27/04; [2004] VSC 448

SUPREME COURT OF VICTORIA

CHIEF COMMISSIONER of POLICE v RIGG

Balmford J

18 October, 8 November 2004 — (2004) 10 VR 134; (2004) 42 MVR 496

CRIMINAL LAW – DRINK/DRIVING – APPLICATION TO BE AGAIN LICENSED – APPLICATION GRANTED SUBJECT TO ALCOHOL INTERLOCK CONDITION FOR SIX MONTHS – APPEAL BY CHIEF COMMISSIONER OF POLICE – WHETHER APPLICATION A "CRIMINAL PROCEEDING" – WHETHER CHIEF COMMISSIONER A PARTY TO THE PROCEEDINGS – "PROCEEDING" – MEANING OF – "PARTY" – MEANING OF – WHETHER CHIEF COMMISSIONER ENTITLED TO APPEAL – CLASSIFICATION OF OFFENCES – APPLICANT HAD PRIOR CONVICTIONS – OFFENDER CONVICTED OF SECOND WHEN NOT CONVICTED OF FIRST OFFENCE – WHETHER APPLICANT CONVICTED OF A "THIRD OFFENCE" – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S92; *ROAD SAFETY ACT* 1986, SS50AAB(3), 50AAB(6).

R. was convicted of a drink/driving offence in 2003. At the time of the conviction, R. had two drink/driving convictions however, the conviction imposed on the first offence occurred after the time when the conviction for the second offence was imposed. R. applied to the Magistrates' Court to be again licensed. The application was granted subject to the imposition of an alcohol interlock condition for a period of six months. If R. had been convicted of a relevant third offence, the minimum period of the alcohol interlock condition would have been three years. Upon appeal by the Chief Commissioner—

HELD: Appeal dismissed.

1. "Proceeding" means any matter in the Magistrates' Court including a committal proceeding. The very nature of the inquiry by the Magistrate in the application to be again licensed turned on the number of criminal offences related to drink/driving for which R. had been convicted. Accordingly, the application was properly regarded as a criminal proceeding which could be the subject of an appeal under s92 of the *Magistrates' Court Act* 1989.

2. s50(4) of the *Road Safety Act* 1986 ('Act') provides that a copy of an application to be again licensed must be given to the Chief Commissioner of Police. Further, on the hearing of the application the court must hear any evidence tendered by the applicant or the Chief Commissioner. Those provisions lead to the conclusion that the Chief Commissioner was a party to the proceeding and was entitled to appear to oppose the application.

3. R. had been convicted three times of drink/driving offences. However, the conviction in respect of the second offence was recorded before the conviction in respect of the first offence. If R.'s conviction in respect of the 2003 offence were a third offence, s50AAB(3)(b) of the Act required that the Magistrate impose a period of three years during which R. would be subject to the alcohol interlock condition.

4. Where an Act imposes penalties for second and subsequent offences, an offence is not ordinarily to be considered a "second offence" unless at the time it was committed the offender had a prior conviction. That is, an offence is not a "third offence" unless the offender had two prior convictions when the offence was committed. Whilst the court in the present case had a discretion to specify a period longer than the prescribed minimum, the magistrate was not in error in deciding that R.'s third offence was a second offence and accordingly that he was required to direct that the specified period was six months.

***Farrington v Thomson and Bridgland* [1959] VicRp 49; [1959] VR 286; [1959] ALR 695; and *Christie v Britnell* [1895] VicLawRp 9; (1895) 21 VLR 71, applied.**

BALMFORD J:

Introduction

1. This appeal was initiated pursuant to section 92(1) of the *Magistrates' Court Act* 1989 ("the Magistrates' Court Act") which reads:

> 92(1) A party to a criminal proceeding (other than a committal proceeding) in the [Magistrates'] Court

may appeal to the Supreme Court on a question of law, from a final order of the [Magistrates'] Court in that proceeding.

