08/01; [2000] VSC 306

SUPREME COURT OF VICTORIA

ALEXANDROS v BIRCHELL and ANOR

Smith J

31 July, 4 August 2000 — (2000) 31 MVR 307

SENTENCING – MOTOR TRAFFIC MATTERS – SUBSEQUENT CONVICTIONS – WHETHER EVIDENCE OF ADMISSIBLE IN SENTENCING HEARING: *SENTENCING ACT* 1991, S6.

1. Whilst evidence of subsequent convictions cannot be taken into account for the purposes of an escalation of penalty for second or subsequent offences, evidence of subsequent convictions is admissible at least in respect of the issues of leniency and the risk of recidivism.

2. Section 6(6) of the *Sentencing Act* 1991 provides that in determining the character of an offender "a court may consider ... (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender". The language of the sub-section is broad and not qualified and the phrase "previous findings of guilt or convictions of the offender" should not be read as only applying to convictions recorded prior to the commission of the offence in respect of which the offender is being sentenced.

***R v Rumpf* [1988] VicRp 55; [1988] VR 466; (1987) 29 A Crim R 252, referred to.**

SMITH J:

Proceedings

1. Peter Alexandros (Alexandros) has brought three appeals from orders of the Magistrates' Court of Victoria made on 4 February 2000. On that day he was convicted of the following offences committed on 25 April 1999:

(a) driving in a manner dangerous, for which he was fined $750 and ordered to pay $53 costs;

(b) driving without L plates displayed, for which he was fined $100;

(c) driving in breach of permit condition, for which he was fined $150.

On each charge, it was also ordered that his licence be cancelled and that he be disqualified from driving in the State of Victoria for a period of 12 months commencing from 4 February 2000.

2. The question of law ordered to be tried in each appeal is in the following terms:

"(a) That the Magistrate erred in permitting evidence to be led of convictions occurring subsequent to the date of the alleged offence."

The proceedings below

3. Prior to the trial of the proceedings on 4 February 2000, counsel appearing for Alexandros had discussions with the prosecutor as a result of which the prosecution agreed to withdraw four charges and Alexandros pleaded guilty to the remaining above three charges.

4. On the morning of the hearing the prosecutor indicated to counsel for Alexandros that he intended to advise the Magistrate of two convictions which had been recorded against Alexandros after the occurrence of the offences which were dealt with at the court that day. Counsel for Alexandros indicated that he opposed that course and he sought to raise the issue before the matter commenced before the learned Magistrate.

5. The two convictions in question were as follows:

(a) A conviction entered on 29 June 1999 in respect of the offence of exceeding the speed limit committed on 14 November 1998. As to that, Alexandros had been fined $800 with $53 statutory

> costs. An order was made cancelling his licence and disqualifying him from driving in the State of Victoria for four months effective from 29 June 1999.
>
> (b) A conviction entered on 13 December 1999 for the offence of driving at a speed dangerous on 27 May 1999. Alexandros had been fined $800 with $53 statutory costs and an order was made suspending him from driving in the State of Victoria for a period of eight months effective from 13 December 1999.

6. In essence, counsel for the Alexandros submitted to the learned Magistrate that the evidence of offences for which convictions were recorded after 25 April, 1999 were not relevant to the sentencing task facing the learned Magistrate. They were not prior convictions and were, therefore, not relevant. According to the transcript exhibited in these proceedings, the learned Magistrate responded,

> "There are, well there are two points as I see it, the first is that a prior conviction brings with it in some cases high penalties that it has to be a prior conviction ... A subsequent conviction can be brought to the notice of the Court in fact I believe it should be brought to the notice of the Court for the purpose of determining the, I think it is Rump (sic), isn't it Rump's case, you probably know better than I do, that those matters can be brought before the Court to determine what penalty is appropriate, but doesn't operate any statutory provision which are brought about by a prior convictions per se: "

A little later the learned Magistrate is recorded as saying:

> "There is a difference between a prior conviction and taking well, taking (h)eed or note or whatever o(f) some disposition which has been recently or subsequently imposed. The Court (is) entitled to take into account if for example a person has recently been or subsequently been placed on a Community Based Order and that person has refused to undergo that Community Based Order or breached that order that one can take that into account in deciding whether or not another one ought to be imposed."

The learned Magistrate went on to say that he was just putting the reference to the Community Based Order as an example and a little later is recorded as saying:

> "It doesn't go to, it won't go to aggravate the circumstances, some things such, has occurred subsequent to the offence does not go to aggravate the circumstances or aggravate a penalty which were to impose in respect of the matters which have been dealt with, that they can be taken into account in determining basically rehabilitation programs etc that is the way I understand it."

7. The learned prosecutor argued that the material was admissible it being relevant, saying, in particular, that the fact that one of the convictions resulted in a licence suspension of eight months commencing from December of the previous year made that "totally relevant". The learned Magistrate responded "Right".

8. There was then some further discussion after which the prosecuting officer detailed the events giving rise to the charges. His Worship was then handed a "Vic Roads Extract" setting out a prior conviction for exceeding the speed limit by 40 KPH on 15 September 1998 for which Alexandros was fined $300 and his licence suspended for four months from 14 October 1998. It would appear that the extract also included the two previous but subsequent convictions.

9. Mr Bourke renewed his objection. The learned Magistrate responded:

> "I think I explained what I understand to be the situation as far as prior convictions and non prior convictions and the only reason why those subsequent matters can be used, I have already explained that and I believe that the matters can be put before me."

