**06/76**

## DISTRICT COURT OF QUEENSLAND

# *MURPHY v AIRD*

**Mylne DCJ**

**1975 — App No 84/1975 — CSM Quarterly Notes (Brisbane Sept. 1975 Vol.7)**

**MOTOR TRAFFIC – DRINK/DRIVING – SENTENCING – PERIOD OF DISQUALIFICATION FROM HOLDING A DRIVER LICENCE – BAC 0.21% – DRIVER WEAVING ON THE ROAD – NO PRIOR CONVICTIONS – COMMERCIAL TRAVELLER – MINIMUM PERIOD OF SIX MONTHS FIXED BY STATUTE – 15 MONTHS' DISQUALIFICATION IMPOSED BY MAGISTRATE – WHETHER PERIOD EXCESSIVE – FACTORS TO BE CONSIDERED IN FIXING PERIODS BEYOND STATUTORY MINIMUM PERIODS OF DISQUALIFICATION.**

**HELD: Appeal allowed. Disqualification period varied.**
**The Magistrate disqualified the appellant for a period of 15 months, mainly if not solely due to the alcohol content of his blood. Having regard to the appellant's manner of driving and to the fact that this was his first conviction for this type of offence, and to all the circumstances of this case, the period of 15 months' disqualification was manifestly excessive in the circumstances and that the appeal should be allowed by substituting a disqualification for a period of nine months.**

**MYLNE DCJ:** The appellant was convicted on 10th July 1975 of being in charge of a motor vehicle on 8th May 1975 at Brisbane whilst he was under the influence of liquor or a drug. He was fined $350 in default 50 days' imprisonment, and was disqualified from holding or obtaining a driver's licence for a period of 15 months from 10th July 1975.

The ground of his appeal is that the period of disqualification of his driving licence was manifestly excessive. The evidence adduced before the Stipendiary Magistrate was that Sergeant Murphy was driving a police car alone in Newmarket Road, Wilston, when his attention was drawn to the appellant's vehicle being driven outbound along Newmarket Road. He describes it as being driven 'in a weaving manner, and that it was not being driven in a direct course.' He followed the vehicle as it turned left into Laurel Avenue where he was able to drive the police vehicle abreast of the appellant's vehicle and call on the appellant to stop his vehicle. According to the police officer, he drove parallel with the appellant's vehicle in Laurel Avenue for a distance of about 60 or 70 yards, and after some distance the appellant stopped his vehicle on the correct side of the road opposite to where he lived.

There was no evidence adduced before the Magistrate of any dangerous driving, or driving on the incorrect side of the road or of any hazard to other drivers, but it may well be that there was very little traffic on the road, the time being 12.55 a.m.

The police officer asked the appellant to alight from the vehicle, and observed that the pupils of his eyes were dilated, his eyes were bloodshot, his speech was slurred and he swayed when standing. He requested him to have a roadside breath test and then requested the appellant to accompany him to the police station where the appellant submitted to a breathalyser test at approximately 1.35 a.m. The reading of the breathalyser indicated that he had a percentage of alcohol in his blood of .21.

Before the Stipendiary Magistrate imposed his punishment, he was addressed by the appellant's counsel, who informed the Magistrate that the appellant was the representative of a leather goods firm and depended on his driving licence to travel about the country in a motor vehicle, and he asked the Magistrate to make the suspension of the licence minimal and increase the extent of the fine.

I should mention that the appellant had no previous convictions for this type of offence. It was also pointed out to the Magistrate that, in the present economic climate, the appellant might lose his employment if he were deprived of driving a vehicle for any length of time.

At the hearing of the appeal, application was made to tender affidavits elaborating upon the disabilities that the appellant would suffer through disqualification from driving for a period of 15 months. It was urged that this was not new material but was merely a presentation in detail of the submission made to the Magistrate and was information concerning the attitude of the appellant's employer consequent upon his disqualification.

For the respondent it was urged that I should not admit this fresh material, firstly because it should have been placed before the Magistrate on sentence and secondly because it was irrelevant as circumstances personal to the offender should be disregarded upon a sentence for being in charge of a motor vehicle whilst under the influence of liquor or a drug.

I admitted the material subject to the respondent's objection and I now formerly overrule the objection. The material discloses that the appellant receives wages as a result of his employment with a company of $145 gross per week and that he receives a commission of 1½ per cent of the net turnover of sales in his area which covers southern Queensland from Tweed Heads to Rockhampton and inland as far as Charleville. His average mileage in the course of employment has been approximately 35,000 miles per year and it was stated that the company was prepared to keep him employed only if he could make suitable provision to hire a driver to drive him when required to drive by virtue of his employment. It was further said that this would cost the appellant $15 a day and over a period of 15 months the cost would be in the vicinity of $3,000.

