked to give an advisory opinion and whether I should decline to do so, but I am persuaded by counsel that it is appropriate to hear and to determine this appeal.

8. It is perhaps unfortunate that if, as I was told, there were other instances of such orders being made (and assuming that in some of those instances, the defendants may have been represented) that this case was chosen as the vehicle for testing the question, because by virtue of the respondent being unrepresented, I have not had the benefit of any contrary argument being put on behalf of the respondent. I also do not have before me any reasons for the magistrate's decision. I was told that none were in fact given, but I do not presume that the decision was an instance of egregious error. His Worship may well have interpreted the legislation as permitting him to make the order which he made, but if that is so, then I have not had the benefit of considering those reasons for such interpretation. I have, however, had the benefit of a helpful and detailed argument by counsel appearing for the Director.

9. The relevant provisions of the Act for the purposes of the present appeal are s28(1)(a) and (b).

"(1) If a court convicts a person of, or is satisfied that a person is guilty of, an offence against this Act or of any other offence in connection with the driving of a motor vehicle, the court—

(a) in the case of an offence of driving a motor vehicle at a speed—

(i) of 130 kilometres per hour or more ;

or

(ii) of 30 kilometres per hour or more in excess of that permitted, whether generally or in relation to the particular vehicle or circumstances—

must suspend for such times as the court thinks fit (not being less than the period specified in Column 2 of Schedule 5 ascertained by reference to the speed at which the vehicle was driven as specified in Column 1 of that Schedule), all driver licences and permits held by that person; and (b) in any case but subject to paragraph (a), may suspend for such time as it thinks fit or cancel all driver licences and permits held by that person and, whether or not that person holds a driver licence, disqualify him or her from obtaining one for such time (if any) as the court thinks fit."

There is a discretion given to the magistrate under s28(2):

"(2) If the court is satisfied that the circumstance of the case are so unusual as to warrant it, an order made under sub-section (1)(b) may be limited in its application to a category or categories of motor vehicles and such an order has effect according to its terms and this section applies to such an order with such modifications as are necessary."

Given that the admitted speed here exceeded 130 kph, subsection (1)(a) applied, and thus

subsection (2) did not apply. Accordingly, there was no power for the magistrate to suspend only the motorcycle licence. Subsection 1(a) required that all licences be suspended, and the decision of the magistrate was therefore in error.

10. I considered whether s28(1) might not have applied to motorcycle licences at all. The words "driving of a motor vehicle" which appear in that section might suggest that it was not intended that that section apply to the riding of a motorcycle rather than the driving of a motor car. "Motor vehicle" is defined in s3 of the Act, as is "motorcycle", but the definition of "motor vehicle", in my opinion, is sufficiently broad as to include "motorcycle". The use of the word "driving" rather than "riding" must be read in the context of the terms of Rule 19 of the *Road Rules (Victoria)* 1999, which provide:

"Unless otherwise expressly stated in the Road Rules, each reference in the *Road Rules* (except in this Division) to a 'driver' includes a reference to a 'rider', and each reference in the *Road Rules* (except in this Division) to 'driving' includes a reference to 'riding'."

11. The *Road Rules* are incorporated into the Regulations under the Act, by virtue of Regulation 201 of the *Road Safety (Road Rules) Regulations* 1999. The Regulations themselves are authorised by s95 of the Act. Thus, the expanded definition of "driver" to include "rider" may be taken to apply to s28(1) of the Act. It seems to me that the decision of the magistrate was therefore in error and it is apparent that that error should be corrected.

12. In setting aside the order, however, I do not want there to be any possibility that the respondent could be charged with an offence of driving his motorcar during the period of suspension. Plainly, if he did so, then he did so in good faith and reliant on, and in obedience to, the order which was made by the magistrate. I propose therefore to express my order in terms so as to ensure that whilst substituting an appropriate order as should have been made by the magistrate as of 25 May 2001, the respondent to this appeal is not placed at risk of any action being taken against him for that relevant period.

13. The respondent has attended before the Master on two occasions, and also before me. There was no practical impact upon him of my ruling on this appeal and his attendance was as a matter of a courtesy to the court. The Director was concerned to establish the law and the respondent's case, was chosen merely as the vehicle for that purpose. The Crown has not argued against my suggestion that it should, in the circumstances, therefore meet the out-of-pocket expenses of the respondent, which I fix at \$510.

14. The orders I propose to make therefore will be:

- (1) that the appeal will be allowed;
- (2) that the decision of the magistrate made on 25 May 2001 is set aside insofar as it limited the suspension of any licence to the motorcycle licence;
- (3) in lieu thereof, I substitute and order that as at 25 May 2001 and pursuant to s28(1)(a), of the *Road Safety Act* 1986, all driver licences and permits held by the respondent be suspended for four months;
- (4) I order that the appellant pay the respondent's out-of-pocket costs, fixed at \$510.
- (5) I order that execution of my order under paragraph (3), above, be permanently stayed.

APPEARANCES: For the appellant DPP: Mr D Trapnell, counsel. Solicitor to DPP. The respondent D'Amico was not represented.