2. The appellant ("the Chief Commissioner") seeks to appeal from a final order made on 13 April 2004 by the Magistrates' Court at Frankston, constituted by Mr Winton-Smith, Magistrate, whereby an application made by the respondent pursuant to section 50(4) of the *Road Safety Act* 1986 ("the Road Safety Act") for an order as to the issue of a driver licence or permit was granted, subject to the imposition of an alcohol interlock condition for a period of six months. The appeal is essentially brought against the period of the condition, the contention of the Chief Commissioner being that the period should be at least three years.

3. On 13 May 2004 Master Wheeler ordered that the questions of law shown by the appellant to be raised by the appeal were:

(a) whether the drink driving offence of which the respondent was convicted on 10 July 2003 is properly characterised as the respondent's second offence for the purpose of specifying a period for the imposition of an alcohol interlock condition pursuant to section 50 AAB(3) of the [Road Safety] Act.

(b) whether on the proper construction of section 50AAB(3) of the [Road Safety] Act the Magistrate was required, when making an order under section 50(5) as to the issue of a driver licence or permit, to direct the Roads Corporation that it could only grant the applicant a licence or permit if it was, for a period of 3 years, subject to a condition that the applicant must only drive a motor vehicle with an approved interlock installed.

4. Provisions of the *Road Safety Act* which are relevant to this appeal read as follows, so far as relevant:

3. Definitions
(1) In this Act— ....
"alcohol interlock", in relation to a motor vehicle, means a device capable of—
(a) analysing a breath sample for the presence of alcohol; and
(b) if it detects more than a certain concentration of alcohol, preventing the motor vehicle from being started;
"alcohol interlock condition" means a condition imposed on a driver licence or permit in accordance with a direction under section 50AAA;

50. Provisions about cancellation and disqualification
... (3) Except on the order of the Magistrates' Court made on an application under sub-section (4), a driver licence or permit must not be issued to a person who has been disqualified from obtaining one under this section or section 89C unless—
(a) the offence was under section 49(1)(b), 49(1)(f) or 49(1)(g); and
(b) the concentration of alcohol—
(i) in the blood of that person was less than 0.10 grams per 100 millilitres of blood; or
(ii) in the breath of that person was less than 0.10 grams per 210 litres of exhaled air—
as the case requires; and
(c) it was that person's first such offence.

(4) A person to whom sub-section (3) applies may, at the end of the period of disqualification and on giving 28 days written notice of the application and of the venue of the Court at which it is to be made to the Chief Commissioner of Police and the appropriate registrar of the Court, apply to the Magistrates' Court for an order as to the issue of a driver licence or permit.

(5) On an application under sub-section (4) the court may make or refuse to make the order sought, and for the purpose of determining whether or not the order should be made—
(a) the court must hear any relevant evidence tendered either by the applicant or by the Chief Commissioner of Police and any evidence of a registered medical practitioner required by the Court; and
(b) without limiting the generality of its discretion, the court must have regard to—
(i) the conduct of the applicant with respect to intoxicating liquor or drugs (as the case may be) during the period of disqualification; and
(ii) the applicant's physical and mental condition at the time of the hearing of the application; and
(iii) the effect which the making of the order may have on the safety of the applicant or of the public; and
(iv) any licence restoration report obtained under sub-section (4B)(b) or (4C) and any report obtained under sub-section (4B)(a).

50AAA. Direction to impose alcohol interlock condition

(1) This section applies if—

(a) a person was disqualified under section 50 from obtaining a driver licence or permit because he or she was convicted or found guilty of an offence under section 49(1)(a) (other than an offence involving only drugs) or under section 49(1)(b), (c), (d), (e), (f) or (g); and

(b) the offence was not an accompanying driver offence; and

(c) the person makes an application under section 50(4) for an order as to the issue of a driver licence or permit; and

(d) the court considers it appropriate to make the order.

