23/85

SUPREME COURT OF VICTORIA

BELL v FEEHAN

Gobbo J

14 March, 29 May 1985 — [1985] VicRp 82; [1985] VR 841; 2 MVR 341

MOTOR TRAFFIC – DRIVER CONVICTED AND DISQUALIFIED FROM OBTAINING A LICENCE – APPEAL TO COUNTY COURT – DRIVER DETECTED DRIVING WHILST APPEAL PENDING – WHETHER FIRST CONVICTION A PRIOR CONVICTION FOR PURPOSES OF SUBSEQUENT DRIVING CHARGE – DATE WHEN CONVICTION OPERATES WHERE APPEAL LODGED: *MOTOR CAR ACT* SS26, 28(1); *MAGISTRATES' COURTS ACT* 1971, S75.

F. was convicted of drink/driving charges and driving whilst disqualified. He lodged notice of appeal the same day on which the convictions were imposed. 5 weeks later, F. was detected driving his motor car. When the appeal came on for hearing, it was dismissed. When the charge relating to the second episode of driving came on for hearing, the Magistrate took the view that it was not a second offence of driving whilst disqualified and accordingly did not impose a term of imprisonment. On order nisi to review—

HELD: Order nisi discharged.
(1) When an Act imposes increased penalties for second and subsequent offences, the second offence must be committed subsequently to conviction for the first offence.
***Farrington v Thomson and Bridgland* [1959] VicRp 49; [1959] VR 286; [1959] ALR 695, applied.**

(2) Once a notice of appeal is lodged, a conviction of a Magistrates' Court has only a limited or provisional character.

(3) In the present case, the date of the previous conviction operated as from the date of the determination of the appeal by the County Court, and accordingly, the lodging of the notice of appeal prevented the Magistrate's regarding the conviction as a first offence of the purposes of s28(1) of the *Motor Car Act* 1958.

GOBBO J: [1] This is the return of an Order Nisi seeking a review of an Order of the Magistrates' Court at Box Hill made on 27th May 1983. This matter raises a short but important point, namely, has a defendant committed a second or subsequent offence for the purposes of s28(1) of the *Motor Car Act* 1958 of driving a motor car during a period of disqualification from obtaining a licence if a second episode of driving while disqualified occurred while an appeal to the County Court in respect of the first episode of driving while disqualified was still pending. The learned Magistrate was of the opinion that the conviction in respect of the first episode of driving while disqualified operated as from the date of the determination of the appeal by the County Court and not from the earlier date of the conviction by the Magistrates' Court. Accordingly, he found that at the date of the second **[2]** episode of driving while disqualified, the defendant had not committed a first offence within the meaning of the *Motor Car Act*. The informant has sought to review that decision by the learned Magistrate.

The facts are not in dispute and may be stated briefly. On 5th November 1982 the respondent had been convicted of two counts of driving under the influence of alcohol, one count of refusing to furnish a breath sample, one count of refusing to give particulars to police and one count of driving whilst disqualified. These offences occurred on 5th May 1982. This last conviction is important in this review and may be described as the first offence of driving whilst disqualified. The respondent gave Notice of Appeal following these convictions on 5th November 1982. Not long after, on 12th December 1982, the respondent was stopped by Constable Colin Bell whilst driving his car along Springvale Road, Nunawading.

On 8th April 1983 the appeal in respect of the November 1982 convictions came on for hearing in the County Court and was dismissed. On 27th May 1983 the information in respect of the December 1982 conviction came on for hearing before the Magistrates' Court at Box Hill. The respondent was unrepresented and pleaded guilty to the charge of driving whilst disqualified.

He admitted the convictions at Box Hill Magistrates' Court of 5th November 1982. The learned Magistrate took the view that the driving episode in December 1982 was not a second offence of driving whilst disqualified within the meaning of s28(1) of the *Motor Car Act* 1958 and he accordingly did not impose a term of imprisonment. The applicant now challenges that ruling on the following grounds that were the subject of an Order Nisi to review:

