27/94

SUPREME COURT OF VICTORIA

BUCKLEY v DPP

Ashley J

4 August 1994

SENTENCING – POSSESS/USE CANNABIS L. – YOUTHFUL OFFENDER/NO PRIORS – CONVICTIONS/ FINES IMPOSED – NO REASONS GIVEN - WHETHER PROPER EXERCISE OF DISCRETION – OFFENDER'S DRIVER LICENCE CANCELLED – DISQUALIFIED FOR 12 MONTHS – WHETHER OFFENCES "IN CONNECTION WITH THE DRIVING OF A MOTOR VEHICLE": *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981 SS73,75,76(1)(2); *ROAD SAFETY ACT* 1986 S28.

B., aged 19 years, living with his parents and without prior convictions was found by a police officer in a parked motor vehicle. Upon a search of the vehicle, 7 grams of Cannabis L. were discovered by the police officer behind the driver's seat. B. was subsequently charged with and pleaded guilty to possession and use of Cannabis L. Without giving any reasons, the Magistrate convicted and fined B. $250 on each charge, cancelled his driver licence and disqualified B. from driving for 12 months. Upon appeal—

HELD: Appeal allowed. Convictions and orders set aside. Matter remitted for hearing by another magistrate.
1. The wording of S76(1) of the *Drugs, Poisons and Controlled Substances Act* 1981 is to the effect that a Court is to proceed to an adjournment without conviction unless the court considers a conviction appropriate. In the circumstances of the case, the Magistrate was in error (in the absence of any reasons given) in imposing convictions and fines on B.

2. Section 28 of the *Road Safety Act* 1986 ('Act') empowers a Court to cancel a driver licence where a person is convicted of an offence in connection with the driving of a motor vehicle. In relation to the charge of using Cannabis some days prior to the date of interception, it could not be said to have been connected with the driving of a motor vehicle.

3. Section 28 of the Act operates where in a very real sense the offence in question is related to the driving of a motor vehicle or there is a substantial relation between the offence committed and the driving of the vehicle.
***Murdoch v Simmonds* [1971] VicRp 108; [1971] VR 887; and**
***Rochow v Pupavac* [1989] VicRp 8; [1989] VR 73; (1988) 9 MVR 93, applied.**

4. Insofar as there was a connection between the offence of possessing cannabis and the motor car, it was a connection in which the driving was essentially irrelevant. If there was any connection, it could properly be described as peripheral. Accordingly, the Magistrate misdirected himself as to the operation of S28.

ASHLEY J: [1] There are before me two appeals by Dean Michael Buckley who was at the Moe Magistrates' Court on 12 April 1994, convicted by a Magistrate of offences against the *Drugs, Poisons and Controlled Substances Act* 1981 ("the Act"). The appellant faced two charges. The first was that on 3 March 1994, not being authorised by or licensed under the Act, he did have in his possession a drug of dependence, namely Cannabis L. The second was that on 28 February 1994, not being appropriately authorised or licensed under the Act, he did use a drug of dependence, namely, Cannabis L.

When the matter came before the learned Magistrate on 12 April the appellant was unrepresented. He pleaded guilty to each of the charges. The prosecutor read a summary of the offences. The summary identified the appellant as a man of 19 years of age, unemployed, and living with his parents in Morwell. It indicated that on 3 March 1994 the appellant drove in his motor vehicle with a friend to a secluded location on the west side of Morwell. The purpose of the appellant and his friend driving to that location, as described to the learned Magistrate, was that they were going to pick up another friend already in the area.

The summary further indicated that the vehicle was seen parked by police from the Morwell Station, who approached the vehicle and in due course undertook a search of it. A small bag containing green vegetable matter and two foils containing such matter were located behind the driver's seat. The material located proved to be Cannabis L of a total weight of seven grams. **[2]** The summary further disclosed that the appellant was interviewed, made full admissions, stated that the vegetable matter located by the police belonged to him and was for his own personal use, and that his friend had no knowledge of it. As to its use, the appellant provided an explanation, shortly noted as "It relaxes me".

