53/88

SUPREME COURT OF VICTORIA

WATSON v REITERER

Gray J

10 November 1988

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD/ALCOHOL CONCENTRATION LESS THAN .10% – DEFENDANT FOUND GUILTY – CHARGE ADJOURNED WITHOUT CONVICTION – WHETHER CANCELLATION OF LICENCE MANDATORY: *ROAD SAFETY ACT* 1986, SS49(1)(f), 50, 78.

The mandatory provisions of s50 of the *Road Safety Act* 1986 concerning cancellation and disqualification of driver licences are conditioned upon persons being convicted of certain offences. Accordingly, where a court is satisfied that a person is guilty of an offence under s49(1) of the Act, but does not proceed to a conviction, the court is not required to make an order against the offender's driver licence.

GRAY J: [1] This is the return of an order nisi to review an order of the Magistrates' Court at Port Melbourne made on 25 February 1983, wherein the applicant was found guilty of a breach of s49(1)(f) of the *Road Safety Act* 1986. The order nisi was granted on two grounds but counsel for the applicant relies only on ground one. The gist of ground one is that the Magistrate erred in concluding that he had no alternative but to cancel the applicant's driving licence. **[2]** It is now common ground between the parties that the Magistrate did err in the manner alleged in ground one of the order nisi. The only remaining question is the manner of disposition of the present application.

The learned Magistrate, having heard the evidence, decided to exercise his powers under s83 of the *Penalties and Sentences Act.* That section authorises the Magistrate, if satisfied that the person before the Court is guilty of the offence charged, to adjourn the proceedings to a date to be fixed in circumstances which do not lead to a conviction if the person charged complies with the conditions upon which the adjournment is granted. The course taken by the learned Magistrate was open to him because the prohibition against adjournment contained in s78 of the *Road Safety Act* does not apply where the defendant's blood alcohol is less than .1 per cent. In this case, the applicant's reading was .095 per cent.

In the result, the learned Magistrate adjourned the information from the date of the hearing, namely, 25 February 1988, until 1 February 1989 upon the defendant entering into his own recognizance in the sum of $200, conditioned **[3]** upon the applicant appearing on the adjourned date and being of good behaviour in the meantime. The applicant was also ordered to pay $200 into the Court fund. Before announcing his order, the learned Magistrate had read a written statement prepared by the applicant, in which a plea for leniency was made. This statement set out a number of difficulties which would be occasioned to the applicant if his licence was cancelled. After reading the applicant's statement, the learned Magistrate stated that he sympathised with the applicant but did not have any discretion in the matter and was compelled by law to cancel the applicant's licence. The learned Magistrate then made the order that I have stated. As I said earlier, it is now common ground that the learned Magistrate was not required to cancel the applicant's licence, notwithstanding that he had found the applicant guilty of the charge. The Magistrate did not proceed to a conviction. Section 50 of the *Road Safety Act* makes it mandatory to cancel a driving licence in certain circumstances, but s50 is conditioned upon the person before the Court being convicted of the offence.

In the result, the only remaining question is what order this Court should make, it being common ground that the learned Magistrate was in error in the view he took as to the absence of any discretion available to him in the matter of the applicant's licence. Counsel for the applicant suggested that I should proceed on the basis that the Magistrate would inevitably have declined to

cancel the applicant's licence if he **[4]** thought that course was open to him. Counsel may very well prove to be right in that forecast but, to my mind, the matter must be remitted to the Magistrate to enable him to exercise the discretion which the legislation gives him in the circumstances which developed in the proceedings. I will express it in this way – order nisi made absolute on ground one with costs. Order below set aside. Information remitted to the Magistrates' Court at Port Melbourne to be reheard in accordance with law.

APPEARANCES: For the applicant Watson: Mr SF McCredie, counsel. Michael J Amad, solicitor. For the respondent Reiterer: Mr IF Turley, counsel. Victorian Government Solicitor.