(2) If the offence—

(a) was a first offence; and

(b) in the case of an offence under section 49(1)(b), (f) or (g), the concentration of alcohol—

(i) in the person's blood at the relevant time was 0.15 grams or more per 100 millilitres of blood; or

(ii) in the person's breath at the relevant time was 0.15 grams or more per 210 litres of exhaled air—

as the case requires—

on making the order, the court may direct the [Roads] Corporation that it can only grant the person a driver licence or permit that is subject to a condition that the person must only drive a motor vehicle with an approved alcohol interlock installed and maintained by an approved alcohol interlock supplier or a person or body authorised by such a supplier.

(3) . . . if the offence was not a first offence—

(a) . . .

(b) on making the order, the court must direct the [Roads] Corporation that it can only grant the person a driver licence or permit that is subject to a condition that the person must only drive a motor vehicle with an approved alcohol interlock installed and maintained by an approved alcohol interlock supplier or a person or body authorised by such a supplier.

50AAB. When an alcohol interlock condition can be removed

(1) If the court gives a direction under section 50AAA(2) or (3)(b), it must specify in the direction a period during which the person concerned cannot apply to the court for the removal of an alcohol interlock condition imposed on his or her driver licence or permit.

(2) If the direction is given under section 50AAA(2), the specified period must be at least 6 months after the condition is imposed.

(3) If the direction is given under section 50AAA(3)(b), the specified period must be—

(a) at least 6 months after the condition is imposed if—

(i) the offence concerned was a second offence; and

(ii) in the case of an offence under section 49(1)(b), (f) or (g), the concentration of alcohol—

(A) in the person's blood at the relevant time was less than 0.15 grams per 100 millilitres of blood; or

(B) in the person's breath at the relevant time was less than 0.15 grams per 210 litres of exhaled air—

as the case requires; or

(b) in any other case, at least 3 years after the condition is imposed.

. . .

(6) In determining whether to make an order to remove an alcohol interlock condition imposed on a person's driver licence or permit—

(a) the court must hear any relevant evidence tendered by either the person or the Chief Commissioner of Police and any evidence of a registered medical practitioner required by the court; and

(b) the court, without limiting the generality of its discretion, must have regard to—

(i) the person's use of alcohol in the period since the condition was imposed; and

(ii) the person's physical and mental condition at the time of the hearing of the application; and

(iii) the effect that the making of the order may have on the safety of the person or the public; and

(iv) any report obtained under sub-section (5).

50AAC. Appeals against direction or period specified in direction

(1) If the court gives a direction under section 50AAA(2) or (3)(b), the person in respect of whom the direction is given may appeal to the County Court under section 83 of the *Magistrates' Court Act* 1989 against--

(a) in the case of a direction under section 50AAA(2)—

(i) the giving of the direction; or

(ii) the period specified in the direction during which the person cannot apply for the removal of an alcohol interlock condition if that period is more than 6 months; or

(b) in the case of a direction under section 50AAA(3)(b)--the period specified in the direction during which the person cannot apply for the removal of an alcohol interlock condition if that period is more than the minimum period set out in section 50AAB(3)(a) or (b) (whichever applies)—

as if the direction were a sentencing order of a kind referred to in section 83 of the *Magistrates' Court Act* 1989.

(2) That Act applies with respect to the appeal with any necessary modifications.

The Preliminary Issue

5. Mr Nash, for the respondent, submitted at the outset that there was no appeal properly before the Court. His submissions were first, that the application by the respondent made under section 50(4) of the *Road Safety Act* was not a "criminal proceeding" as required by section 92 of the *Magistrates' Court Act*; and second, that in any case the Chief Commissioner was not a party to the proceeding before the Magistrate, and accordingly had no right of appeal under section 92.

