27/07; [2007] VSC 153

SUPREME COURT OF VICTORIA

ROBINSON v NIXON

Smith J

7, 18 May 2007

PRACTICE AND PROCEDURE – APPLICATION TO BE AGAIN LICENSED – GRANTED BY MAGISTRATE WITH CONDITION THAT AN ALCOHOL INTERLOCK DEVICE BE INSTALLED FOR THREE YEARS – BELIEF BY MAGISTRATE THAT NO DISCRETION EXISTED IN RESPECT OF THE CONDITION – MAGISTRATE IN ERROR – MAGISTRATE SHOULD CONSIDER WHETHER TO GRANT APPLICATION AND THEN CONSIDER THE QUESTION OF THE IMPOSITION OF THE ALCOHOL INTERLOCK CONDITION: *ROAD SAFETY ACT* 1986, SS50(4), 50AAA.

When a magistrate is dealing with an application by a person to be again licensed to drive a motor vehicle, the magistrate has a discretion as to whether an alcohol interlock condition should be imposed. It would be desirable if the decision to grant the application be made solely on the basis of the history of the individual since the offence and whether it would be appropriate to make an order for the licence to be granted independently of whether there are any devices or techniques which could monitor that individual's behaviour while driving with a licence and provide some protection to the community as a result. Approaching the order for the grant of a licence independently of the consideration of the condition has the effect that the magistrate will need to be persuaded that the particular applicant has demonstrated that the risks and problems that existed at the time of the commission of the offence and the conviction have been sufficiently addressed by the applicant. The question of whether an alcohol interlock condition should be imposed is a matter to be taken up once the magistrate is satisfied that an order granting the licence should be made.

SMITH J:

1. Jon Daniel Robinson, the appellant, has, by notice of appeal, brought these proceedings to challenge part of an order made by the Magistrates' Court at St Arnaud on 16 March 2006. The order was made in an application pursuant to s50(4) of the *Road Safety Act* 1986 by the appellant for an order as to the issue of a driver licence. The order made on 16 March 2006 was that the application be granted and that an alcohol interlock condition be imposed for a period of three years. The appeal is brought against the latter part of the order – namely, the imposition of the condition that an alcohol interlock device be installed and remain for a period of three years.

2. In appeals of this nature, it is necessary for the appellant to demonstrate an error of law. It is common ground between the parties that there was in fact an error of law made in that the learned magistrate approached the issue of whether to impose an alcohol interlock condition as being one in which she had no discretion in the circumstances of the case and that she was obliged under the *Road Safety Act* to impose such a condition and impose it for at least the minimum period specified in the Act – three years. It is common ground that, in the circumstances of the case, the learned magistrate had a discretion as to whether to impose such a condition and as to the period for which the device must remain in place.[1]

3. The circumstances were that the prosecutor failed to draw the Court's attention to the fact that, in the circumstances of the case, there was a discretion. It is not surprising, in my view, that the error occurred having regard to the extraordinary complexity of the provisions involved. Having, with considerable difficulty, and with the assistance of counsel, come to some understanding of the provisions, it appears to me that the concession is properly made that the learned magistrate did in fact have the discretion not to impose an alcohol interlock device and a discretion as to the period should such a condition be imposed.

4. Two issues have arisen that require consideration. The first relates to the order that may be made by this Court in this application in respect of the orders made below. The other issue raised is the appropriate form of a costs order.

5. As to the order to be made, counsel for the appellant submitted that the appeal related to only part of the order, namely the alcohol interlock condition, and it is that part of the order that should be set aside and that part only. Counsel for the respondent submitted, however, that the order made was that the Road Traffic Authority issue the licence but only on certain conditions. Counsel submitted that if an error was made in respect of the condition, the whole order must be set aside. Counsel also submitted that by appealing under s92 *Magistrates' Court Act* 1989, the appellant appeals against the final order. I note, however, that the appeal was expressly directed to part only of the order – the condition. Counsel emphasised the fact that the making of the orders does not give the person a licence. The person having got such an order must then apply for the licence to the Road Traffic Authority and will only get the licence from that authority with that condition attached. The order gives the person the right to apply to the Authority for a licence with that condition attached.

6. The situation is not entirely satisfactorily. It was common ground that the appellant was issued with and holds the licence but the condition was rendered inoperative by an appeal made to the County Court pursuant to s50AAC *Road Safety Act* 1986 and s83 *Magistrates' Court Act* 1989 which apparently rendered the condition inoperative but allowed the licence to stand.

7. I was not referred to any authority which suggests that an appellant under s 92 *Magistrates' Court Act* 1989 must appeal against the whole of the final order made and cannot appeal against part of the final order made. The section does not contain such a limit and, in my view, it would be most unsatisfactory if s92 was so limited.

