

3/00; [2000] VSC 32

SUPREME COURT OF VICTORIA

DPP v FOSTER

Hedigan J

7 February 2000 — (2000) 30 MVR 512

MOTOR TRAFFIC – DRIVING WHILST LICENCE SUSPENDED – DEFENDANT INTERCEPTED WHILST DRIVING – INFORMED BY POLICE OFFICER THAT HIS DRIVER LICENCE WAS SUSPENDED – DEFENDANT NOT PREVIOUSLY NOTIFIED IN WRITING OF SUSPENSION – REFUSAL BY DEFENDANT TO ACCEPT STATEMENT BY POLICE OFFICER – DEFENDANT DROVE OFF – CHARGE LAID – WHETHER DEFENDANT BELIEVED ON REASONABLE GROUNDS THAT PERIOD OF SUSPENSION HAD NOT COMMENCED – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: ROAD SAFETY ACT 1986, S30(1).

F. was intercepted driving a motor vehicle at 3.25am. A suspension of F's driver licence came into effect from midnight the previous day. F. was informed by the police officer of this suspension; however, F. refused to accept the truth of this statement and drove off. He was later charged with the offence of driving during a period of suspension. At the hearing, F. said that due to changes of address, he did not receive notification of suspension of his licence. Further, because of previous dealings with the police, F. had a distrust of the police. In dismissing the charge, the magistrate in effect concluded that F. believed on reasonable grounds that he was entitled to drive. Upon appeal—

HELD: Appeal dismissed.

1. The question in this matter was whether it was reasonably open to the magistrate to conclude on the evidence that there were reasonable grounds for F's belief that at the time of the alleged offence he was licensed to drive a motor car.

Kidd v Reeves [1972] VicRp 64; (1972) VR 563, referred to.

2. Circumstances would be rare indeed in which it could be thought a belief was held upon reasonable grounds that the relevant person was entitled to drive a motor car because his or her licence was not suspended, when they had been told by a police officer in the circumstances that it was. However, cases must yield to the individual facts.

3. In the present case, the circumstances were relatively unusual. Given the fact that F. had not been notified in writing of the suspension of his driver licence and that F. had a distrust of police in view of his previous dealings with them, it was reasonably open to the magistrate to conclude on the evidence that there were reasonable grounds for F. to believe that at the time of the alleged offence he was licensed to drive a motor car.

HEDIGAN J:

1. This is an appeal pursuant to s92 of the *Magistrates' Court Act* from an order of the Magistrates Court at Melbourne, 31 August 1999, whereby that court dismissed a charge laid pursuant to s30(1) of the *Road Safety Act* 1986, by the police informant Brothwell against the respondent to the appeal, Foster. The appellant in the appeal in accordance with the provisions and practice is the Director of Public Prosecutions.

2. The question of law raised by, and identified by the Master, for consideration by the court, was in the following form:

"Was it open for a reasonable magistrate properly instructed to find that the respondent Foster had an honest and reasonable belief that his licence to drive a motor car had not been suspended."

3. When the appeal was called on for hearing, I had a brief discussion with Mr Silbert, counsel for the Director of Public Prosecutions, concerning the question in that form, as to whether or not it does truly amount to a question of law. I do not propose to develop that, because probably, on balance, in the form in which it is, it is arguably a question of law. However, I wish to say something about it because it is important to emphasise that the determination of the facts, and the law in association with those facts, in cases that fall within the jurisdiction of the Magistrates Court of Victoria, is committed to the magistrates. It is well accepted that it is not an appropriate

ground of appeal to simply call upon a superior court to seek to review the findings of fact, made by magistrates on the basis that they were arguably incorrect. That is why the issues that are permitted to be taken to this court, are described as questions of law.

4. I think it should be said that there has been, over some time, some ongoing consideration of these matters by the Court of Appeal in Victoria, which has revisited a number of statements made by superior courts about those matters. In one of those cases, *S v Crimes Compensation Tribunal* (1998) 1 VR 83 the Court of Appeal (on which I then sat as a member) looked at what amounts to a question of law in the context of the Crimes Compensation Tribunal Appeal. Without going into the detail of that, it was emphasised in some of the judgments, that even if a tribunal's finding might even seem illogical, that did not convert what was a question of fact into a question of law. However, even that simple statement is itself in some respects misleading.