Criminal Proceeding

6. As to his first submission, he referred to section 26(1) of the *Magistrates' Court Act*, which begins:

26(1) A criminal proceeding must be commenced by filing a charge—

and submitted that as the proceeding before the Magistrate in this case was commenced by the making of an application under section 50(4) of the *Road Safety Act*, and not by the filing of a charge, it was not a criminal proceeding, and accordingly could not be the subject of an appeal under section 92 of the *Magistrates' Court Act*.

7. There is no definition of "criminal proceeding" in the *Magistrates' Court Act*, and "proceeding" is defined in section 3 to mean "any matter in the Court, including a committal proceeding [but excluding the exercise by a registrar of certain specified powers]". Section 25(1) sets out a number of specific heads of criminal jurisdiction and section 25(2) reads:

(2) The jurisdiction given by sub-section (1) is additional to any other jurisdiction given to the Court with respect to a criminal proceeding by or under any Act other than this Act.

8. In support of the proposition set out in [6] above Mr Nash relied on *Loughnan v Magistrates' Court of Victoria*[1] where the Full Court (Brooking, JD Phillips and Byrne JJ) was concerned with section 464U(1) of the *Crimes Act* 1958 ("the Crimes Act") which empowers a member of the police force to apply to the Magistrates' Court for an order directing the person to give a sample of blood. Their Honours were referred to the decision of Southwell J in *Glare v Magistrates' Court of Victoria*[2] to the effect that a proceeding under section 464U was a "criminal proceeding" within the meaning of section 43 of the *Magistrates' Court Act*. They said[3] in that context:

Section 43 of the *Magistrates' Court Act* enables "any party to a criminal proceeding in the [Magistrates'] Court" to apply for the issue of a witness summons. The expression "criminal proceeding" is a common one in part 4 of the *Magistrates' Court Act*, and in particular Div. 2, in which s43 is found. Section 26, which commences Div. 2, describes how a "criminal proceeding" is to be commenced: it is to be by the laying of a charge. If that be the nature of the "criminal proceeding" which is referred to in s43, there can be no doubt: an application under s464U is not a criminal proceeding within the meaning of s43; nor, we should have thought, is the suspect under s464U, a "party" to a proceeding in a relevant sense. His Honour considered that the expression "criminal proceeding" went beyond what was described in s26, by virtue of s25; but we are not so clear. Be that as it may, we think that in s43, the expression "criminal proceeding" is used in the sense of that "criminal proceeding" which, under s26, "must be commenced by filing a charge". It is only in such a "criminal proceeding" that "a party" to the criminal proceeding may apply for the issue of a witness summons under s43. That is enough to exclude the possibility on an application under s464U of the *Crimes Act*. There are many provisions in Div. 2 which appear to us altogether inappropriate, and inapplicable therefore, to the proceeding under s464U.

9. Mr Nash submitted that an application under section 464U of the *Crimes Act* was essentially similar, for present purposes, to the application under section 50(4) of the *Road Safety Act* before the Magistrate below, and thus the passage cited above from *Loughnan* was equally relevant to

such an application, which accordingly was not a "criminal proceeding". In his submission if no charge had been laid there was no criminal proceeding on foot.

10. However, it is clear from the careful wording of the passage cited above from *Loughnan* that the Full Court intended to allow for there being proceedings which could properly be described as "criminal" but which were not commenced by a charge under section 26.

11. Mr Dennis, for the appellant, submitted, and I accept, that section 26(1) of the *Magistrates' Court Act* is a procedural provision, not a definition of "criminal proceeding". He drew attention to the passage in *Loughnan*[4] where the Court said:

> . . . it must be remembered that s464U is part of the investigative process. .... It is the purpose of s464U to make a particular investigative tool available, subject to appropriate safeguards.

That being so, he submitted that *Loughnan* was clearly distinguishable from the present case. In that case there was no criminal proceeding on foot and the provisions sought to be invoked did not depend on any criminal proceeding. He pointed out that the very nature of the inquiry before the Magistrate in the present case was criminal in nature; the success of the application turned on the number of criminal offences related to drink driving for which the respondent had been convicted. It was intrinsically a criminal proceeding.