The further conduct of the matter was that the prosecutor advised the learned Magistrate that the appellant had no prior convictions and that he had not appeared in court on any matter previously. It is apparent from *viva voce* evidence that the appellant gave before me today that the Magistrate then proceeded to convict him and impose penalties, and that no reasons were provided by the Magistrate for the course that he took. Upon each of the two charges the appellant was fined $250. Additionally, in respect of each charge, it was ordered, apparently in reliance upon s28 of the *Road Safety Act* 1986, that the appellant's motor vehicle driving licence be cancelled, and that he be disqualified from driving in the State of Victoria for a period of 12 months, effective from 12 April 1994.

The charges against the appellant were for breaches of s73 and s75 of the Act. Section 73 creates the offence of possession of a drug of dependence. Section 75 creates the offence of use of a drug of dependence. Section 76 is of major importance to this appeal. Section 76(1) relevantly reads as follows:

> "Where before the Magistrates' Court—
> (a) in relation to cannabis (i) ...
> (ii) a person is charged with an offence **[3]** under section 73 and at the hearing the court is satisfied on the balance of probabilities that the offence was not committed by the person for any purpose relating to trafficking in cannabis;
> (iii) a person is charged with an offence under section 75; (iv) ...
>
> (b) a person mentioned in paragraph (a) has not previously been convicted of an offence under—
> (i) ...this Part; ...
> and has not previously been dealt with under this section; and
>
> (c) in relation to a person mentioned in paragraph (a) the court is satisfied beyond reasonable doubt that the person is guilty of the offence with which he is charged—
> the court, without proceeding to conviction, shall having regard to the character and antecedents of the person and to all the circumstances and the public interest, adjourn the further hearing to a time and place to be fixed (such time being not more than twelve months thereafter) and allow the person charged to go at large upon his giving an undertaking under section 75(1) of the *Sentencing Act* 1991, unless the court considers it appropriate to proceed to a conviction".

I should refer also to sub-section (2) of s76 which is in these terms:

> "Where sub-section (1) applies to a person and the Magistrates' Court proceeds to a conviction, the court shall state its reasons for doing so".

In the present case there is no doubt that the Magistrate was confronted by a defendant whose circumstances fell within s76(1)(a), (b) and (c). As to s76(1)(a)(ii), the material before the learned Magistrate must, upon an assumption that he considered it, have satisfied him upon balance of probabilities that the **[4]** possession of the cannabis was not committed by the appellant for any purpose relating to trafficking in the drug. So far as s76(1)(b) is concerned, it was common ground, and the Magistrate was informed by the prosecutor, that there had been no relevant prior conviction, and that the appellant had not previously been dealt with under the section. As to s76(1)(c), the summary of offence and the plea of guilty entitled the Magistrate to be satisfied beyond reasonable doubt that the appellant was guilty of the two offences with which he was charged.

That, then, called into operation the concluding portion of s76(1). Obviously enough, the use of the word "shall" does not, where used in that provision, compel the Magistrates' Court to adjourn the hearing without conviction. There is a discretion to be exercised. On the other hand, the verbiage is to the effect that a Magistrates' Court is to approach the matter by proceeding

to adjournment without conviction, unless the alternative course of conviction is considered appropriate. That is, there is a certain skewing of the provision in favour of adjournment as distinct from conviction. Such a reading is, I think, to be preferred, particularly when regard is had to sub-section (2). The Magistrates' Court is there specifically enjoined to state its reasons in the event that it proceeds to conviction under sub-section (1). That appears to underline the relatively grave step of proceeding to conviction in a case where sub-section (1) has potential application to the benefit of an offender.

[5] It is not, however, in the present case, necessary to rest my decision upon what I have said as to the preferable reading of the closing portion of s76(1). What is at least clear is that that section compels a consideration of the merits on the one hand of adjournment without conviction, and of conviction on the other. And that in the event that the latter course is adopted, then reasons are to be given. In the present case, as I have said, the material before me shows that no reasons were provided, despite a conviction having been recorded, and despite s76(1) having operation upon the material that was before His Worship.

The first ground of appeal in each instance is that the learned Magistrate – and I paraphrase – misinterpreted and therefore misapplied s76 sub-sections (1) and (2) of the Act. The thrust of the argument pursued for the appellant upon this ground was that the discretion must have been misunderstood, or that it was at least misapplied in that in circumstances that were quite inappropriate, a conviction was recorded.

