34/07; [2007] VSCA 145

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v NOVAKOVIC

Nettle, Ashley and Redlich JJ A

6 June, 6 July 2007

(2007) 17 VR 21; (2007) 172 A Crim R 414; (2007) 48 MVR 202

MOTOR TRAFFIC – DISQUALIFICATION OF DRIVER LICENCE – "IN CONNECTION WITH THE DRIVING OF A MOTOR VEHICLE" – MEANING OF – PERSON CHARGED WITH ROBBERY OF A MOTOR VEHICLE WHICH WAS THEN DRIVEN – WHETHER SUBSTANTIAL CONNECTION TEST MADE OUT – LENGTH OF DISQUALIFICATION PERIOD – WHETHER APPROPRIATE TO IMPOSE A DISQUALIFICATION PERIOD EXTENDING BEYOND THE DEFENDANT'S EARLIEST RELEASE DATE: *ROAD SAFETY ACT* 1986, S28(1).

N. was found guilty of offences which included robbery of a motor vehicle and then driving it away. At the trial, the judge imposed a total sentence of 4 years and 9 months' imprisonment with a non-parole period of 2 years and 9 months' imprisonment. In addition, the judge cancelled N's driver licence and disqualified him from obtaining a licence for a period of 6 years. Upon appeal—

HELD: Appeal allowed only so as to make a different order under s28(1)(b) of the *Road Safety Act* 1986 ('Act').

1. Despite the potential breadth of the phrase "in connection with" in s28(1) of the Act, there must be a substantial relation between the other offence and the driving of a motor vehicle in order that the additional punishment of the driver licence cancellation may be imposed. In the present case, the circumstances of taking the vehicle and driving it away unarguably met the substantial connection test.

***Murdoch v Simmonds* [1971] VicRp 108; [1971] VR 887, followed;**

***Rochow v Pupavac* [1989] VicRp 8; [1989] VR 73; (1988) 9 MVR, not followed.**

2. A s28(1)(b) order has an intended punitive element and there may be many cases where a period of disqualification would exceed the period of imprisonment. In the present case, having regard to N's ability to rehabilitate, the relatively lengthy period of parole and his particular need for use of a vehicle in order to effectively resume work after his release, a disqualification period of two years would aid N's rehabilitation.

***R v Lefebure* [2000] VSCA 79; (2000) 112 A Crim R 41; (2000) 31 MVR 131, followed.**

ASHLEY J: [With whom Nettle and Redlich JJ A agreed]

9. This is an appeal, pursuant to leave granted, from sentence imposed upon the appellant, Milorad Novakovic, in the County Court on 8 May 2006. The appellant, who had earlier pleaded guilty to counts of criminal damage (1 count, Count 1), being a prohibited person in possession of an unregistered firearm (1 count, Count 2), common assaults (2 counts, Counts 3 and 4) and armed robbery (1 count, Count 5), was sentenced on that day to a total effective sentence of 4 years and 9 months' imprisonment, with a non-parole period of 2 years and 9 months. Other orders were also made, including orders that the appellant's driver's licence be cancelled, and that he be disqualified from obtaining another licence for a period of 6 years.

10. The grounds of appeal are as follows:

> "1. The individual sentences, total effective sentence and non-parole period are manifestly excessive.
> 2. The learned sentencing judge erred in disqualifying the appellant from driving or alternatively in the period of disqualification imposed."

11. On the hearing of the appeal, the second ground of appeal was the main focus of attention.

[After dealing with the circumstances of the offences, His Honour continued] ...

Ground 2

30. Section 28 of the *Road Safety Act* 1986 relevantly says this:

> "If a court convicts a person ... of any other offence in connection with the driving of a motor vehicle,

> the court—
>
> (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."

31. The first issue which the appellant sought to raise by ground 2 was whether the court convicted the appellant of "any other offence in connection with the driving of a motor vehicle." On the plea, counsel for the Crown had argued that the provision was triggered by "the armed robbery of the vehicle and the use of the vehicle in the offence." The "vehicle was stolen ... during the armed robbery and then driven away ..." Counsel for the appellant had not then denied the potential applicability of the provision, saying that it was "ultimately a matter" for the learned judge.

32. The second issue which the appellant sought to raise concerned the judge's exercise of discretion in fixing the period of disqualification. According to the appellant's submission, his Honour failed to approach the matter as required by *R v Lefebure* [2000] VSCA 79;(2000) 112 A Crim R 41, 44, [7]-[8]; (2000) 31 MVR 131. *[His Honour then considered the issue of whether there was any right of appeal in respect of an order made under s28(1) of the* Road Safety Act *1986 and continued] ...*

"In connection with the driving of a motor vehicle"

57. I return to the first issue argued under ground 2 for the appellant. It is necessary to understand what count 5 comprehended. The presentment alleged, relevantly, that the appellant–

> "robbed David Mitev of certain property, namely a Holden Commodore, an NEC mobile telephone, two gold necklaces and one gold ring and at the time had with him an offensive weapon namely a firearm".

It was to the offence thus described that the appellant pleaded guilty.

58. In my opinion, principle stands this way.

59. First, there must be a substantial relation between the other offence and the driving of a motor vehicle. [See *Murdoch v Simmonds* [1971] VicRp 108; [1971] VR 887, 889, 890; *Crammer v McDougall* (1995) 21 MVR 363, 370, " ... in a very real sense a relationship between the offence and the driving or a substantial connection." See also my formulation in *Buckley v DPP* (Unreported, Supreme Court of Victoria, 4 August 1994), 10.] That is so despite the potential breadth of the phrase "in connection with". That phrase takes colour from its context. [See, for instance, *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; (1993) 115 ALR 1; (1993) 18 AAR 9; (1993) 43 FCR 280, 288 and *R v Orcher* [1999] NSWCCA 356, [27]–[32]; (1999) 48 NSWLR 273 (Spigelman CJ).] Here its context is, as Adam J said in *Murdoch v Simmonds* [1971] VicRp 108; [1971] VR 887 one of a "highly penal provision", providing for an additional punishment which may in a particular case be serious by comparison with the penalty imposed for the "other offence".

