

21/90

SUPREME COURT OF VICTORIA

ROSS v GARVEY

Nathan J

3 April 1990 — (1990) 11 MVR 297

MOTOR TRAFFIC – DRIVING WHILST DISQUALIFIED – SIMILAR PRIOR CONVICTIONS – VEHICLE NOT OWNED BY OFFENDER – WHETHER REGISTRATION OF MAY BE ORDERED TO BE CANCELLED – WHETHER COURT REQUIRED TO IMPOSE APPROPRIATE PENALTY: ROAD SAFETY ACT 1986, SS30, 31.

Joyce was convicted of driving whilst disqualified a motor car owned by R., a woman with whom Joyce occasionally lived. Without imposing any other penalty, the magistrate ordered that the registration of R.'s car be cancelled. Upon order nisi to review—

HELD: Order absolute.

Section 31(1) of the *Road Safety Act 1986* gives power to a court convicting a person of driving whilst disqualified to order, in addition to the imposition of an appropriate penalty, the cancellation of the registration of the vehicle involved if owned by the person convicted. In the present case, the magistrate was in error in failing to impose an appropriate penalty and in ordering the cancellation of the registration of the motor vehicle which was not owned by the person convicted.

NATHAN J: [1] Joyce drove a car along the Ovens Valley Highway at Eurobin on 24th November 1989. He was disqualified from driving at the time. His licence had been cancelled. An information laid by Garvey for this offence amongst others was issued. In January 1990 he appeared before the Magistrate at Myrtleford who, after hearing plea material, ordered that the registration of the car which he had been driving be cancelled pursuant to s30(1) of the *Road Safety Act* (the Act). This is the return of an order to review. The car was not his. It was owned by a woman with whom he occasionally lived, and registered in her name.

The relevant section of the Act as appropriately edited reads:

"A person must not drive a motor vehicle while the authorisation granted is suspended, cancelled or during a period of disqualification. The penalty for the first offence is 30 penalty units or four months' imprisonment and for a subsequent offence imprisonment of not less than one month nor more than two years. Section 6 of the *Penalties and Sentences Act* does not apply."

Joyce had prior convictions for driving whilst disqualified. Section 6 of the *Penalties and Sentences Act* No. 10260 permits a court "to fine the offender in addition to or instead of any other punishment". It did not apply to Joyce. The Act creates the offence of driving whilst disqualified and assigns to it the appropriate range of penalties. There was no power for the Magistrate to order the cancellation of the registration of another person's vehicle, and the order must be made absolute. However, the following observations should be made. [2] The Act assigns the penalty of imprisonment for a second or subsequent offence of driving whilst disqualified. The leniency of the law in permitting a fine in substitution of imprisonment has been expressly abrogated. The section must be seen as stressing the punitive aspects of the criminal law, as well as protecting the community from unlicensed drivers. Further, a minimum term of imprisonment is prescribed which should be imposed once the offence is proved.

The power of a Magistrate to impose a suspended sentence of imprisonment pursuant to s21 of the *Penalties and Sentences Act* is also circumscribed. In cases where a Magistrate is minded to impose a sentence greater than one year but less than the maximum, there is no power to suspend actual imprisonment. There is power to impose community based orders in respect of these offences. Section 28 of the *Penalties and Sentences Act*, as appropriately edited, provides:

"Where a Court convicts a person of an offence punishable by imprisonment the Court may ... in addition to sentencing the person to a term of imprisonment of not more than three months make a community based order."

It is to be noted that actual incarceration can be an ingredient in the making of a community based order and those orders are not an entire substitution for imprisonment. Secondly community based orders themselves oblige the offender to give up his liberty for certain periods and to work for the community's benefit. The orders themselves have a 'deprivation of liberty' component. It follows that in most cases of a second or subsequent offence by a person driving whilst disqualified, [3] or the licence having been suspended or cancelled, actual physical imprisonment will follow.

The drastic consequences following being twice convicted for driving whilst disqualified are apparent from the Act. The licence to drive is not a right but a privilege obtained by persons so qualified under the terms of the Act. It is comprehensible that the privilege having been abused once, a monetary penalty may be attracted.

It is equally comprehensible that if the privilege is again abused, incarceration will follow. The import of s31(1) is clear. It incorporates the penalty provisions as part of the text, and not as a sub-script. The legislature has expressed the intention to visit repeated offenders with prison.

APPEARANCES: For the applicant Ross: Mr N Green, counsel. Vaccaro & Associates, solicitors. For the respondent Garvey: Mr S Lee, counsel. Victorian Government Solicitor.