10. Counsel for Alexandros then addressed the learned magistrate about aspects of the earlier convictions and went on to draw his attention to mitigatory circumstances including the fact that the Alexandros had been having difficulty obtaining employment but now had employment and that that was the reason for his non-attendance at the hearing. He also informed the learned magistrate that the motor cycle involved in the events in question had been disposed of and referred to other matters. He concluded by submitting to the learned magistrate that he should impose a substantial monetary penalty but do nothing to put his client off the road for any longer period.

11. At the conclusion of the submissions of counsel for Alexandros, the learned magistrate stated the following:

> "Thank you. It is true to say that the defendant is entitled to a reduced penalty as a result of pleading guilty, however that reduction in penalty is minimised by the fact that the matter has been listed here on a number of occasions, been through the Contest Mention and the Plea comes today. As a result of that he gets a minimal discount. It is said that there is no danger to others, a motor cycle travelling at 120 kilometres an hour in a 60 zone is a danger, not only to others but more particularly to the defendant himself, and on that basis the order of the Court is that driving whilst in a ma(nn) er dangerous he is convicted and fined the $750, he is ordered to pay $53 statutory costs, and his licence is cancelled and he is disqualified from obtaining another for 12 months."

12. The learned magistrate then went on to deal with the other two charges in the manner outlined above.

Issues on appeal

13. Counsel for Alexandros in the three appeals put two arguments that relate to the question of law for determination. He argued first that the provisions of the *Sentencing Act* 1991 did not allow evidence of the convictions to be admitted into evidence. The second argument was that, to the extent that the common law applies, the authorities indicate that the evidence of subsequent convictions is relevant only to the fixing of minimum terms, that the magistrate in this instance had no discretion as to the minimum term to be fixed and that, therefore, the evidence was irrelevant.

The *Sentencing Act* 1991

14. Part 2 of the *Sentencing Act* sets out the governing principles to be applied in sentencing. In s5(2) the following is provided:

> "5. **Sentencing Guidelines**
> (1) ...
>
> (2) In sentencing an offender a court must have regard to: (a) ... (f) the offender's previous character; and ..."

The Act goes on to identify factors to be considered in determining the "offender's character" in s6:

> "**6. Factors to be considered in determining offender's character**
> In determining the character of an offender a court may consider (among other things) —
> (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender; and..."

15. Counsel for the Alexandros submitted that the reference to "previous findings of guilt or convictions of the offender" in s6(a) should be read as applying to convictions recorded prior to the commission of the offence in respect of which the offender is being sentenced. I can see no justification for that conclusion. The language is broad and not qualified and s6(a) also requires the sentencing court to consider the "date" and the "relevance" of such previous findings or convictions.

The common law argument

16. It may be accepted, I think, that the common law decisions in this area can assist in determining the answer to the question posed by s6(a) of the relevance of the evidence of the previous findings of guilt and convictions in this case. The learned magistrate referred to the leading Victorian authority of *R v Rumpf* (1988) VR 466 see especially at 467-476. Counsel for Alexandros relied upon this case and earlier authorities cited in it in support of his argument that the law is that the evidence of the subsequent convictions was relevant and admissible only in circumstances where a minimum term was to be determined.

17. There are several difficulties with this argument. It is sufficient to address the general question raised about the relevance and permitted use of such evidence.

18. It is true that the relevance of subsequent convictions on the issue of minimum terms was highlighted in the above cases, particularly, in *R v Rumpf* (above). To limit the relevance and

use of such evidence to that issue, however, would be incorrect and in my view the statements in those cases were not intended to confine the law in that way. The law is, I suggest, accurately summarised by Fox and Freiberg in *Sentencing, State and Federal, Law in Victoria* at para 2.324 where the learned authors state:

> "While accepting that 'subsequent convictions' cannot be taken into account in the same way as 'prior convictions' for the purposes of a statutory escalation of penalty for second or subsequent offenders, the courts have taken the view that a sentencer is not, and should not, be precluded from considering the significance of this on-going offending when deciding upon an appropriate penalty within the relevant statutory limits for the present offence. It has been accepted that material showing the offender's later conduct, including the commission of 'subsequent offences', can legitimately be placed before the court to diminish leniency, to impair the good character for which the offender would otherwise have been allowed credit as a first offender, to shed light on the risk of recidivism, or the claims of rehabilitation, and to rebut any suggestions that the offence before the court is an isolated one."

19. The learned authors refer to a number of cases including: *R v Hutchins* (1957) 75 WN (NSW) 75; *R v Aston (No. 2)* [1991] 1 Qd R 375; *R v McInerney* (1986) 42 SASR 111, 112; *R v Carbone* (1984) 36 SASR 306 and other unreported cases.

20. At times the discussion before me ventured into the area of the appropriateness or otherwise of the learned magistrate's actual use of the evidence. The question to be determined on this appeal, however, is whether the evidence was admissible. I am satisfied that it plainly was, it being relevant to two issues at least, namely, the issues of leniency and the risk of recidivism.

Conclusion

21. For the foregoing reasons I am satisfied that the learned magistrate was correct in admitting the evidence and the appeals must therefore fail.

APPEARANCES: For the appellant Alexandros: Mr P Hurley, counsel. Koutsantoni & Associates, solicitors. For the respondents: Mr RM Read, counsel. Peter Wood, Solicitor for the Office of Public Prosecutions.