60. Second, whilst I agree with the observation of Nathan J in *Rochow v Pupavac* [1989] VicRp 8; [1989] VR 73 at 77; (1988) 9 MVR 93 that each case must turn on its particular facts, with respect I do not agree that it will be sufficient that –

> "A connection not be so remote and fanciful as to offend a reasonable man's concept of relationship of one event with another". [*Ibid* 77.]

61. Third, I do not accept the submission for the appellant that the reasons for judgment of Adam J in *Murdoch* are to be read as suggesting that his Honour perceived a need for a demonstrated connection between the other offence and the manner of driving. Whilst his Honour made some reference to such a concept, [[1971] VR 887, 889] it was not part of his ultimate formulation.

62. In my opinion, the circumstances of the present case unarguably met the substantial connection test. The "other offence" consisted in part of taking the vehicle, by driving it away.

Exercise of the sentencing discretion

63 I go to the third issue – that is, the way in which the discretion was exercised. *Lefebure* makes clear the approach which must be taken. Tadgell JA said this:

> ". . . counsel for the appellants submitted that the learned sentencing judge had not been directed to, and did not himself take account of, the relevant matters to be taken into account in deciding whether a convicted person should be disqualified for any period of time from obtaining a driving licence. We were referred to five cases in which the matter has been canvassed to a greater or lesser extent. They were *Rv Tantrum* (1989) 11 Cr App R (S) 348 at 349, *George* (unreported, Court of Criminal Appeal, Vic, No 155 of 1989, 21 September 1989), *Boeyen* (1990) 50 A Crim R 482, *Bazley* (unreported, Court of Appeal, Vic, No 9 of 1997, 21 August 1997) and *R v Bell* [1999] VSCA 223; (1999) 30 MVR 115. From these decisions I think it may be said that the following considerations are to be taken into account on the imposition of a period of disqualification. First, since the disqualification falling to be imposed contains a punitive element, it is necessary to evaluate the extent to which disqualification is required in the total punishment in order to mark the dissatisfaction of the community with the offence. In making that evaluation, aggravating or mitigating factors are to be considered, and also is to be weighed the length of the disqualification compared with any period of custody which is ordered. It is not necessary that the two should be equated in length. Sometimes it is desirable, balancing all the facts, that a period of disqualification will exceed the length of the period of any custody... Next, it is usually appropriate that, in assessing the necessary length of any disqualification period, the convicted person's dependency on a driving licence should be taken into account. To do so it is usually necessary to ensure that the prospects of rehabilitation of the convicted person will not be unduly hampered. Such considerations as the necessity or convenience of a motor vehicle when looking for, obtaining and maintaining employment are to be considered."

64. The learned judge was not referred by counsel to the analysis which needed to be undertaken. I think it is clear – and indeed counsel for the Crown conceded so much – that his Honour did not undertake it. The exercise of the discretion having miscarried, the order under s28(1)(b) must therefore be set aside, and the matter reconsidered.

65. I consider that the appropriate order is that any driver's licence or permit held by the appellant be cancelled, and that he be disqualified from obtaining one for a period of two years from the date of sentence. The period of disqualification would thereby equate, broadly, with the appellant's earliest possible release date. [That is because, although the non parole period was fixed at two years and nine months' imprisonment, there were 280 days of pre-sentence detention.]

66. In so concluding, I have not forgotten that a s28(1)(b) order has an intended punitive element. Neither have I overlooked the Crown's submission that there were circumstances in this case – counsel particularly referred to the appellant's drunken state at the time of the offending, this leading to him driving the vehicle so as to crash it, and inferentially to have been a danger to other road users in the period until he crashed it; and the appellant's unwillingness to confront his psychological problems, which it was suggested were a root cause of his abuse of alcohol – that would warrant a period of disqualification exceeding the period of imprisonment.

67. In some, perhaps many, cases, circumstances such as I have mentioned would be likely to yield a period of disqualification exceeding the offender's earliest release date, or the release date flowing from the total effective sentence. But I do not consider that such a period should be set in this case. The learned judge found that the appellant did have the ability to be rehabilitated, and stated that he set a non-parole period to assist the appellant's re-entry into the community. Whilst it may be said that there is nothing unusual in such a disposition, I think that it would be inconsistent with the tenor of what his Honour said about, and did to aid, the appellant's rehabilitation to seriously inhibit the appellant's activities beyond the earliest time of his release. In that context, two matters may be noted. First, the period of possible parole was relatively lengthy. It admitted of possible prolonged supervision of the appellant. Second, there was some evidence which suggested that the appellant had particular need for use of a vehicle in order to effectively resume work after his release. Return to work should be regarded as rehabilitative. The effect of a s28(1)(b) order extending beyond the appellant's earliest possible release date could thus operate to hinder, not aid, the appellant's rehabilitation. That would sit uncomfortably with a sentence which otherwise sought to aid the appellant's rehabilitation...

Conclusion

72. In my opinion the appeal ought be allowed only so as to make a different order under s28(1)(b) of the *Road Safety Act* 1986.

APPEARANCES: For the Crown: Mr T Gyorffy, counsel. Ms A Cannon, Solicitor for Public Prosecutions. For the appellant Novakovic: Mr CB Boyce, counsel. Victoria Legal Aid.