8. The critical question appears to me to be whether the power to make the order and the power to impose the condition are interconnected. That would appear to depend on whether the possibility of imposing an alcohol interlocking device condition is something to be taken into account by the magistrate when determining under s50(4) *Road Safety Act* 1986 that a licence be granted. Section 50(4) provides as follows:

> "(4) A person to whom subsection (3) applies may, at the end of the period of disqualification and on giving 28 days written notice of the application and of the venue of the Court at which it is to be made to the Chief Commissioner of Police and the appropriate registrar of the Court, apply to the Magistrates' Court for an order as to the issue of a driver licence or permit."

The Act then provides for certain reports to be obtained in certain circumstances. There then follows a sub-section which sets out the matters to be taken into account as follows:

> "(5) On an application under subsection (4) the court may make or refuse to make the order sought, and for the purpose of determining whether or not the order should be made—
> (a) the court must hear any relevant evidence tendered either by the applicant or by the Chief Commissioner of Police and any evidence of a registered medical practitioner required by the court; and
> (b) without limiting the generality of its discretion, the court must have regard to—
> (i) the conduct of the applicant with respect to intoxicating liquor or drugs (as the case may be) during the period of disqualification; and
> (ii) the applicant's physical and mental condition at the time of the hearing of the application; and
> (iii) the effect which the making of the order may have on the safety of the applicant or of the public; and
> (iv) any licence restoration report obtained under subsection (4B)(b) or (4C) and any report obtained under subsection (4B)(a).
>
> **Note** The court may, in making the order sought, be permitted or required to direct the Corporation to impose an alcohol interlock condition on a driver licence or permit granted to the applicant: see section 50AAA."

The list is in terms not exhaustive and it might be said that under sub-s (5)(b)(iii) the imposition of a condition requiring an alcohol interlock device might be relevant to the decision. In my view, however, there are contrary indications in later sections. In particular I refer to s50AAA:

> "**50AAA Direction to impose alcohol interlock condition**
> (1) This section applies if—
> (a) a person was disqualified under section 50 from obtaining a driver licence or permit because he or she was convicted or found guilty of an offence under Section 49(1)(a) (other than an offence involving only drugs) or under section 49(1)(b), (c), (d), (e), (f) or (g); and
> (b) the offence was not an accompanying driver offence; and

(c) the person makes an application under section 50(4) for an order as to the issue of a driver licence or permit; and
(d) the court considers it appropriate to make the order.

(2) If the offence—
(a) was a first offence; and
(b) in the case of an offence under section 49(1)(b), (f) or (g), the concentration of alcohol--
(i) in the person's blood at the relevant time was 0·15 grams or more per 100 millilitres of blood; or
(ii) in the person's breath at the relevant time was 0·15 grams or more per 210 litres of exhaled air—
as the case requires—
on making the order, the court may direct the Corporation that it can only grant the person a driver licence or permit that is subject to a condition that the person must only drive a motor vehicle with an approved alcohol interlock installed and maintained by an approved alcohol interlock supplier or a person or body authorised by such a supplier.

Note: For "approved alcohol interlock" and "approved alcohol interlock supplier", see section 3(1).
(3) Subject to sub-section (3A), if the offence was not a first offence—
(a) despite section 50(4A) and (4B), the person is not required to obtain, and the court is not required to have regard to, a report referred to in section 50(4B)(a); and
(b) on making the order, the court must direct the Corporation that it can only grant the person a driver licence or permit that is subject to a condition that the person must only drive a motor vehicle with an approved alcohol interlock installed and maintained by an approved alcohol interlock supplier or a person or body authorised by such a supplier.

(3A) Despite sub-section (3), if—
(a) the offence was not a first offence; and
(b) the person was disqualified under section 50 from obtaining a driver licence or permit on or before the commencement of section 10 of the *Road Safety (Alcohol Interlocks) Act* 2002—
sub-section (3)(a) has no application to the offence and, on making the order, the court may direct the Corporation that it can only grant the person a driver licence or permit that is subject to a condition that the person must only drive a motor vehicle with an approved alcohol interlock installed and maintained by an approved alcohol interlock supplier or a person or body authorised by such a supplier.

(4) For the purposes of this section, in determining whether an offence referred to in sub-section (1)(a) was or was not a first offence, any previous conviction or finding of guilt of the person of an offence under section 49(1)(a) (involving only drugs) or of an offence under section 49(1)(ba), (bb), (h) or (i) is to be disregarded, despite section 48(2)."

9. It is clear from s50AAA(1) that the section which gives the magistrate the power to direct the imposition of an alcohol interlock condition, does so only where the Court has considered it appropriate to make an order under s50(4) for the issue of a driver licence or permit. In the subsequent sub-sections, the power to direct that the grant of the licence be subject to condition only arises on the making of the order that the licence be granted. Thus the issue of whether to require an alcohol interlock condition is treated as a question separate from the issue whether to order the grant of a licence.