Mr Gebhardt of counsel, for the appellant, drew attention to considerations that the appellant was a youth of 19, living with his parents; that he was a person not only without convictions, but who had not previously appeared in court on any matter; that he had made admissions in relation to the offences with which he was charged; that he had pleaded guilty to the offences; that the quantity of cannabis in his possession was very small. I note in this connection that the amount in total was 7 grams, and that a “small quantity" of cannabis is, by combination of s70 and Schedule 11 Part 2 Column 4 of **[6]** the Act, 50 grams. In the circumstances that Mr Gebhardt referred to, and in the absence of any reasons that would explain why the Magistrate had proceeded to conviction, it was submitted that the conviction and the penalties imposed stood quite outside the limits of a sound discretionary judgment.

Mr Dennis, for the respondent, contended, on the other hand, that there was no identifiable error in the exercise of discretion, and he rightly warned me against simply substituting my own opinion for that of the Magistrate. I am very conscious of the matters to which Mr Dennis drew attention, but I have reached the conclusion that the matters referred to by Mr Gebhardt overwhelmingly indicate that the learned Magistrate's discretion went amiss.

It seems to me upon the material that was before the learned Magistrate that for him to have convicted the appellant and imposed quite substantial penalties, without explanation, is indicative that the exercise of the discretion went very much astray.

The second ground of the appeal – and I paraphrase – is that the Magistrate erred in not giving reasons for the conviction pursuant to s76(2) of the Act. Upon the material before me it is plain that no reasons were given in circumstances where the Act underlines the need to give reasons. Mr Dennis submitted that where no reasons were supplied, the appropriate course was to remit the matter to the Magistrate so that reasons could be given. He referred me to the judgment of Ormiston J in *Body* **[7]** *Corporate Strata Plan No. 4166 and Ors. v Stirling Properties Limited No.2* [1984] VicRp 73; [1984] VR 903; (1984) 56 LGRA 227, and particularly to passages at VR pp910 to 912. It may be that in some cases, as His Honour said, the better course would be to compel reasons rather than quash a decision. But here, as it seems to me, the failure to state reasons was inextricably linked with what seems to me to have been an improper exercise of discretion. I think it is important that justice be seen to be done, and in circumstances where there is reason to believe that a discretionary exercise has miscarried, I think it would be unsatisfactory to remit matters to a Magistrate for the purposes of his providing reasons which, it might be thought, would give him an opportunity to patch up that which appeared to have miscarried. I do not say for a moment that the Magistrate would in fact enter upon a patch-up exercise in the event of remission, but the issue is one of perception, and I think that a reasonable person, not least the appellant, might have some such perception in the circumstances.

The third ground of appeal may be paraphrased this way: that the learned Magistrate misdirected himself with respect to s28 of the *Road Safety Act* 1986 in cancelling the appellant's motor vehicle driving licence and disqualifying him from obtaining such a licence for a 12 months period. Even if I had some doubt as to the validity of this ground of appeal, it seems to me, having regard to the fact that the other grounds of appeal are made out and that the matter will need to be reconsidered at large, that so much of the orders as relates to the appellant's **[8]** motor vehicle licence should be set aside. But I would, were it necessary, conclude that the circumstances were not such as attracted s28.

It should be noted in the first place that the orders in relation to the appellant's licence were made in respect of two charges; one of which was that the appellant used a drug of dependence on 28 February. That was some days before the material was found in the appellant's vehicle. Presumably the evidence of use emerged from the interview that the appellant had with the police officers on the day of his apprehension. What is clear is that the material before the Magistrate was not capable of suggesting that the driving of a motor vehicle was in any way connected with the use of the cannabis on 28 February. Mr Dennis was, indeed, disposed to agree that as an order was made under s28 in respect of the charge of use, it was insupportable. That seems to me to be clear-cut. However, as Mr Dennis submitted, a mirror order in relation to the licence was made in respect of each charge. Even if the appellant succeeded in his appeal in respect of the charge of use, he would be left under the same disability with respect to his licence by reason of the order made on the charge of possession — unless s28 was also inapplicable in that situation. Insofar as it is desirable, if not necessary, to deal with s28 in context of the charge of possession, I think that it was not open to the Magistrate to conclude that the appellant was guilty of an offence under the Act "in connection with the driving of a motor vehicle".

