54/90

SUPREME COURT OF VICTORIA

STAFFORD v REDMOND

Teague J

4, 12 December 1990 — (1990) 52 A Crim R 173

MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST POSITIVE – FAILURE TO ACCOMPANY POLICE OFFICER FOR A BREATH TEST – OFFENDER'S CONCERN THAT HIS MOTOR VEHICLE MAY BE STOLEN – CHARGE FOUND PROVED – NO SUBMISSIONS AS TO PENALTY – CHARGE DISMISSED AS TRIFLING – NO REASONS GIVEN – WHETHER PROPER EXERCISE OF DISCRETION: *PENALTIES AND SENTENCES ACT* 1985, SS12, 81, 83; *ROAD SAFETY ACT* 1986, SS49(1)(e), 50, 55.

R. was intercepted by S., a police officer, whilst riding a motor cycle. R. underwent a preliminary breath test, which proved positive, but refused to accompany S. to a police station for a full breath test due to a concern that his motor cycle may be stolen in the meantime. At the subsequent hearing, R. pleaded not guilty to the charge of failing to accompany S. to a police station for a breath test. However, the charge was found proved and without hearing submissions on the question of penalty, the magistrate, without giving reasons, dismissed the charge as trifling pursuant to the provisions of s81 of the *Penalties and Sentences Act* 1985. Upon nisi to review—

HELD: Order absolute. Remitted to the magistrate for further decision.
In failing to state what considerations were taken into account and failing to give any reasons for decision, the magistrate failed to exercise his discretion properly and accordingly, fell into error.
***Sun Alliance Insurance v Massoud* [1989] VicRp 2; (1989) VR 8, applied.**

TEAGUE J: [1] On 3 August 1990, Master Evans made an order nisi to review the order made by the Magistrates' Court at Broadmeadows on 5 July 1990, dismissing an information by which it was charged that the respondent failed to accompany a member of the police force to a police station for the purposes of a breath test, under s49(1)(e) of the *Road Safety Act*.

There were three grounds set out in the order nisi as to the basis upon which it was put that the learned magistrate erred. The first was in deciding that this offence under s49(1)(e) of the *Road Safety Act* was of a trifling nature in that he must have failed in the exercise of his discretion to take into account or give sufficient weight to relevant considerations or have given weight to extraneous or irrelevant considerations so as to fail to exercise his discretion properly or at all; the second was in the exercise of his discretion under s81 of the *Penalties and Sentences Act* by determining to dismiss the charge under s49(1)(e) of the *Road Safety Act* 1986 when the offence itself was intentional and of a serious nature and there was no good and substantial reason for absolving the respondent from the punishment prescribed by law for the offence, and the third was in failing to give reasons for his decision to dismiss the charge.

The relevant parts of the relevant provisions of the *Road Safety Act* are as follows:-

[2] "49(1) A person is guilty of an offence if he or she—
(e) refuses or fails to comply with a requirement made under section 55(1) or (2) ..."

"50(1B) On conviction for an offence under section 49(1)(a), (c) (d) or (e) the court must, if the offender holds a driver licence or permit, cancel that licence or permit and, whether or not the offender holds a driver licence or permit, disqualify the offender from obtaining one for such time as the court thinks fit, not being less than—
(a) in the case of a first offence, 2 years ..."

"55(1) If a person undergoes a preliminary breath test when required by a member of the police force ... to do so and—
(a) the test in the opinion of the member ... in whose presence it is made indicates that the person's blood contains alcohol in excess of the prescribed concentration of alcohol; ... the member of the police force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force ... to a police station ..."

The relevant parts of the relevant provisions of the *Penalties and Sentences Act* are as follows:-

> "12(1) Where a Magistrates' Court passes a sentence of imprisonment on a person, the Magistrates' Court—
> (a) must state in writing the reasons for its decision; and
> (b) must cause those reasons to be entered in the records of the court."
>
> "81 ... if upon the hearing of a charge for an offence punishable on summary conviction ... the Magistrates' Court thinks that though the charge is proved the offence was in the particular case of so trifling a nature that it is **[3]** inexpedient to inflict any punishment or any other than a nominal punishment—
> (a) the court without proceeding to conviction may dismiss the information ....
>
> "83(1) If—
> (a) a court has commenced to hear an .... information; and
> (b) the court is satisfied that the person charged is guilty of the offence— the court, instead of convicting the person, may grant an adjournment if it appears to be expedient to do so, having regard to all the circumstances of the case ....
> (3) An adjournment under this section must not be granted unless the person enters into a bond ...."

On 5 July 1990, when the matter came on before the learned magistrate, the respondent was charged with four other offences, to which he pleaded guilty. To the charge brought under s55(1) of the *Road Safety Act*, the respondent pleaded not guilty. There was no transcript kept of the proceedings, but two affidavits were filed setting out the recollections of what took place, a supporting affidavit sworn by the informant, and an affidavit sworn by Mr McKenzie of counsel, who appeared for the respondent before the learned magistrate.

