26/89

SUPREME COURT OF VICTORIA

FINNIS v IRVINE; FAIRWEATHER v DAVIS

Ormiston J

10 April 1989

MOTOR TRAFFIC – DRINK/DRIVING AND SPEEDING – FIRST OFFENCES – NO POWER TO IMPRISON – COMMUNITY-BASED ORDER MADE – NO ORDER MADE IN RESPECT OF DRIVER LICENCE – WHETHER POWER TO MAKE COMMUNITY-BASED ORDER – WHETHER ORDER AGAINST DRIVER LICENCE REQUIRED: *ROAD SAFETY ACT* 1986, SS49(1)(f), (3), 78; *ROAD SAFETY (TRAFFIC) REGULATIONS* 1988, R1001; *PENALTIES AND SENTENCES ACT* 1985, SS28(1), 39(2).

Having regard to the language of s28 of the *Penalties and Sentences Act* 1985, power to make a community-based order is available only in respect of an offence punishable by imprisonment. Accordingly, where a first offender was found guilty of an offence against s49(1)(f) of the *Road Safety Act* 1986 and a speeding offence against r1001 of the *Road Safety (Traffic) Regulations* 1988 (in respect of neither has provision been made for imprisonment of the offender) a court was in error in making a community-based order, in refusing to convict and in failing to make an order against the offender's driver licence.

ORMISTON J: **[1]** These are two orders to review decisions of a magistrate at the Heidelberg Court on 13 October 1988. In the first case in which Jennifer Louise Irvine was defendant, she was charged both under s49(1)(f) of the *Road Safety Act* 1986 and also under the *Road Safety (Traffic) Regulations* 1988 in respect of a speeding offence, each of which was said to have occurred on 22nd May 1988 in Plenty Road, Kingsbury, during which it was alleged that she was travelling along that road at 104 kilometres per hour in an area where the relevant speed limit was 60 kilometres an hour.

The alleged offence under the *Road Safety Act* was one under a section which has caused a good deal of trouble to this Court and to other courts and in which it was alleged that within three hours after driving the motor vehicle she furnished a sample of her breath for analysis by a breath analysing instrument pursuant to s55(1), the result of which analysis indicated that more than the prescribed concentration of alcohol was present in her blood. On the facts of the case the allegation was that the certificate showed a .115 per cent reading.

In the second of these cases in which Bruce Macleod Davis was defendant, a similar charge was brought under the *Road Safety Act* s49(1)(f) in respect of his driving on 9 April last year on the Eastern Freeway, in which it was said that the reading as a result of the furnishing of a **[2]** breath sample was .140 per cent. He was likewise charged under the *Road Safety (Traffic) Regulations* with travelling on the Eastern Freeway at a speed exceeding the speed indicated by numerals on the speed restriction signs and it was said that he was travelling at 125 kilometres an hour.

The surrounding facts relating to these matters were read to the court by the prosecuting informants after a plea of guilty made by each of the respondents, in the case of Miss Irvine, one made by her solicitor, and in the other, one made in person. Upon the respondents each agreeing that the statement of facts was accurate, it also appeared that no previous conviction of a relevant kind was alleged against either of the defendants, so that in the result these were cases in which the respondent was a first offender.

The Magistrate, upon considering the matters, and after some argument, which is only set out in the briefest of terms, reached the conclusion that he was empowered under the *Penalties and Sentences Act* 1985 to impose, both in respect of the breath analysis offences and in respect of the speeding offence, orders pursuant to part 5 of the *Penalties and Sentences Act*, namely, community-based orders.

In each case that is what he did, imposing a community-based order for a period of some 52 weeks and providing for some 50 hours of community work over that period to be performed by the respondent in each case. Consequently, he also felt that he was able to **[3]** apply the provisions of s39 sub.s(2) of the *Penalties and Sentences Act* so as not to cancel the driver's licence of each respondent, nor to disqualify them from obtaining any driver's licence in the future. Accordingly, in each case, the driving licence of each respondent was not cancelled, nor was an order for disqualification made.

