25/01; [2001] VSC 342

SUPREME COURT OF VICTORIA

DPP v CROAKER

Bongiorno J

21, 24 August 2001 — (2001) 34 MVR 397; (2001) 120 A Crim R 588

MOTOR TRAFFIC – DRINK/DRIVING – TRAFFIC INFRINGEMENT NOTICE ISSUED TO DEFENDANT FOR DRINK/DRIVING OFFENCE – EFFECT OF NOTICE – WHETHER CONVICTION FOR PURPOSES OF A SUBSEQUENT OFFENCE – "CONVICTION" – MEANING OF – WHETHER MAGISTRATE IN ERROR IN NOT TREATING INFRINGEMENT AS A PRIOR CONVICTION: *ROAD SAFETY ACT* 1986, S89A(2).

Section 89A of the *Road Safety Act* 1986 has the effect that a traffic infringement notice issued in respect of a drink-driving infringement takes effect as a conviction for the offence 28 days after the date of the notice. The statutory conviction brought about by s89A(2) incorporates as a matter of necessity a statutory finding of guilt. Accordingly, a magistrate was in error in ruling that the conviction under s89A(2) did not involve a finding of guilt.

BONGIORNO J:

1. On 20 December 1996 the respondent, Scott Croaker, was apprehended by police and given a breath test, as a result of which he was found to have been driving a motor vehicle whilst the percentage of alcohol in his blood exceeded the statutory limit, contrary to s49(1)(b) *Road Safety Act* 1986. His reading on that occasion was .07%. He was issued with a traffic infringement notice by a police officer which had the effect, 28 days after it was issued, of taking effect as a conviction for the offence specified in the notice. This result is achieved by the effect given to a traffic infringement notice by s89A *Road Safety Act* 1986.

2. On 19 June 2000 Mr Croaker was again apprehended and breath tested by police, and on this occasion was found to have a blood alcohol reading of .077%. As a result of that event, on 21 February 2001 he appeared in the Melbourne Magistrates' Court charged with another breach of s49(1)(b) *Road Safety Act* 1986, the same offence with which he had been charged in 1996. Before he was asked to plead to the charge, an exchange took place between his counsel and the magistrate in which his counsel said:

> "I appear for Mr Croaker. This is a drink drive matter, section [the section is quoted]. The matter hasn't resolved, in so far as the police aren't willing to withdraw the charges. However, if you're willing to give a sentence indication that you wouldn't interfere with the defendant's licence, he'd be willing to plead guilty today. There is a problem with that because this defendant, the police will allege, has a prior for a drink driving offence in 1996."

Counsel then went on to put an argument to the magistrate to the effect that although, if this was the first occasion on which Mr Croaker had been found guilty of this offence the magistrate would have had a discretion not to interfere with his licence, the fact that he, in fact, had a prior conviction did not mean that that discretion had been lost. At the end of the argument which included reference to what judges in the County Court had done on two other occasions, the prosecutor was invited to reply. He said:

> "And in relation to the legal argument put forward to you, I've discussed this with counsel outside. I am really in the position where, looking at the Act, I'm happy to proceed with whichever determination Your Worship sees fit in relation to this. I personally haven't come up against an argument such as this before, so - - - "

The magistrate then stood the matter down temporarily. Upon returning he said:

> "Mr Walsh-Buckley, I am persuaded by your submission that in fact the court does have discretion in this matter."

The magistrate then went on to say something further about the submissions made on behalf of the respondent.

3. I have set out that passage from the proceeding below because of a submission made by Mr Walsh-Buckley in this Court to the effect that, by reason of the conduct of the prosecutor in the court below, this appeal ought either be dismissed or permanently stayed, on the basis that to permit it to proceed would be unfair to his client and/or an abuse of the process of this Court. I shall return to this argument shortly, but first I shall deal with the substantive issue.