My attention was drawn to *Holdzberger v Birt* (1957) QWN 40 in which O'Hagan J had to consider an appeal for a breach of the traffic regulations. It was an appeal against punishment imposed for failing to give right-of-way at an intersection. The learned judge held that by virtue of the provisions of s54(1)(b) of the *Traffic Act* he was precluded from considering circumstances personal to the defendant and was bound to consider only the nature of the offence, the circumstances in which it was committed and the interests of the public.

In *Wess v Sprinkhuizen; ex parte Sprinkhuizen* (1961) Qd R 313 at 322 Stable J with whom the other members of the Full Court of Queensland agreed, stated 'The appellant is also a driver by occupation. However, the fact that a person earns his living by driving is no reason for excusing him from disqualification, absolutely or for a period, from holding a driver's licence, in a case in which the individual circumstances indicate such punishment, for it could hardly be regarded as other than a punishment. Indeed, the Full Court has so called it and treated it in *R v Daunt* (1956) QWN 44 per Philp J, Mack and O'Hagan JJ, agreeing.'

It was urged by the respondent that the words 'absolutely or for a period' qualified or modified the word 'excusing' and not the 'disqualification'. In my view the words 'absolutely or for a period' qualify the word 'disqualification'. I read the remarks of Stable J as indicating that the fact that a person earns his living by driving is not a reason why he should not be subject to the disqualification provisions and not that circumstances personal to the offender should be disregarded entirely.

The view expressed by the Full Court is in accord with the remarks of Bray CJ in *Grubb v Normandale* (1971) 3 SASR at 70 where he says,

> 'The driver whose conduct is shown to have been a danger on the road on one occasion, cannot, as has been said in many cases in the past, expect any leniency merely because a disqualification order will affect him in his livelihood.'

In that case, the learned Chief Justice distinguished between offences related to road safety and offences not related to road safety. Certainly, the *Traffic Act* is aimed at the potential danger on the roads of a person who consumes alcohol as well as the actual danger caused by a driver who has taken alcohol because the provisions apply not only to a person who drives, but to one who is in charge of a vehicle.

It was urged by the appellant that, if circumstances personal to the offender were to be completely disregarded by the court, then disqualification for a person following a particular occupation, that is a truck driver or commercial traveller, would entail a much more severe punishment, perhaps loss of employment than for say, a person who uses a motor vehicle for pleasure at week-ends and whose wife is available to drive where the circumstances and nature of the offence are similar.

The respondent relied not only upon *Holzberger v Birt* (*supra*) but upon *Picken v O'Sullivan* (1952) SASR 184 at 185 and upon *Whittall v Kirby* (1947) KB 184 at 200 per Lord Goddard, Chief Justice. The last-mentioned case was based upon a Statute in which the court had to consider 'special reasons', and the financial hardship in the case of a person who uses his car for his living was not a special reason which the court could take into account in considering penalty.

By amendment to the *Traffic Act* in 1974, s20(1) of the *Traffic Act* provides that where a person is convicted of an offence of being in charge of a motor vehicle whilst under the influence of liquor or a drug he shall, if during the period of five years prior to conviction he has not been previously convicted, be disqualified by such conviction and without any specific order for a period of six months from the date of such conviction from holding or obtaining a driver's licence.

Section 20(5) now provides as follows:-

> "In the case of any conviction referred to in this section in respect of which a person is disqualified by such conviction and without any specific order for a period of time specified from holding or obtaining a driver's licence, the judge before whom such person is so convicted upon indictment or the justices by whom such person is so convicted may order that from the date of conviction such person shall be disqualified absolutely or for a longer period than the period specified in his case from holding or obtaining a driver's licence, and he shall thereupon be so disqualified under and in accordance with that order.'

It seems to me that these two sections read together are sufficient authority for a Stipendiary Magistrate to make an order for a disqualification in excess of the mandatory period of six months in the case of a person who, during the preceding five years, has not been previously convicted of an offence of being in charge of a motor vehicle whilst under the influence of liquor or a drug, and that there is no necessity to invoke the provisions of s54(1)(b) of the *Traffic Act.*

It was said on behalf of the appellant that a disqualification of more than six months was warranted by the fact that the alcohol content in his blood was .21 but that, in view of the circumstances of the offence, that is that he was driving apparently at a moderate speed, and that apart from weaving on the road he was not creating a danger to other road users and that his driving otherwise was fairly normal a disqualification from driving for 15 months was unreasonable.

I am impressed by the reasoning of Fox J in *Burke v Muir* (1967) FLR 300, particularly at p304.

It seems to me that the Stipendiary Magistrate disqualified the appellant for a period of 15 months, mainly if not solely due to the alcohol content of his blood. Having regard to the appellant's manner of driving and to the fact that this is his first conviction for this type of offence, and to all the circumstances of this case, I am of the opinion that a period of 15 months' disqualification was manifestly excessive in the circumstances and that the appeal should be allowed by substituting a disqualification for a period of nine months from 10th July 1975.

I order the respondent to pay the appellant's costs of and incidental to the appeal to be taxed. I order that the costs be paid to the Registrar within a period of 28 days and that the Registrar pay such costs to the appellant's solicitors.

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