12. He referred to *Kay v The County Court of Victoria*,[5] an application with a tortuous history, described by Chernov JA,[6] with whom Ormiston and Batt JJ A agreed, as

> "an application for an order extending the time within which the applicant may amend the appeal book in his appeal against the determination of Vincent J dismissing the originating motion by which the applicant sought to challenge the refusal by Chief Judge Waldron to grant him leave to withdraw his abandonment of the appeal against the decision of the magistrate ... convicting him of breaches of an intervention order."

13. Chernov J went on to say:[7]

> Unless the appeal in question can be characterised as a criminal proceeding for the purpose of the definition of "proceeding" in s3(1) of the Act, the applicant will also need to obtain leave of the Court to continue his appeal.
>
> ... it is my opinion that, for relevant purposes, the appeal in this case is a criminal proceeding because, as a matter of substance, it (together with the proceeding before the Chief Judge and the review proceeding before Vincent J) is subordinate or ancillary to, or relevantly connected with, the criminal proceeding that came before the Magistrates' Court or the (abandoned) appeal against the magistrate's decision or both. On either basis, the prior substantial matter which has led to the appeal to this Court is a criminal proceeding which might be affected by the resolution of the appeal: that is to say, should the applicant succeed in overturning the determination of Vincent J, it is likely that his appeal to the County Court will be reinstated, or at least the applicant will have an opportunity to have it reinstated if this Court remits the matter to the Chief Judge or to some other Judge of the County Court for determination according to law. The applicant may thereby avoid the criminal sanction that was imposed upon him.

In the circumstances, therefore, for relevant purposes the appeal to this court can be properly regarded as a criminal proceeding.

14. In *Clarkson v DPP*[8] the Full Court (Crockett, Murphy and Nathan JJ) found that the appellant's originating motion seeking judicial review in the nature of *certiorari* for an order directed to the County Court judge to bring up for quashing convictions and the consequent sentences passed upon him following trial on indictment in the County Court, was a criminal matter or proceeding. In the judgment of Murphy J, with whom the other two members of the Court agreed, he cited from the judgment of Cussen J in *R v Watt; Ex parte Slade*[9]:

> In other cases the proceeding directly under consideration may be said, in some respects, to be equivocal. Such are cases of *habeas corpus*, *mandamus*, *certiorari* and matters of that kind. In these cases you may have to look back to see whether the matter directly under consideration is not merely subordinate or ancillary to some prior and more substantial matter, and whether the decision one way or the other, in the matter directly under consideration, does or does not affect the proceedings

> on or in connection with, the other and more substantial matter. If you find it does affect the prior matter, whether a proceeding in Court or not, which itself is criminal, then it may be held, and it has been held in many cases, that the proceeding directly under consideration is a criminal matter … . If, for example, you have an application for *habeas corpus*, you cannot determine straight off, simply on learning that fact, whether the matter is criminal or not. If you find that that habeas corpus relates to the imprisonment of some person who is in prison for some offence, then it would probably be held that it is a criminal matter, and if it relates to the custody of a child, apart from any question of imprisonment in the ordinary sense, it may be held to be a civil matter.

That passage was similarly relied upon by Phillips JA in *Perkins v County Court of Victoria*.[10]

15. In my view, the present application is, in the light of those passages, properly to be characterised as a criminal proceeding. It depends on the prior application under section 50(4), the decision in which may affect the undoubtedly criminal proceeding in which the respondent was convicted on 10 July 2003, because it will affect the overall result of that conviction so far as the respondent is concerned. I note that in the second reading speech for the *Road Safety (Alcohol Interlock) Bill*, which introduced the provisions with which I am here concerned the Minister for Transport said, "This bill is not about punishment but harm minimisation and rehabilitation".[11] Whatever the purpose of the legislation, there will be a substantial effect on the respondent if the appeal is successful. The respondent, and others in his position, might be forgiven for perceiving an alcohol interlock condition as having a punitive effect and perceiving the difference between a condition imposed for a minimum of six months and a condition imposed for a minimum of three years as relevant in that context. The restriction on the activities of a person whose driver licence is subject to such a condition is not insignificant.