5. I think on balance the correct view may be that if the issue is whether there was any evidence open to found the legal conclusion, that is probably a question of law. These matters were subsequently discussed again in *Transport Accident Commission v O'Reilly* [1998] VSCA 106; [1999] 2 VR 436; (1998) 28 MVR 327; (1998) 14 VAR 189, Court of Appeal, 13 November 1998, in which in the judgments of Tadgell JA and Callaway JA, the issues are again discussed, in particular in the broader sense. I refer to the statements in paragraph 58 of the report in the judgment of Callaway JA where he refers to not only *S v Crimes Compensation Tribunal* (1998) but previous decisions including *Public Transport Corporation v Sartori* [1996] VICSC 33; (1997) 1 VR 168 and *Martin v Crimes Compensation Tribunal* (1997) 91 A Crim R 301 at 303-303; 11 VAR 169. I have had occasion myself subsequently in *Victoria Police v Burton & VCAT* ([1999] VSC 534; (1999) 15 VAR 443, December 1999) in a quite different context, on an appeal from that tribunal, to address the issue as to whether the questions there raised involved questions of law.

6. However, both counsel have very sensibly and helpfully, I think, approached this case by coming directly to what the point at issue is. That does require me to give a broad but by no means complete description of some of the background.

7. The respondent Foster, to use his own language, as the transcript revealed, had an appalling record in relation to the driving of motor cars. Those matters, however, were irrelevant (save on question of sentence, which never arose) but for some special features about them in relation to the facts which occurred.

8. On 25 September 1998, at 3.25am police officers in their motor vehicle observed a motor vehicle driven by the respondent Foster. It was almost immediately known, it would seem to me, that the likelihood was that Foster was the driver of the vehicle, because of its lettered number plate, 'S-H-A-T-E-D', with which one of the police officers, the ultimate informant here, Officer Brothwell, knew, because of previous police duty dealing with Foster. It would seem that she realised that it was likely to be driven by him. There does not appear to have been any driving offence committed at that time although it would seem likely that that police officer in any event, had some suspicion in view of his driving record as to whether his licence to drive at that time had been suspended.

9. There is some dispute in the evidence as to what then occurred; clearly he was pulled over, he had a passenger, Ms Mihalidis, and a conversation took place. Foster said, when asked to produce his licence, that he did not have it with him. The ordinary police practice was followed, in which the officer from the police vehicle made enquiries through the Intergraph lines seeking to get the information about the state of the licence. The information received, as I understand it, was that the suspension of Mr Foster's licence in effect commenced at one minute into the morning of that very day, that is the suspension had operated from midnight.

10. According to the transcript, this was accepted by the magistrate. Police Officer Brothwell told Foster that his licence was suspended. There does not appear to be much doubt that a dispute arose as to whether that was accurate or not, Foster claiming that he still had some days to go before the apprehended suspension of his licence would become operative. In short form, it appears that Foster had accumulated substantial demerit points, had opted to continue driving under the provision for that in the Act, which required no further offences, in order to work through the period. It appears in Foster's case that he had not successfully done that, having committed an

offence, it would appear (although it was not fully explored) being connected with the failure to wear a seat belt.

11. The consequence of that offence, however, was that he was charged with a breach and his licence was suspended for a month. It appears that he was aware of that, was aware the date the month expired, and went to obtain his licence personally from the relevant authorities. It appears also, from his past experience, that he was aware that that intervening further breach would produce the effect ultimately of the suspension of the licence that he held.

12. He however apparently believed that he had to get a notification about that, although he regarded the suspension as inevitably likely to occur. It does also, I may say, appear ultimately that that did occur, as he gave evidence that he had not driven for eight months after the suspension had operated.

13. That leads to what is still only background material, namely that the question of whether or not he had received notification of the time at which the inevitable suspension was to commence. The evidence was that on about 25 August, that was the previous month, a written notification of the commencement of that suspension on 25 September, the very day on which he was ultimately apprehended, had been sent. However, it had been sent to the address that he had previously had. Foster and his partner had moved from that address the day on which the notification was sent, 25 August. They moved to some other premises — I think in Magnolia Court, Taylors Lakes.

14. They had left the new forwarding address at the Epping Post Office, but amazingly enough and unhappily enough, on the day on which they moved to Taylors Lakes, their new premises were burned down. After a brief period of time, new premises in which they could live were found elsewhere. However, the elsewhere address had not been provided and of course the premises notified as a forwarding address at Taylors Lakes no longer existed. Thus there was ample reason for the magistrate to accept his version of events that he had never received the notification. It appears likely also that the magistrate accepted that he believed he was entitled to be notified.

15. However, that does not become the key feature of this case, by way of appeal. What the key issue became was the effect of the police telling Foster that his licence was suspended. The magistrate accepted that Foster was told by police officer Brothwell that his licence was suspended, leading to the dispute to which I have referred. Some other elements involved in that were that Foster refused to accept the truth of the statement that he was suspended, and angrily drove off.