4. As I have already indicated, s89A *Road Safety Act* 1986 has the effect that a traffic infringement notice issued in respect of a drink-driving infringement "becomes" (*sic*) a conviction for the offence 28 days after the date of that notice. Within that 28-day period, however, the recipient of the notice has the right to object to the traffic infringement notice by giving notice in writing of his objection to the person specified for that purpose in the notice itself. Upon his providing certain particulars he can then have the matter dealt with by a court. If it is so dealt with it is subject to the ordinary procedural rules of the Magistrates' Court. It would be heard by a magistrate, determined by him and a penalty imposed if the offence was found proved. The minimum driving disqualification period prescribed by the *Road Safety Act* 1986 is the same whether it is imposed by a magistrate or imposed by operation of the Act itself; that is to say, in Mr Croaker's case, a disqualification from driving for six months for a first offence or 14 months for a second offence.

5. Although since its commencement in 1986 the Act has been amended in two significant ways: firstly, by the *Road Safety (Miscellaneous Amendments) Act* 1989 and, secondly, by the *Road Safety (Licence Cancellation) Act* 1992, it is not necessary to refer to those amendments. It is sufficient if I turn directly to s50(1AB) of the Act which preserves, in a very restricted form, the discretion available to a magistrate not to interfere with a driver's licence under certain restricted and confined circumstances. In general terms, those circumstances are that the driver must be a first offender who has a blood alcohol reading less than .1%.

6. It was the wording of s50(1AB) which gave rise to the argument in this case. The sub-section reads:

> "(1AB) If a court finds a person guilty of an offence under section 49(1)(b), (f) or (g) but does not record a conviction, the court is not required to cancel a driver licence or permit or disqualify the offender from obtaining one in accordance with sub-section (1A) if it appears to the court that at the relevant time the concentration of alcohol in the blood of the offender—
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> (a) in the case of *a person previously found guilty of an offence* against any one of the paragraphs of section 49(1) or any previous enactment corresponding to any of those paragraphs or any corresponding law, was not more than 0.05 grams per 100 millilitres of blood, or
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> (b) in any other case, was not more than 0.1 grams per 100 millilitres of blood." (emphasis added)

7. The argument on behalf of the respondent was to the effect that the conviction which he had received by virtue of the traffic infringement notice issued to him in respect of the 1996 offence did not involve a previous finding of guilt for the purpose of his appearance before the Melbourne Magistrates' Court in respect of the June 2000 offence. In order to make good this submission, the respondent had to urge an interpretation of the Act to the effect that an automatic conviction recorded as a result of a failure to object to a traffic infringement notice issued under s89A *Road Safety Act* 1986 did not involve a finding of guilt of an offence. Accordingly it is necessary to look at the question of what constitutes a conviction in order to determine whether it of necessity involves a finding of guilt of an offence.

8. The Full Court of this Court in 1963 was concerned with the question of whether a plea of guilty of its own force constituted a conviction. In *R v Tonks*[1], their Honours said, at 127-128:

> "The review of the authorities which we have made satisfies us that a plea of guilty does not of its own force constitute a conviction. In our opinion it amounts to no more than a solemn confession of the ingredients of the crime alleged. A conviction is a determination of guilt, and a determination of guilt must be the act of the court or the arm of the court charged with deciding the guilt of the accused. It may be that even a determination of guilt will not in all cases amount to a 'conviction',

> for the latter term may be used in a particular context as meaning not merely conviction by verdict where no judgment is given, but conviction by judgment. But there must at least be a determination of guilt before there can be a conviction. There can accordingly be no conviction on a count to which an accused pleads guilty until by some act on the part of the court it has indicated a determination of the question of guilt, and if there can be no conviction till then, neither can there be a successful plea of *autrefois convict*."

That passage was referred to with approval by the High Court in *Maxwell v R*[2], per Dawson and McHugh JJ at 508, and had previously been approved in the Supreme Court of Queensland in *R v Jerome & McMahon*[3], per Gibbs J at 604.

9. In *Maxwell's* case, which concerned the question of the court's power with respect to a plea of guilty accepted by a prosecutor, Dawson and McHugh JJ said, at 509:

> "Whilst a plea of guilty is a confession of guilt, it does not of itself amount to a conviction. A conviction does not occur until there is an acceptance of the plea amounting to a determination of guilt by the court."

In the same case, Toohey J, at 519, quoted *Cobiac v Liddy*[4], and in particular McTiernan J, as saying of the word "conviction":

> "It may mean a mere determination of guilt or a finding of guilt, plus a judgment on the finding."