Party

16. As to his second point, Mr Nash relied on the passage from the judgment of Gillard J in *Lednar v Magistrates' Court of Victoria*[12] where His Honour said that in hearing an application for a forensic procedure under section 464ZF of the *Crimes Act* "the Magistrate is not exercising his or her usual role as a judicial officer deciding disputes between parties. Other than the fact that a member of the police force makes the application, there is no provision providing for any other party to the proceeding and in my opinion the subject of the order is not a party to the proceeding". Mr Nash submitted that an application under section 464ZF of the *Crimes Act* was essentially similar to an application under section 50(4) of the *Road Safety Act* and thus the appellant was not a party to that application. In his submission, neither the requirement in section 50(4) to serve notice of the application on the Chief Commissioner nor the right to tender evidence which is conferred on the Chief Commissioner by section 50(5)(a) rendered the Chief Commissioner a party to the application.

17. No submission was made by either counsel to the effect that "party" is a term of art, and I was not referred to any definition of the word either in legislation or at common law.

18. Section 50(4) provides that notice of an application under that section and of the venue of the Magistrates' Court at which the application is to be made must be given to the Chief Commissioner. Further, section 50(5)(a) requires that the court, on an application under section 50(4), must hear any relevant evidence tendered by either the applicant or the Chief Commissioner. Those provisions would seem to lead to the conclusion that the Chief Commissioner is entitled to appear to oppose the application; if not, there would be little purpose in the giving of notice of the application to the Chief Commissioner, or in the notification as to the venue, or in the allocation of police resources to appearing and presenting evidence at the hearing. In my view the role of the Chief Commissioner on an application under section 50(4) as appropriately described as that of a party.

19. In contrast, while section 464ZF of the *Crimes Act* (with which Gillard J was concerned in *Lednar*) requires that if the application is for a forensic procedure to be conducted on a child, the application must be served on the child and its parent or guardian, there is no other provision in that section requiring service of the application and no provision for the giving of evidence by any person (although the court may make such enquiries as it considers desirable). Thus the decision in *Lednar* is not determinative of the question before me.

20. Mr Nash's final submission was that, as section 50AAC of the *Road Safety Act* confers a

right of appeal on the person in respect of whom a direction under section 50(4) is given, but on no other person, the intention of Parliament must have been that no other person should have a right of appeal against such a direction.

21. However, as Mr Dennis pointed out, the right of appeal conferred on the applicant, but not on the Chief Commissioner, by section 50AAC is an appeal on the merits to the County Court under section 83 of the *Magistrates' Court Act*, to be conducted as a re-hearing by virtue of section 85 of that Act. It cannot be said that the conferral of that right of appeal on the applicant alone indicates an intention that the Chief Commissioner shall have no right of appeal to this Court on a question of law under section 92 of that Act from an order under section 50(4).

22. For the reasons given, I find that the Chief Commissioner was entitled to appeal to this Court under section 92(1) of the *Magistrates' Court Act* against the decision of the Magistrate on the application of the respondent under section 50(4) of the *Road Safety Act*.

The Substantive Issue

23. The respondent has been convicted three times under section 49(1)(f) of the Road Safety Act of exceeding the prescribed concentration of alcohol.[13] The several convictions were recorded on the following dates:

- On 8 January 1999, by virtue of section 89A(2) of the *Road Safety Act*, relating to an offence (A) committed on that date;
- On 30 September 1999, relating to an offence (B) committed on 3 November 1998; and
- On 10 July 2003, relating to an offence (C) committed on 26 March 2003.