10. One can well understand that Parliament would not have wanted the possibility of an alcohol interlock condition to be considered by the Magistrates' Court when determining whether to direct the Authority to grant the person a licence. Plainly it would be desirable for the latter decision to be made solely on the basis of the history of the individual since the offence and whether it would be appropriate to make an order for the licence to be granted independently of whether there are any devices or techniques which could monitor that individual's behaviour while driving with a licence and provide some protection to the community as a result. Approaching the order for the grant of a licence independently of the consideration of the condition has the effect that the magistrate will need to be persuaded that the particular applicant has demonstrated that the risks and problems that existed at the time of the commission of the offence and the conviction have been sufficiently addressed by the applicant.

11. It seems to me, therefore, that the question of whether an alcohol interlock condition should be imposed is not one that is to be considered at the time the decision is made to order that the licence be granted. It is a matter to be taken up once the magistrate is satisfied that an order granting a licence should be made. In those circumstances the two parts of the final order are plainly severable. The order sought by the appellant to set aside that part of the order relating

to the imposition of the condition can be made without setting aside the order that a licence be granted. The order sought appears to me to be the appropriate order.[2]

12. The other issue on which there was debate before me was the appropriate order for costs. Counsel for the appellant submitted that the costs should follow the event and that the respondent should pay the appellant's costs of the appeal. Counsel for the respondent, however, submitted that an order should only be made for portion of the appellant's costs because the appellant had a much cheaper and, in many ways, more effective and efficient mode of appeal available pursuant to s50AAC of the *Road Safety Act* 1986:

> "**50AAC Appeals against direction or period specified in direction**
> (1) If the court gives a direction under section 50AAA(2), 50AAA(3)(b) or 50AAA(3A), the person in respect of whom the direction is given may appeal to the County Court under section 83 of the *Magistrates' Court Act* 1989 against—
> (a) in the case of a direction under section 50AAA(2)—
> (i) the giving of the direction; or
> (ii) the period specified in the direction during which the person cannot apply for the removal of an alcohol interlock condition if that period is more than 6 months; or
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> (b) in the case of a direction under section 50AAA(3)(b)—the period specified in the direction during which the person cannot apply for the removal of an alcohol interlock condition if that period is more than the minimum period set out in section 50AAB(3)(a) or (b) (whichever applies); or
>
> (c) in the case of a direction under section 50AAA(3A)—
> (i) the giving of the direction; or
> (ii) the period specified in the direction during which the person cannot apply for the removal of an alcohol interlock condition if that period is more than the minimum period set out in section 50AAB(3)(a) or (b) (whichever applies)—
> as if the direction were a sentencing order of a kind referred to in section 83 of the *Magistrates' Court Act* 1989.
>
> (2) That Act applies with respect to the appeal with any necessary modifications."

13. Counsel for the respondent submitted that a proportion only of the costs should be allowed, such portion to cover what would have been the costs if the right to appeal under s50AAC to the County Court had been exercised.

14. This is not the occasion to provide a definitive answer about the precise limits of the right of appeal given under s50AAC. It is clear, however, that in choosing which right of appeal to follow, there is uncertainty.

15. It was common ground that in the present case the order imposing the condition was erroneously made under s50AAA(3)(b). The right of appeal in respect of such a condition is limited by s50AAC(b) to the period specified if that period is more than a minimum period set out in s50AAB(3)(b). When counsel for the appellant argued that in those circumstances there was no effective right of appeal for the appellant under s50AAC, counsel for the respondent argued in reply that when an appeal has been brought pursuant to s50AAC(1)(b), it comes before the County Court under s83 of the *Magistrates' Court Act* 1989. Under that procedure, the entire order has to be set aside and therefore the s83 appeal was at large and not limited by the wording of s50AAC(1)(b).

16. This debate raises an interesting question of construction of the provisions. A strong argument can, I suggest, be put that the specific provisions of s50AAC impose limits on the general width of the right to appeal against sentence under s83 of the *Magistrates' Court Act* 1989. There is a further possible problem and that is the definition of a sentencing order under s83 of the *Magistrates' Court Act* 1989 which might, but for s50AAC, prevent an appeal being brought in respect of an alcohol interlock condition. The issue is accompanied by sufficient doubt, in my view, to justify the appellant's decision to exercise the right of appeal to this Court, a right as to which there is no doubt. In my view, it was also justified because the primary position taken by the appellant was that the imposition of the condition was vitiated by an error of law.

17. It seems to me that the appellant was entirely justified in coming to this Court and should

be awarded his costs against the defendant.

18. I will hear further submissions about the precise orders that should be made.

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[1] As a result of the operation of s50AAA(3A) *Road Safety Act* 1986 – for terms see below.
[2] *Magistrates' Court Act* 1989 s92(7).

APPEARANCES: For the appellant Robinson: Mr P Billings, counsel. Radford Legal, solicitors. For the respondent Nixon (Chief Commissioner of Police): Mr D Trapnell, counsel. Solicitor for Public Prosecutions.