His Honour, at 520, approved the passage in *R v Tonks* to which I have already referred, and went on to say:

> "Thus, Australian authority indicates that at common law a conviction encompasses a determination of guilt by the court and does not necessarily require judgment on the basis of that determination."

See also the judgment of Gaudron and Gummow JJ at 531 in the same case.

10. In this case, what is being asserted by the respondent is that the statutory conviction brought into existence by s89A(2) *Road Safety Act* 1986 does not involve a finding of guilt. In effect, he says that for there to be a finding of guilt there must be a curial process. The finding of guilt must be made by a court. I disagree. If the discussion concerning the meaning of a conviction to which I have referred in *Tonks* and *Maxwell* is applied to s89A(2) *Road Safety Act* 1986, it follows that the statutory conviction must incorporate, as a matter of necessity, a statutory finding of guilt. Were it otherwise, the conviction itself would have no basis. Whilst *Maxwell* and *Tonks* were both dealing with the procedures followed in a common law court, the Act is providing a new method by which a conviction can be obtained, namely, by the issue of a traffic infringement notice, the failure to object to that notice and the statutory coming into effect of a conviction 28 days after the notice. It would seem to me to make a nonsense of the Act to say that in some way that conviction, which is itself a creature of the statute, did not involve a finding of guilt, also a creature of the same statute.

11. That is sufficient to dispose of the matters raised in this appeal. If the conviction under s89A(2) involves a finding of guilt as I have held, then the discretion open to the magistrate in respect of a first offender under s50(1AB) *Road Safety Act* 1986 does not exist, and accordingly the ruling of the magistrate that he had a discretion not to interfere with the respondent's licence in this case was an error, as was his disposition of the case by not interfering with the respondent's driver licence.

12. Mr Walsh-Buckley, who appeared for the respondent here as well as in the court below, put an interesting and well researched argument on a number of other bases. Each of them, however, depended upon the proposition that a conviction acquired by virtue of s89A *Road Safety Act* 1986 did not involve a finding of guilt. As I have ruled otherwise on that question there is no need to canvass those arguments further here.

13. I turn then to deal with the other ground upon which Mr Walsh-Buckley submits the appeal ought to be dismissed or, in the alternative, permanently stayed. He put this argument on the basis that there would be an injustice were the appellant now to be permitted to prosecute this

appeal, when the prosecutor in the court below had not put any argument to the magistrate in opposition to the argument upon which the respondent was successful. Mr Walsh-Buckley referred to a number of cases in which courts of the highest authority have refused to permit the Crown to succeed on appeal where it had, in the lower court, taken a contrary position. As it was put by the Court of Appeal of this State in *Coleman*[5]: "The Crown ought not be allowed to blow hot and cold." But the whole of Mr Walsh-Buckley's argument depended, in effect, on the prosecutor below having taken a different position to that taken by the appellant here. A careful reading of the transcript reveals that he did no such thing. He did no more than say to the magistrate that he had no submissions to make in respect of the matter. He was not a legally qualified prosecutor. He said he was not in a position to put an argument. There is a big difference between failing to put an argument and positively acquiescing in a particular course of conduct sufficiently prejudicial to a respondent to bring into play cases such as *Coleman*, or the other cases to which Mr Walsh-Buckley referred so as to prevent this Court rectifying the error of the magistrate, or rectifying it but refusing to permit the respondent to be further dealt with according to law. Although the argument put by Mr Walsh-Buckley in this respect may have been largely sound as a matter of law it fails on the facts. There was no blowing "hot and cold".

14. The one point that Mr Walsh-Buckley made which requires further consideration is that, in light of what occurred in the Magistrates' Court upon the case being called, it might be said that the respondent pleaded guilty to the offence in that court only because of the ruling of the magistrate. Had the magistrate ruled otherwise, so his argument went, the respondent would have pleaded not guilty and the matter would have proceeded to a trial. He was, in effect, misled by the ruling of the magistrate. There are two things that might be said about this.