The informant was a constable of police stationed at Broadmeadows. His evidence-in-chief before the magistrate was that, on 8 October 1989, he saw the respondent on a trail bike travel through a stop sign at the intersection of Belfast and Blair Streets, Broadmeadows, that he **[4]** intercepted the respondent nearby, that the respondent told him that the respondent did not have a licence to ride a motor cycle in Victoria, that the trail bike was not registered in Victoria, and that he had had a "couple of cans" that day, that he obtained a positive reading from the respondent on a preliminary breath test, that he told the respondent that the respondent would have to accompany him to the police station, and would have to leave his motor cycle at the point where he had been apprehended, and that the respondent had then refused to leave the motor cycle.

In cross-examination the informant said that he realized that the respondent lived near to the point where the interception took place, that he had suggested that the informant leave his motor cycle in a nearby house, that the smell of the respondent's breath was the only sign of intoxication, and that he was more concerned about the respondent riding his trail bike on the road, and failing to stop than with the question of intoxication, that the respondent continued to refuse to go to the police station even after the informant explained that the penalty for refusal was two years disqualification, and that the respondent was co-operative in all of his dealings with the applicant. The informant swore that the respondent had given evidence before the learned magistrate that he had not been drinking that day, that he had had a few drinks at a party the night before, that he had not wanted his motor cycle to **[5]** get pinched, and so he had not gone with the informant to the police station.

Counsel for the respondent, followed by the prosecutor, had then made submissions to the learned magistrate. Mr Dennis of counsel, who appeared for the informant before me, objected to the affidavit of Mr McKenzie being received in evidence, first because it was sworn after the time limited for an answering affidavit by the order of Master Evans, and secondly because he put that it offended the principles laid down by Crockett J in *Aherne v Freeman* [1974] VicRp 17; [1974] VR 121. However, Mr Dennis was not able to point to any specific prejudice of any moment, and I am satisfied that it is appropriate for me to give leave to file the affidavit of Mr McKenzie out of time and to have regard to the contents of that affidavit. No Affidavit sworn by the learned magistrate was filed.

As will be apparent, the conclusions that I have arrived at are not affected by the differences

in the affidavits, although I will refer to the more significant differences. It was clear from the affidavits taken with the terms of the order nisi that the learned magistrate had found the charge against the respondent proved, and that he had then relied on s81 of the *Penalties and Sentences Act* to dismiss the charge.

[6] Mr Dennis, and Mr Puls, who appeared before me for the respondent, both seemed to accept that one of the reasons why the learned magistrate had not given reasons was that he had assumed that there were only two penalty options available on the fifth charge, in addition to the penalties to be imposed with respect to the four charges to which the respondent pleaded guilty, the two options being to impose the two years' disqualification under s50(1B) of the *Road Safety Act* or to dismiss the information under s81 of the *Penalties and Sentences Act*.

The differences in the affidavits that were the subject of argument by counsel both related to what the learned magistrate had said in announcing his decision. The informant in his affidavit swore that the learned magistrate had said that he believed that the respondent had been drinking, had said that a positive Preliminary Breath Test was obtained, and had said that, in all the circumstances, he would dismiss the charge as being trivial, but had given no further reasons for his decision.

Mr McKenzie, in his affidavit, did not expressly swear that the informant was in error in swearing that there were no further reasons given, but that was implicit in his summary (in about 150 words, as against about 30 in the affidavit of the informant) of what the magistrate said. More importantly, he swore that the learned magistrate had said that the account of the respondent had the ring of truth to it, and that he accepted that the respondent had indicated a willingness to undergo further **[7]** testing under s55 of the Act provided he could ensure that his motorcycle was safe. The first of those matters is difficult to reconcile with the magistrate's conclusion that the charge was proved. The second seems to me not to constitute an adequate basis for a decision that the offence in the particular case was of so trifling a nature that it was inexpedient to inflict any punishment.

The third ground of the order nisi was that the learned magistrate erred in not giving reasons for his decision. Neither Mr Puls nor Mr Dennis were able to take me to any authority for the proposition which stated directly that a magistrate was obliged to give reasons for his decision on penalty. Mr Puls urged me to conclude that there was no such obligation in the circumstances of this case.

He pointed to the statutory requirement in s12 of the *Penalties and Sentences Act* that requires that a magistrate give reasons in writing for a decision to impose a term of imprisonment, and submitted that s12 should be treated as an indication that Parliament did not expect magistrates otherwise to have to give reasons. I would accept that some weight is added to his submission by this consideration, but not a great deal. He also put to me that, in this case, the absence of reasons was a matter with respect to which the **[8]** respondent might appropriately, but the informant ought not to be to, have sought to rely on. He argued that the existence of the right, under the *Magistrates' Court Act* to appeal to the County Court on sentence, where there would be a rehearing, was another reason for accepting that there was not any obligation imposed on a magistrate to give reasons for his decision on penalty.

I am satisfied that the learned magistrate erred in failing to give reasons for his decision to dismiss the information under s81 of the *Penalties and Sentences Act*. The subject of the giving of reasons was reviewed by the Full Court in *Sun Alliance Insurance v Massoud* [1989] VicRp 2; [1989] VR 8, in which Gray, J at page 19 quoted with approval what was said in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at pp279-90 by McHugh JA that the giving of reasons for a judicial decision serves at least three purposes.