The nature of the required connection has been the **[9]** subject of decisions in this court. One of them was the judgment of Adam J in *Murdoch v Simmonds* [1971] VicRp 108; [1971] VR 887. His Honour observed at page 889:

> "The context is important in all these cases where the words 'in connexion with' are used in legislation"... The cancelling of a licence in some cases is, of course, far more serious as a penalty than any fine that can be inflicted. It is of a penal nature and in accordance with the well-settled rules of construction where the language is vague or general the onus does lie on the informant seeking to obtain the penalty to show that the defendant was clearly intended to come within the scope of the legislation. So one is the more predisposed to giving the words 'offence in connexion with the driving of a motor car' a meaning which indicates that in a very real sense the offence in question is related to the driving of a motor car. As it is put in one case in another connexion by, I think, Kitto J, 'a substantial connexion' is required to answer the expression".

His Honour also said this, at p890:

> "Some other cases on the words 'in connexion with' were cited to me, and I am indebted to counsel for bringing them to my attention. I have concluded that they do not really assist, for the reason that this wide form of expression must take its meaning from the context, and the context here suggests to me that the words must be read, at least, narrowly enough as to require a substantial relation between the offence committed and the driving of the car and that connexion is absent".

I was also referred by counsel to *Rochow v Pupavac* [1989] VicRp 8; [1989] VR 73; (1988) 9 MVR 93. In that case Nathan J identified four circumstances where s28 could come into play. Mr Dennis relied upon the third and fourth of those circumstances. They were put this way by His Honour: (p75-76):

> "Thirdly, with offences which are connected with the driving of a motor vehicle, where the vehicle itself is used as an actual instrument or tool to perpetrate the offence, such as using a car to inflict malicious damage, or to purposefully wound and cause actual bodily harm. And fourthly, where the driving of the vehicle is inextricably **[10]** connected with the commission of an offence, but where the vehicle itself may not be driven in a way which itself amounts to an offence".

His Honour also said this:

> "The test is purposive. If the purpose or reason for driving the vehicle is to commit an offence, even if other means are available to do so, the vehicle is being 'driven in connection with' that offence".

His Honour observed, at p77:

> "The connection between the act of driving and the commission of an offence is one which will require qualitative assessment by the presiding magistrate in each case. No firm rules could or should be expressed other than to say that a connection must be not so remote and fanciful as to offend a reasonable man's concept of relationship of one event with another".

That last observation by His Honour appears to go somewhat beyond earlier passages in his judgment, and the approach of Adam J in *Murdoch v Simmonds*. It may be that what His Honour was there addressing was the question whether it could be said in an individual case that a Magistrate's discretion had miscarried. Be that as it may, it seems to me that s28 could relevantly have operation where it might be said that in a very real sense the offence in question is related to the driving of a motor car, that there is a substantial relation between the offence committed and the driving of the car. Note in each of those formulations that it is not merely the existence of a motor car, but the driving of a motor car with which there must be a relevant connection.

In the present case, as it seems to me, the most that could be said in relation to the offence of possession is that it was the appellant's motor car, a vehicle of which he had possession, in which the cannabis was found. Insofar as there was a connection between the offence **[11]** under s73 of the Act and the motor car, it was a connection in which driving was essentially irrelevant. Any connection between the offence and the driving of a motor vehicle, if it could be said to exist at all, could properly be described as peripheral. For those reasons, if it was independently necessary to consider the operation of s28 in relation to the charge of possession, I would hold that the Magistrate misdirected himself as to the operation of the section. The consequence of what I have said is that each appeal succeeds. The orders made by the Magistrate on 12 April 1994 must be set aside, and the charges remitted for hearing by the Magistrates' Court constituted by a Magistrate other than Mr Gurvich.

APPEARANCES: For the appellant Buckley: Mr SP Gebhardt, counsel. Legal Aid Commission of Victoria (Morwell). For the respondent DPP: Mr BM Dennis, counsel. PC Wood, solicitor for Public Prosecutions.