15. The first is that it was inappropriate for the magistrate to have engaged in the exchange with counsel which occurred in this case. Counsel asked the magistrate to rule on a hypothetical basis in respect of his interpretation of the *Road Safety Act* 1986. The magistrate acceded to that request without having the respondent plead to the offence with which he was charged. The opinion of the magistrate was in respect of a hypothetical question. He should not have been asked that question. He should not have answered it. The second matter which needs to be said arises from the fear expressed by Mr Walsh-Buckley that should this matter return to the Magistrates' Court the fact that his client pleaded guilty on the first occasion might be used against him in the event that he pleads not guilty on the matter being remitted. If that factual situation were to arise, a magistrate would be confronted with the question as to whether, in the exercise of his or her discretion, to permit evidence of the earlier plea of guilty to be given, in circumstances where it might be said to have been entered on a particular apprehended view of the result which would follow. That discretion which the magistrate undoubtedly has is the same discretion to which Gaudron J was referring in *Jago v The District Court of New South Wales*[6], when she said, at 77, (admittedly in a different context, but nevertheless relevant for present purposes):

> "Another feature attending criminal proceedings and relevant to the grant of a permanent stay thereof is that a trial judge, by reason of the duty to ensure the fairness of a trial, has a number of discretionary powers which may be exercised in the course of a trial, including the power to reject evidence which is technically admissible but which would operate unfairly against the accused. See *Driscoll v R* [1977] HCA 43; (1977) 137 CLR 517; (1977) 15 ALR 47; (1977) 51 ALJR 731, *Harris v DPP* (1952) AC 694; [1952] 1 All ER 1044; 36 Cr App R 39; [1952] 1 TLR 1075; 116 JP 248 and *R v Christie* (1914) AC 545; [1914-15] All ER 63; (1914) 10 Cr App R 141."

Her Honour was there referring to the power that the District Court of New South Wales had to stay its own proceedings as being an abuse of process, and the power which it also had to ensure the fairness of a trial in the way in which Her Honour suggested. The situation is somewhat different here, but the same discretion resides in the magistrate. If he or she were to consider it unfair to the present respondent that his previous plea of guilty be held against him, as it were, on a re-trial, then there is ample discretion to exclude that evidence upon that re-trial.

16. Accordingly, the argument put by Mr Walsh-Buckley in respect of the propriety of this appeal also fails.

17. Before concluding, it would not be inappropriate to say that the complexity which surrounds the drafting of some of the provisions of the *Road Safety Act* 1986 with which I have had to deal in this case gives rise to a fertile field for technical points to be taken, one after another. The

Court of Appeal of this State has, within the last few days, expressed its view on such technical points: see *Sher v DPP*[7]. In that case, Brooking JA, delivering the judgment of the Court, referred to "the thriving minor industry in which some lawyers seem to find full-time employment keeping the streets safe for those who drive when they have had too much to drink". To those remarks might be added a plea to the legislature to remove the technicalities from this part of the Act by redrafting it to express the relatively simple principles sought to be enacted in language which could not give rise to the sort of argument which was put in this case and in the cases to which the Court of Appeal was referring.

18. The appeal is accordingly upheld, the orders of the magistrate quashed and the matter will be remitted to the Magistrates' Court of Victoria pursuant to s92(7) *Magistrates' Court Act* 1989 to be dealt with according to law.

19. The appellant seeks the costs of the appeal. Notwithstanding argument from Mr Walsh-Buckley on behalf of the respondent opposing that order, I order the respondent to pay the appellant's costs to be taxed.

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[1] [1963] VicRp 19; [1963] VR 121.
[2] [1996] HCA 46; (1996) 135 ALR 1; [1997] 4 Leg Rep C1; (1996) 70 ALJR 324; (1996) 87 A Crim R 180; (1996) 184 CLR 501.
[3] (1964) Qd R 595; 59 QJPR 57.
[4] [1969] HCA 26; 119 CLR 257; [1969] ALR 637; (1969) 43 ALJR 257.
[5] [2001] VSCA 59; 120 A Crim R 415.
[6] [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307.
[7] [2001] VSCA 110; (2001) 34 MVR 153; (2001) 120 A Crim R 585.

APPEARANCES: For the appellant DPP: Mr DA Trapnell, counsel. Solicitor for Public Prosecutions. For the respondent: Mr W Walsh-Buckley, counsel. Kenna Croxford, solicitors.