16. The way the matter was argued before me by both counsel was that the issue was whether or not there were reasonable grounds for the holding of that belief by Foster, that he was entitled to drive as he believed that his licence was not suspended. It is apparent from the affidavit of the police officer in charge of the prosecution, Mr Mohammed, notwithstanding its absence from the transcript of the tape, that the magistrate relied upon *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 in forming the view that the charge must be dismissed, he in effect concluding that the defendant believed on reasonable grounds that he was entitled to drive, to put the matter in a more colloquial way.

17. The prosecution here once again sensibly accepted that it was virtually impossible to attack the magistrate's formation of the view that Foster believed that he was entitled to drive. Such a belief could be arrived at on the basis of having heard and observed Foster in the witness box. A person's beliefs are measurable only by external conduct, what they say and perhaps the probabilities or possibilities arising from the context. In any event it was accepted, and the magistrate found as a fact, that Foster did form that belief. That is not alone sufficient because the law does require the belief to be formed upon reasonable grounds. That does not however exclude elements personal and subjective to the individual.

18. There is clear authority in *R v Wills* [1983] VicRp 80; [1983] 2 VR 201 and *R v Conlon* (1993) 69 A Crim R 92 that those subjective features may be taken into account. The prosecution accepted that they might be taken into account.

19. Essentially, the appeal has been brought on the basis that it could not be a belief held on reasonable grounds, really by anyone, (although I think Mr Silbert retreated from the starkness

of that proposition) but at least it could rarely be thought to be held on reasonable grounds if a police officer, after making enquiries through facilities provided by the State for the making of those enquiries, got information concerning the suspension and then passed it on to the relevant driver.

20. I said in the course of debate, and I say now, the circumstances would be rare indeed in which it could be thought a belief was held upon reasonable grounds that the relevant person was entitled to drive a motor car because his or her licence was not suspended, when they had been told by a police officer in the circumstances that it was.

21. However, cases must yield to the individual facts, and in this case there was a relatively unusual set of circumstances which I am satisfied the magistrate took into account. Those involved in what he described as I think an ongoing war between Foster and the police — that war, I have little doubt, would be largely due to Foster's persistent breaches of the law, and the fact that the police were persistently being drawn in to deal with them. However, whether or not it is reasonable to end up with a distrust of the police because one is constantly in conflict with them over breaches of the law, that might not dispose of a suspicion that might be held, even if it was unreasonably held in the first place.

22. In this case there are some unusual circumstances. There was no particular driving that attracted their attention, so that it was the likelihood of Foster's record, the fact that he was driving the car, the number plate of which was identified, which led to him being stopped. That itself would engender suspicion and re-fuel Foster's doubts about the police — and I state there is no evidence that any of those doubts were well founded — but what had to be considered was his state of mind at the time, and the basis of it.

23. It is clear, of course, that the statement by the police officer that his licence was suspended was correct, although only just. However, the test really is whether he believed at the time that it was not on reasonable grounds. I cannot conclude that it was not open to the magistrate to have taken the view that he did believe that he was entitled to drive on the grounds to which I have referred — namely that he had not been notified in writing that his licence was suspended, and secondly that the relevant police officer was in effect picking on him, so that his doubts that the police were dealing with him in a straight way — ill founded doubts — were nevertheless preying on his mind.

24. Mr Boyce, who appeared on this appeal, referred me to some statements of Menhennitt J in *Kidd v Reeves* [1972] VicRp 64; [1972] VR 563 at 568. They are useful reminders to judges that they are not there to re-decide the facts, far from it. This is not a re-hearing, the facts have been found by the magistrate and the inferences drawn by the magistrate. I am not in any position to determine whether I would have reached the same conclusion or not. It has got nothing to do with it.

25. The issue here is whether it was reasonably open to a reasonable magistrate to conclude on the evidence that there were reasonable grounds for the belief of the defendant that at the time of the alleged offence he was licensed to drive a motor car. This passage is taken specifically from *Kidd v Reeves*. I conclude that it was open.

26. In my view, the magistrate took all of the matters into account. He was clearly satisfied that Foster had the belief that he still had his licence and, perhaps with less confidence, also reached the conclusion that that belief was founded upon reasonable grounds, some but not necessarily all of which I have referred to in these reasons. Accordingly in my view the appeal must be dismissed.

27. I order that the appellant pay the respondent's costs of the appeal. I thank counsel for their assistance.

APPEARANCES: For the appellant DPP: Mr G Silbert, counsel. PC Wood, Victorian Government Solicitor. For the respondent Foster: Mr C Boyce, counsel. Lewenberg & Lewenberg, solicitors.