> **[3]** 1. That the Magistrate was in error in holding that the fact that there was an appeal to the County Court in respect of the respondent's first episode of driving whilst disqualified pending at the time of the respondent's second episode of driving whilst disqualified meant that the respondent had not committed a second offence within the meaning of s28(1) of the *Motor Car Act* 1958.
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> 2. That the Magistrate was in error in holding that the fact that there was an appeal to the County Court in respect of the respondent's first episode of driving whilst disqualified pending at the time of the respondent's second episode of driving whilst disqualified meant that the respondent had not committed a second offence within the meaning of s28(1) of the said Act notwithstanding that prior to the hearing of the information relating to the said second episode the appeal to the County Court had been dismissed and the conviction and sentence confirmed by the County Court.
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> 3. That the Magistrate misdirected himself as to the effect of an unsuccessful appeal to the County Court on the decision appealed from.
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> 4. That the Magistrate was in error in holding that in the circumstances of this case the respondent had not committed a second offence within the meaning of s28(1) of the said Act.
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> 5. That the Magistrate misconstrued s28(1) of the said Act.
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> **[4]** 6. That the Magistrate misdirected himself as to what was required to constitute a second offence within the meaning of s28(1) of the said Act.

The relevant parts of s28(1) of the *Motor Car Act* read:

> "Any person who drives a motor car ... during any period of disqualification from obtaining a licence shall be guilty of an offence and liable in the case of a first offence to a penalty of not more than $1,000.00 or imprisonment for not more than six months and in the case of a second or any subsequent offence imprisonment for not less than one month and not more than two years."

The applicant contends that there was disclosed an offence of driving whilst disqualified subsequent to a conviction of a first and like offence, albeit a conviction of the Magistrates' Court from which an appeal was made to the County Court. The whole of the applicant's argument ultimately proceeded upon the basis that a second offence meant a second conviction. This appears to me to be a correct assumption since in the context it is difficult to do other than read "offence" as meaning an offence that has proceeded to conviction.

A series of cases, including the decision of this Court in *Farrington v Thomson and Bridgland* [1959] VicRp 49; [1959] VR 286; [1959] ALR 695, have applied *Coke's* rule of construction (2 Co Inst 468) that, as to penalty, the second offence must be subsequent to a conviction for a first offence. That principle must in my view be regarded as well-established.

The operation of s28(1) in this case depends upon the proper interpretation of s75(1)(g) of the *Magistrates' Courts Act* 1971. This section reads:

> "75(1) Where a person is authorized to appeal from the conviction or order of a Magistrates' Court to the County Court, he may appeal to such Court subject to the following provisions: -
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> **[5]** (g) The County Court may postpone or adjourn the hearing of the appeal to a later day or a later sitting of the court or to another division of the court sitting at the same or any other place, and upon the hearing thereof may confirm reverse or vary the decision of the Magistrates' Court or remit the matter with the opinion of the County Court thereon to the Magistrates' Court or may make such other order in the matter as the County Court thinks just, and may by the order exercise any power which the Magistrates' Court might have exercised, and such order shall have the same effect and may be enforced in the same manner as if it had been made by the Magistrates' Court."

The six grounds for review essentially depend upon the proper legal characterisation of the appeal provisions in s75(1)(g). The High Court has indicated in *Victorian Stevedoring and*

General Contracting Co Pty Ltd & Meakes v Dignan [1931] HCA 34; [1931] 46 CLR 73; 38 ALR 22, *Commissioner for Railways (NSW) v Cavanough* [1935] HCA 45; [1935] 53 CLR 220; [1935] ALR 304, and more recently in *Builders' Licensing Board v Sperway* [1976] HCA 62; (1976) 135 CLR 616; [1976] 14 ALR 174 that an appeal is not a common law proceeding but a remedy given by statute, in this case Part IX of the *Magistrates' Courts Act* 1971. Although the powers of an appeal Court depend upon the characterisation of the appeal as an appeal *stricto senso* or an appeal by way of rehearing, (*Ex parte Australian Sporting Club Ltd, re Dash* [1947] 47 SR (NSW) 283; 64 WN (NSW) 63), it has been clearly established that an appeal from a Magistrates' Court to the County Court is an appeal by way of rehearing: *Re Lycouressis* [1983] VicRp 82; [1983] 2 VR 219; *Sweeney v Fitzhardinge* [1906] HCA 73; [1906] 4 CLR 716.