It is apparent that offence (B) was committed before the commission of offence (A) on 8 January 1999, although the conviction in respect of (A) was recorded before the conviction in respect of (B).

24. On his conviction for offence (C) the respondent's driver licence was cancelled for twelve months and the court ordered that he was not to be relicensed except by order of a magistrate. On 3 February 2004 the respondent applied to the Magistrates' Court under section 50(4) of the *Road Safety Act* for an order as to the issue of a driver licence. When the application came on before the Magistrate, he decided to make the order. By virtue of section 50AAA(3)(b) of that Act, and the fact that offence (C) for which the respondent's licence was cancelled was not a first offence, the Magistrate was required to direct the Roads Corporation to grant the respondent a licence subject to an alcohol interlock condition, as defined in section 50AAA(3)(b).

25. That being so, section 50AAB(1) required that the Magistrate specify in the direction a period during which the respondent was to be unable to apply for the removal of the condition ("the specified period"). A question then arose as to the length of that period. If the offence concerned (that is (C)) had been a first offence, the direction would have had to be given under section 50AAA(2) and by virtue of section 50AAB(2) the specified period would have been at least six months. However, it was not in issue that, as has been said, (C) was not a first offence.

26. If (C) were a second offence, section 50AAB(3)(a)(i) would require that the specified period be at least six months.[14] "In any other case", that is, for present purposes, if (C) were a third offence, section 50AAB(3)(b) would require that the specified period be at least three years. The Magistrate found that (B) must be regarded as a first offence for this purpose, the conviction for (B) having been recorded after the commission of (A). On that basis he decided that (C) was a second offence and accordingly that he was required to direct that the specified period was six months.

27. The essential issue in this appeal is thus whether (C) was a second offence, with the result, as the Magistrate found, that the specified period is to be at least six months; or a third offence, with the result, as the Chief Commissioner contends, that the specified period is to be at least three years. In order to decide that question, it is necessary to decide whether (B) was a first or a second offence.

28. In *Christie v Britnell*[15] Madden CJ cited from *Coke* the principle that where there are degrees of punishment inflicted for succeeding offences there must be a conviction for each because "it appeareth to be no offence untill judgment by proceeding of law be given against him", and also

cited from *Maxwell on Interpretation of Statutes*, quoting *Coke*, "When a second offence is the subject of distinct punishment it is an offence committed after conviction of a first."

29. Smith J in *Farrington v Thomson and Bridgland*[16] was concerned with section 177 of the *Licensing Act* 1928, which provided that on conviction for a third offence thereunder the licensee *ipso facto* forfeited the licence. His Honour said, after referring to *Christie v Britnell* and other authorities:

> These cases show, I consider, that in sections like section 177, which impose increased penalties for second and subsequent offences, an offence is not ordinarily to be considered a "second offence" unless at the time when it was committed the offender had a prior conviction. They, therefore, support the view that an offence is not a "third offence" unless the offender had two prior convictions when he committed it. ... Moreover it appears to me that the applicability of this rule of construction to section 177 is confirmed by the gravity of the consequences attaching to a conviction for a third offence thereunder as compared with those attaching to a conviction for a second offence.

30. Mr Dennis submitted that it was clear from the authorities that the principle governing the classification of offences was based upon degrees of punishment. He referred to the second reading speech for the *Road Safety (Alcohol Interlock) Bill*[17] as authority for the proposition that the purpose of the legislation relating to alcohol interlock conditions was not punishment, but harm minimisation and rehabilitation. The Minister said:[18]

> The purpose of a minimum interlock period, whether required by the legislation or fixed by a court, is to facilitate rehabilitation and to enable a reliable assessment to be made of any long-term changes in the person's behaviour pattern, or of a lack of any change. A problem drink-driver should stay on an interlock after the minimum period has expired unless and until he or she can convince a court that he or she can be safely trusted not to drink and drive.