It appears perhaps that little was said in the course of argument as to his precise powers, but these orders to review have been taken because it is said that the learned Magistrate had no power to impose a community-based order. The reason for this is said to be the penalty provision contained in s49 of the Acts, and in particular sub-s(3) of s49 of the *Road Safety Act*, which states that:

> "A person who is guilty of an offence under paragraph (b), (c), (d), (e), (f) or (g) of sub-section (1) is liable—
> (a) in the case of a first offence, to a fine of not more than 12 penalty units; and
>
> (b) in the case of a subsequent offence, to a fine of not more than 25 penalty units or to imprisonment for a term of not more than 3 months."

In respect of the speeding offences the relevant provision, Regulation 1001, states that the penalty shall be not more than five penalty units. It will be seen in each case that in respect of neither offence was provision made for the imprisonment or the potential imprisonment of the offender. It is necessary then to look to the powers contained in the *Penalties and Sentences Act* of courts to make community-based orders. That is in the first place **[4]** contained in s28(1) which states that:

> "Where a court convicts a person of an offence punishable by imprisonment, the court may, instead of sentencing the person to a term of imprisonment of not more than 3 months, make a community-based order in respect of the person."

It is not necessary to set out any more of that section. It appears from the affidavits that the Magistrate, or one of his colleagues, had applied the provisions of part 5 of the *Penalties and Sentences Act*, so as to avoid the necessity of cancelling an offender's driving licence, but whether in those circumstances it was a first offence or a subsequent offence is not clear. The language of s28 appears to me to be entirely clear, namely that the power to make a community-based order is available only in respect of an offence punishable by imprisonment.

Counsel for the respondent in each case valiantly argued that sub.s(2) of s39 pointed to a power to refuse to cancel a driver's licence (curiously now called a "driver licence") because of the opening words of sub.s(2) of s39 which reads:

> "Notwithstanding sub-section (1) and anything to the contrary in the *Road Safety Act* 1986, where a community-based order is made on conviction for an offence under the *Road Safety Act* 1986 and that order includes a condition referred to in section 29(2)(c) of this Act—
> (a) the court is not required to cancel any driver licence which the offender may hold, nor to disqualify the offender from obtaining any driver licence; etc."

It is not necessary to proceed to deal with the other paragraphs. **[5]** It was said that this power to refuse to cancel the licence is a power which exists, notwithstanding anything to the contrary in the *Road Safety Act*, but I regret to say that I cannot read that into this sub-section. The sub-section assumes that, where a community-based order is made on conviction for an offence under the *Road Safety Act*, then certain powers arise, or come into existence. The circumstances under which a community-based order may be made are not laid down by s39, for it simply denies an order's effect as a conviction and gives the magistrate the right, in certain circumstances, not to cancel or disqualify, as the power to make the community-based order is given, as I have already pointed out, by s28 of the Act. In no circumstances can the reference to "anything to the contrary" in the *Road Safety Act* be taken as a reference to denying the effect of other powers which might exist, and the sub-section assumes that there is power in the first place to make a community-based order.

This Act, of course, is one which has been the subject of a good deal of judicial criticism, notwithstanding that the provisions are stated to have the very purpose of providing a "simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol". (s47). **[6]** Case after case has come to this Court in which difficulties of construction of this Act and related Acts have arisen. It is unnecessary for me to elaborate upon each of those orders to review and other applications for judicial review, one of which has recently gone to the Full Court in the matter of *Meeking v Crisp and Mills*, [1989] VicRp 65; [1989] VR 740; (1989) 9 MVR 1 a decision handed down by the Full Court on 22 March 1989.

It may seem illogical to the reader of the statute that, where a person is convicted but is only a first offender, there is no power in the magistrate to refuse to cancel his licence, yet where the person so convicted has already committed an offence and is therefore a subsequent offender, the Court may by the imposition of a community-based order not convict and exercise a discretion not to cancel the licence nor disqualify the offender from obtaining a further licence.