This characterisation of the nature of an appeal to the County Court is consistent with other cases wherein it has been expressly held that an Order made by the County Court on appeal is an order of that Court and not of the Magistrates' Court: *R v Wasley; ex parte Frankel* [1914] VicLawRp 92; [1914] VLR 635; 20 ALR 326; 36 ALT 72 and *R v Governor of Pentridge; ex parte Cusmano* [1966] VicRp 78; [1966] VR 583. **[6]** Accordingly, the primary question is whether the lodging of an appeal from a decision of a Magistrates' Court operates in such a manner as to suspend the conviction pending the rehearing of the case. It is clear that the giving of notice of an appeal operates as a stay of execution on the Magistrates' Court Order – but how does this further limit the operation of the conviction?

The High Court considered the matter when obliged to rule whether a person could recover wages for a period of suspension from his duties between a conviction in the Court of Petty Sessions and the reversal of his conviction by the Court of Quarter Sessions in New South Wales: *Commissioner Railways (NSW) v Cavanough* [1935] HCA 45; [1935] 53 CLR 220; [1935] ALR 304. In a joint judgment, Rich, Dixon, Evatt and McTiernan JJ stated:

> "In our opinion he is so entitled because, his conviction having been quashed, he cannot be considered ever to have been convicted and he cannot be deemed to have vacated his office."

It is equally clear from a reading of s75(1)(9) of the *Magistrates' Courts Act* 1971 that upon the abandonment of an appeal, the order appealed from is recorded as an order of the County Court dismissing the appeal and affirming the order appealed against. In *Blacker v Parnell* [1978] 1 NSWLR 616 the New South Wales Court of Appeal held that when a District Court Judge dismissed appeals from a Magistrate, and confirmed the convictions and sentences, the convictions became those of the District Court Judge and the sentences imposed were those imposed by him. As a consequence of the District Court Judge's Order, there remained no conviction or order of the Magistrate. For the contrary to be true, a person convicted again on appeal would have to have two convictions arising out of the same circumstances recorded against him.

[7] The applicant nonetheless submits that the first conviction by the Magistrate must retain the character of a conviction until confirmed, reversed or varied by the County Court. It is difficult to reconcile this submission with the decisions referred to earlier. In my view, a conviction of the Magistrates' Court has only a limited or provisional character once a notice of appeal is given. This view is consistent with the other provisions of s75 of the *Magistrates' Courts Act* 1971, which allow a defendant to be released from custody upon his entering into a recognizance to appear in the County Court and "to surrender himself and not to depart that Court without leave and often as leave is given to return to the Court at the time appointed and again surrender himself and to abide the judgment of the Court on the appeal and to pay the costs awarded by the Court".

In *Geeves v Boxhall* [1951] Tas SR 2, Morris CJ interpreted a section substantially equivalent to s75(1)(b) to mean that the suspension of a licence is stayed upon the appellant entering into a recognizance:

> "By implication, where the recognizance is entered into or the security lodged, the appeal does operate as a stay of execution. The whole order of the Court of Petty Sessions, therefore, is stayed, and the suspension of the licence does not operate until it is imposed by the judge after hearing the appeal."

However, in Victoria, s26(6)(b) of the *Motor Car Act* 1958 provides that the giving of notice of appeal shall not of itself stay the operation of the order but the court making such order if it thinks fit may stay the operation of the order pending the decision of the appeal. The introduction

of the section into the *Motor Car Act* 1958 suggests that in the absence of this provision a notice of appeal ordinarily would stay the operation of the order.

It was put that I should interpret the section so as to avoid the possibility of defendants lodging notices of appeal so **[8]** as to avoid the effect of a second conviction pending appeal. In my view, if that is an anomaly, it is not such as to cause the ordinary principle of construction of such a provision to be set to one side. Moreover, there are situations that could arise that might raise competing issues of policy such as the case of the defendant who does in fact win an appeal but in the meantime has been dealt with on the second episode as though it was a true second conviction. In any event, the situation of a motorist who twice drives whilst disqualified if is thought to be sufficiently serious can easily be dealt with by the Magistrate, for it is open to him in appropriate cases to impose a prison sentence of up to six months even for a first offence.

I have concluded that the learned Magistrate was correct in regarding the date of the previous conviction as the date of the County Court order, and that the giving of the notice of appeal operated to prevent a Magistrate from regarding the conviction in the Magistrates' Court as a 'first offence' for the purposes of s28(1) of the *Motor Car Act*. For these reasons I am of the view that the Order Nisi should be discharged.

Solicitor for the applicant: RJ Lambert, Acting Crown Solicitor.
Solicitors for the respondent: Accornero, Brett and Matisi.