The first is to enable the parties to see the extent to which their arguments had been understood and accepted as well as the basis of a judge's decision, the second to further judicial accountability, and the third to enable interested persons to ascertain the basis upon which like cases will probably be decided in the future. The general principle cannot be stated without noting, as was noted in *Sun Alliance*, the qualification that in certain situations the reasons need not be given because the foundation for the decision will be indicated as a matter of necessary inference.

[9] I cannot see that the qualification could be seen to apply in the subject situation, because no submissions at all on the subject of the application of s81 of the *Penalties and Sentences Act* or of the other penalty options had been put to the learned magistrate before he announced his decision on penalty without reasons. I could speculate that the magistrate, having had regard to some matters of comparative substance/triviality put to him in making a determination as to "liability" under s55 of the *Road Safety Act*, has taken into account again those same matters in arriving at his decision as to "penalty" under s81 of the *Penalties and Sentences Act*, but I cannot see that the situation is one of "necessary inference".

In the course of argument, I was referred to a number of cases where superior courts have reviewed decisions of magistrates in relation to the applicability of provisions similar to those of s81 of the *Penalties and Sentences Act*. I refer to *Cobiac v Liddy* [1969] HCA 26; 119 CLR 257; [1969] ALR 637; (1969) 43 ALJR 257; *Farrelly v Little* [1970] VicRp 2; [1970] VR 18; *Jones v Morley* (1981) 29 SASR 57; *Dunsmore v Trembath* (1987) 6 MVR 146; *Walden v Hensler* [1987] HCA 54; (1987) 163 CLR 561; 75 ALR 173; (1987) 29 A Crim R 85; 61 ALJR 646. In every one of those cases, the magistrates set out the reasons for their decisions on penalty at some length. The availability to the learned magistrate of the "bond option" under s83 of the *Penalties and Sentences Act* has to be a matter of significance. **[10]** I am satisfied, after looking at the provisions of s83 of the *Penalties and Sentences Act*, and ss49, 50(1B), 78 and 89A of the *Road Safety Act*, although I do not propose to set out the relevant details in full, that the magistrate did have the option of deciding to grant an adjournment subject to a bond being entered into, under s83, in the circumstances of this case. Mr Puls did not contend that the bond option was not open.

The learned magistrate precluded giving himself the opportunity to consider the bond option by the course that he followed in not requesting submissions as to penalty, but proceeding to dismiss the information without giving reasons. I repeat that I am satisfied that, in the circumstances of this case, the learned magistrate was obliged to give reasons for his decision on penalty, and that he erred in not giving them. Mr Puls argued that because this court should only review by way of order to review, the discretionary decisions of a magistrate on penalty in extreme cases, in accordance with the principles set out in *Bakker v Stewart* [1980] VicRp 2; [1980] VR 17, and because this was not an extreme case, the decision ought not to be reviewed.

He argued further that, for the magistrate to have decided to dismiss the information under s81 of the *Penalties and Sentences Act* was appropriate, as the magistrate was in the best position to assess the sentencing options, and the course of dismissing under s81 **[11]** was in accord with what the High Court had accepted as appropriate in *Cobiac*, where the court was concerned with a drink-driving case, and a mandatory penalty provision.

On the question of the review of the exercise of judicial discretion, Kitto, J in *Australian Coal and Shale Employees' Federation v Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at 627 said:

> " ... the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from ... A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law imposes in the court of first instance."

I am satisfied that the case before me is not a case to be treated as one where the magistrate's exercise of his discretion is being reviewed merely on the basis that it was inappropriate, so that one must consider whether the circumstances are extreme, as in *Bakker*. In the subject case, I am satisfied that the magistrate is to be treated as not having exercised his discretion at all because he has not stated what considerations he has taken into account. Accordingly, I cannot be satisfied that, he has not taken into account considerations that he ought to have taken into account, and/or failed to give proper weight to **[12]** considerations that he ought to have taken into account, in the exercise of his discretion.

I would also add that the court in *Cobiac* was concerned with a provision which is

significantly different in form from s81, and although the High Court concluded that the magistrate had properly exercised his discretion, it seems to me clear that the majority arrived at their conclusion otherwise than by accepting that the offence was trivial in nature.

I am satisfied that the appropriate course for me to follow is to make the order nisi absolute, and to refer the information back to the learned magistrate to be further dealt with according to law. How the learned magistrate exercises his discretion as to penalty is a matter for him to decide in the light of these reasons, and in the light of submissions made as to penalty. It may be appropriate for me to add a rider that it seems to me that it would be desirable for magistrates to note in the register, where any charge is dismissed pursuant to s81, that that was the basis for dismissal. The effect, in the event of a latter conviction on the same charge, of an earlier dismissal, was a matter that concerned Windeyer J in *Cobiac*, albeit in a somewhat different context.

APPEARANCES: For the applicant Stafford: Mr BM Dennis, counsel. Victorian Government Solicitor. For the respondent redmond: Mr J Puls, counsel. Legal Aid Commission Victoria.
