

25/74

SUPREME COURT OF VICTORIA

DEANS v CURSIO

Gowans J

19 June 1974 — [1974] VicRp 78; [1974] VR 640

MOTOR TRAFFIC – DRIVING A MOTOR VEHICLE WHILST LICENCE SUSPENDED – FINDING BY MAGISTRATE THAT DEFENDANT SHOULD HAVE BEEN CHARGED UNDER ANOTHER PROVISION OF THE MOTOR CAR ACT 1958 – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, SS22C, 27B, 28(1).

HELD: Order nisi absolute. Order of dismissal set aside. Remitted for determination according to law.

1. The submission in relation to the provisions of s27B(2) of the *Motor Car Act 1958* ('Act') involved a misconception of the import of that sub-section. Its purpose was only to state the effect of a suspension under s27B(1) in terms to be contrasted with the effect of a suspension under s26 by a Magistrates' Court. By s26(5) of the Act it was provided that a licence suspended by the court shall, during the term of suspension, be of no effect, while s27B(2) provided that, although a person whose licence had been suspended under the demerit system was to be deemed not to be licensed to drive a motor car during the period of the suspension, the provisions of s27B(2) were not to prevent the renewal of a licence which expired during the period of the suspension.

2. It was quite clear that the effect of s27B(2) was not to say that a person whose licence to drive a motor car was suspended by notice under that section, and nevertheless drove, was to be treated as a person who was not driving a motor car during a period of suspension of his licence, under s28(1). If that were intended to be the operation of s27B(2) one would have expected some express words to be inserted in s28 to make it clear that the person there referred to as having had his licence suspended did not include a person having his licence suspended under s27B.

3. There was nothing in s28(1) to detract from the full operation of that provision and there was nothing anywhere else in the Act to detract from its full operation; and, in particular, having regard to the operation intended for s27B and its language, there was nothing in that provision to detract from the full operation of s28.

4. Accordingly, the magistrate was wrong and the order nisi was made absolute on each of the three grounds set out in the order nisi.

GOWANS J: This is an order to review the order of a Magistrates' Court at Footscray on 7 February 1974 dismissing an information directed against the defendant Michele Cursio, on a charge relating to s28(1) of the *Motor Car Act 1958*. The information alleged that on 7 January 1974, at Tottenham, the defendant drove a motor car on a highway, to wit, Sunshine Road and Ashley Street, during a period of suspension of his licence by the Chief Commissioner of Police in the State of Victoria.

The affidavit in support of the order nisi to review states that at the close of the police case the defendant did not give evidence, and his counsel asked for the dismissal of the charge. He said:

"Your Worship, my client has been charged under s28(1) of the *Motor Car Act 1958*. The prosecution alleged that he drove a motor car during a period of a suspension of his driver's licence by the Chief Commissioner of Police. There is no argument that his licence was suspended by the Chief Commissioner of Police but I draw the Court's attention to the provisions of s27B of the *Motor Car Act 1958* which establishes the right of the Chief Commissioner of Police to suspend the person's driver's licence by notice under this section. This was done in this case. However, s27B(2) of the same section expressly declares the following: 'A person whose licence to drive a motor car is suspended by notice under this section shall be deemed not to be licensed to drive a motor car during the whole of the period of the suspension'. Furthermore I direct the Court's attention to the remarks made on p95 of vol 1 of the 4th ed. of *Vickery on Motor and Traffic Law* (Vic.) under the title of 'Deemed not

to be licensed'. 'A person whose licence had been suspended pursuant to s27B(1) and who drives a motor car during such suspension is, by virtue of the fact that he is deemed not to be licensed during the period of such suspension, liable to penalty under s22C of the Act rather than under s28(1).' I further ask the Court to dismiss this information."

After hearing argument, the stipendiary magistrate said this:

"After hearing both the defence counsel and the prosecutor in this matter, and reading the relevant sections applicable, I find that the accused should be charged with unlicensed driving as per s22C of the *Motor Car Act* 1958. I have also read the note on p95 of Vickery referred to by the defence counsel Mr Weller, and agree that it states the correct proposition. I therefore dismiss the information before the court against the accused Cursio. The information before the court cannot be amended to read: 'unlicensed driving' and I will not proceed on a charge of unlicensed driving at the present time."

The grounds upon which the order nisi to review was obtained are as follows:—

(1) That the said court erred in holding that a person whose licence to drive a motor car has been suspended under s27B of the *Motor Car Act* 1958 cannot be convicted of an offence under s28(1) of the Act.

(2) That the said court erred in holding that a person whose licence to drive a motor car has been suspended under the said s27B can only be convicted of an offence under s22C of the Act.

(3) That the said court erred in dismissing the information on the ground that the defendant should have been charged with an offence under the said s22C.