Sections 50(5) and 50AAB(6) are indications of that intention.

31. For that reason, Mr Dennis submitted, the principle governing classification of offences was not applicable to offences under legislation relating to alcohol interlock offences. Accordingly, (B) was a second offence, and (C) a third offence, falling within the expression "In any other case" in section 50AAB(3)(b). That being so, in his submission the minimum period during which the respondent was to be unable to apply for the removal of the condition was three years.

32. However, it appears to me that the use of the word "consequences" by Smith J in the passage cited above from *Farrington* is significant, and is consistent with the general thrust of the passage from the judgment of Cussen J in *R v Watt; Ex parte Slade* which is cited in[14] above. In my view, it indicates that His Honour, like Cussen J, had in mind the possibility that consequences of a series of convictions other than an increase in the severity of the punishment may justify the operation of the principle. It is relevant to note that punishment is one only of the five heads of purposes for which sentences may be imposed,[19] and those purposes include rehabilitation and the protection of the community, which latter can be equated with harm minimisation.

33. Further, as I indicated in [15] above, whatever the purpose of the legislation, the difference between a condition imposed for six months and a condition imposed for three years may well appear to the person affected as a considerable increase in punishment, analogous to the forfeiture of the publican's licence with which Smith J was concerned in Farrington. The characterisation of the purpose of a sentence as rehabilitation and harm minimisation does not alter its nature from the point of view of the person sentenced.

34. Mr Dennis submitted further that it was inconceivable that a court, on an application under section 50(4), would be precluded from taking into account the commission of an offence because that offence had not constituted a prior offence for the purpose of sentencing.

35. However, the court is not bound to grant an application under section 50(4) merely because it is made at the expiry of the specified minimum time, and section 50(5) is wide enough to enable the court to take such an offence into account in deciding whether to grant the application. That decision is quite separate from the specification of the minimum period within which such an application may not be made. That specification depends on the precise terms of the legislation, and the only discretion which the court has is a discretion to specify a period longer than the

prescribed minimum. No doubt in the exercise of that discretion such a conviction could also be taken into account. However, the present appeal is concerned with the specification of the minimum period.

Conclusion

36. For the reasons given, I find the answers to the question of law posed in the Master's order to be: (a) Yes. (b) No. I invite submissions from counsel as to the form of the orders to be made and as to costs.

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[1] [1993] VicRp 49; [1993] 1 VR 685.
[2] [1992] VicRp 7; [1992] 1 VR 91.
[3] at 697-8.
[4] at 697.
[5] [2000] VSCA 175.
[6] at [3].
[7] at [8] to [10].
[8] [1990] VicRp 65; [1990] VR 745 at 747.
[9] [1912] VicLawRp 43; [1912] VLR 225 at 241-2; 18 ALR 96; 33 ALT 222.
[10] [2000] VSCA 171; (2000) 2 VR 246 at 254; (2000) 115 A Crim R 528.
[11] Victoria, *Parliamentary Debates*, 29 November 2001, 2186-2187.
[12] [2000] VSC 549; (2000) 117 A Crim R 396 at 428.
[13] Counsel were in agreement that a similar conviction in 1974 is, by virtue of section 50AA of the *Road Safety Act*, not relevant for present purposes.
[14] No issue arises as to the presence of the relevant concentration of alcohol.
[15] [1895] VicLawRp 9; (1895) 21 VLR 71 at 73.
[16] [1959] VicRp 49; [1959] VR 286 at 288; [1959] ALR 695.
[17] cited in [15] above.
[18] at 2186.
[19] *Sentencing Act* 1991 s5.

APPEARANCES: For the appellant Chief Commissioner of Police: Mr B Dennis, counsel. Victorian Government Solicitor. For the respondent Rigg: Mr PG Nash, QC with Mr J Lavery, counsel. Tony Danos, solicitor.