It appears to me to be necessary in each case that a conviction be recorded, certainly in these cases because by s78 of the *Road Safety Act* the court is not entitled to adjourn a matter where the reading is in excess of .10 grams per 100 millilitres of blood in the case of an offence pursuant to s49(1)(f) of the Act. However the logic of the legislation is not something which by judicial construction I can correct, and indeed this was pointed out in the decision of **[7]** *Meeking v Crisp and Mills* where it was argued, in support of the decision from which the appeal lay, that it was inconvenient or unjust to read the section in the way there put forward. However the Full Court, adopting the language of Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at p305; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434, and that of the Full Court in *Byrne v Armstrong* [1900] VicLawRp 23; (1900) 25 VLR 125 at pp127-128, said, in terms which need not be elaborated, that the Court cannot read legislation in a manner which is convenient and not in a manner where the plain reading of the language dictates a particular solution.

It may be said with some justification that the particular collocation of the sections, that is the sections of the *Road Safety Act* and the *Penalties and Sentences Act*, in particular s39, ought to be reconsidered by Parliament when it has an opportunity to consider this very badly drafted legislation, but it is not for this Court to embark upon an exercise of redrafting. In consequence the Magistrate erred in each case in making a community-based order and in refusing to convict and he erred in failing to cancel the licence and to disqualify each of the respondents from obtaining a further licence for the relevant period which is set out in the First Schedule to the *Road Safety Act*.

I was asked to substitute a penalty in the circumstances of this case because the offences were said **[8]** to be small, or apparently of little consequence, being first offences, and because it would seem unfair that the matter should go back to the magistrate for a reconsideration by him of what is an appropriate penalty. There is a good deal to be said for that view, but, if that was the course which the respondents wished to take, then they should have put material before me on affidavit, which could have been challenged if necessary, as to the facts which were alleged from the bar table that in the one case one respondent had served 50 hours or performed 50 hours of the required period of service under the community-based order, and in the other case the respondent had performed some 20 hours or thereabouts of the required service.

If that material had been before the court it may have been possible to devise an order without the need to remit the matter back to the Magistrates' Court. However, Magistrates' Courts are familiar with these offences, familiar with the appropriate duration in respect of disqualification, the minimum periods of which are set out in the first schedule to the Act. I am not suggesting in this case that, when the Magistrate reconsiders this matter, he should disqualify for more than the minimum period contained in column 2 in respect of each of these respondents, nor am I suggesting that he should impose a heavy fine – far from it, if the evidence indicates that indeed these two respondents, who were not told of this **[9]** appeal for some two months after the order nisi was obtained, have served substantial periods, then those matters should be taken into account in imposing an appropriate penalty.

It is, however, a case where the matter should be remitted for conviction and for the

imposition of an appropriate sentence and the imposition of a penalty in the form of cancellation and disqualification pursuant to the requirements of the *Road Safety Act*. This not a trivial matter, nor a matter where I can simply dismiss the informations, although making a holding on the legal point. Each of these offences is relatively serious even if the Magistrate misunderstood the purport of the legislation with which he was dealing.

In the circumstances each of the orders nisi is made absolute, the community-based orders are quashed, and I direct in each case that the information, which will include the information for speeding which was likewise wrongly dealt with by way of a community-based order for the same reasons, should be remitted to the Magistrate at the Magistrates' Court at Heidelberg for rehearing in accordance with law and in accordance with the reasons which I have now pronounced. I shall order that the respondent in each case pay the applicant's costs and, if there is an application in respect of the Appeal Costs Fund, I will grant a certificate.

APPEARANCES: For the plaintiffs Finnis & Fairweather: Mr JD McArdle, counsel. Victorian Government Solicitor. For the defendants Irvine & Davis: Mr PJ Elliott, counsel.