Prior to the enactment of Act No. 7915, the *Motor Car (Traffic Offenders) Act* 1969, s22C(1)(a) and s28(1) of the Act stood unaffected by any such reference as now appears in s27B. Section 22C(1)(a) provided as follows:

"22C(1) Subject to this Act any person—

(a) who drives a motor car other than a motor cycle upon any highway, unless he is the holder of a licence to drive a motor car;"

(then follow various other paragraphs (b), (c), (d), (e) and (f))

"shall be guilty of an offence against this part and liable—"

(then followed penalties depending upon whether the offender had ever been the holder of a licence, or whether he had never been the holder of a licence).

Section 28(1) read:—

"28(1) Any person who drives a motor car during the period of any suspension of his licence to drive a motor car or after his licence has been cancelled or during any period of disqualification from obtaining a licence shall be guilty of an offence and liable to be imprisoned in the case of a first offence for a term of not more than three months and in the case of a second or any subsequent offence for a term of not less than one month and not more than six months."

It will be apparent from a comparison of those two provisions that the graver offence was that embodied in s28(1), of a person driving a motor car during any period of suspension or after his licence had been cancelled or during any period of disqualification from obtaining a licence, it presumably being regarded as worthy of a greater penalty if a driver continued to drive after any of those things had happened to him, as compared with the position of a person who was merely driving a motor car without holding a licence.

When the legislation stood in that form there were various powers vested in different authorities to suspend licences or to cancel them, or disqualify persons from obtaining a licence. There was a power to suspend vested in the Chief Commissioner under s25(1), and there was a power to suspend vested in the Magistrates' Court under s26(1). Then when Act No. 7915 was introduced in 1969 a collection of sections numbered from 27A to 27G was introduced to deal with what was called the "demerits system". Section 27B(1) then gave the Chief Commissioner power, by notice, to suspend a licence for a different reason, that is because the holder of a licence had

had recorded against him a total of so many demerit points. Subs(2) of s27B then provided:—

"(2) A person whose licence to drive a motor car is suspended by notice under this section, shall be deemed not to be licensed to drive a motor car during the whole of the period of suspension of three months or six months (as the case may be) but the provisions of this sub-section shall not prevent the renewal of any licence which expires during the period of the suspension."

The argument presented to the magistrate and accepted by him in effect meant that a person whose licence to drive a motor car had been suspended, and who nevertheless drove it, was no longer to be dealt with under s28(1), and incur the more serious penalty provided for him in that section, but should for the future only be guilty of an offence under s22C(1) of driving without being the holder of a licence, and incur only the less grave penalty prescribed by that section.

I accept the submission that has been made that to attribute that effect to the provisions of s27B(2) involves a misconception of the import of that sub-section. I agree that its purpose is only to state the effect of a suspension under s27B(1) in terms to be contrasted with the effect of a suspension under s26 by a magistrates' court. By s26(5) it is provided that a licence suspended by the court shall, during the term of suspension, be of no effect, while s27B(2) provides that, although a person whose licence has been suspended under the demerit system is to be deemed not to be licensed to drive a motor car during the period of the suspension, the provisions of s27B(2) are not to prevent the renewal of a licence which expires during the period of the suspension.

The effect of s27B(2) could conceivably be to enable resort to be had to the provisions of s22C(1)(a) that is to say to enable a person, whose licence to drive has been suspended but who nevertheless drives, to be treated as though he were driving without a licence. It is unnecessary, however, to determine that matter, and in any case I draw attention to the fact that s22C(1) is preceded by the words "Subject to this Act". It may be that when the occasion arises it will be held that a person whose licence has been suspended under s27B is not to be treated as liable to be punished for driving without a licence under s22C(1)(a) having regard to the history of the matter and the language that is used.

However that may be and whether resort may be made to s22C(1)(a) or not, it is, in my opinion, quite clear that the effect of s27B(2) is not to say that a person whose licence to drive a motor car is suspended by notice under that section, and nevertheless drives, is to be treated as a person who is not driving a motor car during a period of suspension of his licence, under s28(1). If that were intended to be the operation of s27B(2) one would have expected some express words to be inserted in s28 to make it clear that the person there referred to as having had his licence suspended did not include a person having his licence suspended under s27B.

On the contrary, the words of s28(1) are quite general in embracing all forms of removal of licence and they refer to "any suspension of his licence to drive a motor car". In those circumstances, I think, particularly having regard to the fact that s27B and the associated sections dealing with the "demerits register" were inserted in the Act between s22C and s28(1), the language of s28(1) must be treated as being unaffected by that insertion. There is nothing, in my view, in s28(1) to detract from the full operation of that provision and there is nothing anywhere else in the Act to detract from its full operation; and, in particular, having regard to the operation intended for s27B and its language, there is nothing in that provision to detract from the full operation of s28.

That being so, in my view, the magistrate was wrong and the order nisi should, therefore, be made absolute on each of the three grounds set out in the order nisi. The order nisi will be made absolute with costs. The order of dismissal is set aside. The information will be remitted to the magistrate to deal with it in accordance with this judgment. Order absolute.

Solicitor for the informant: John Downey, Crown Solicitor.