22/81

SUPREME COURT OF VICTORIA

CEPPA v BACKAS

Murray J

29 April 1981

MOTOR TRAFFIC - DRIVING AT AN EXCESSIVE SPEED - DEFENDANT CONVICTED AND FINED AND DRIVER LICENCE SUSPENDED - APPLICATION FOR STAY OF LICENCE SUSPENSION PENDING APPEAL TO COUNTY COURT - APPLICATION REFUSED - NO REASONS GIVEN - JUSTICES IN ERROR: *MOTOR CAR ACT* 1958, S26(6).

C. was convicted of driving his motor vehicle at an excessive speed, fined and his driver licence suspended for six weeks. C. then applied for permission to drive pending appeal but the Justices – without giving any reasons – refused the application. Upon appeal—

HELD: Order absolute.
1. The provisions of s26(6) of the *Motor Car Act* 1958 indicate quite clearly that the decision either to grant or to refuse a stay is one that is completely unfettered in its scope and a matter purely for the exercise of the discretion of the magistrates. But that discretion must be exercised judicially.

2. C. had a right of appeal and was entitled under the law to prosecute that appeal and have his case re-heard by a County Court judge. Any refusal to stay the operation of the suspension of his driver licence upon the basis of the Justices' opinion of his demeanour would be tantamount to a pre-determination of his prospects of success on appeal.

3. In the present case, not being able to conjecture any proper good and sufficient reason for refusing C. a stay, it appeared that the evidence indicated that the discretion of the two Justices in question must have miscarried. Accordingly, it was ordered that the order of the Justices refusing a stay of the suspension of the applicant's licence pending the hearing of his appeal be set aside.

MURRAY J: This is the return of an order nisi to review a decision of Justices sitting at the Magistrates' Court at Werribee on the 30th March 1981 whereby after convicting the applicant for driving his vehicle at a speed above that permitted by a section of the *Motor Car Act* and Justices imposed a fine of $120 and ordered that the applicant's licence be suspended for six weeks. Notice of appeal was given and the applicant's counsel then made application pursuant to s26(6) *Motor Car Act* 1958 that the order suspending the applicant's licence be stayed pending the determination of the appeal. This application was refused by the Justices. The order nisi was obtained on two grounds, namely, in summary, that the Justices failed to give sufficient weight to relevant considerations, and secondly, that their refusal was so unreasonable and plainly unjust as to indicate that they must have failed to exercise their discretion properly.

I may say at the outset that the real difficulty in this case derives from the fact that the Justices did not give any reasons for refusing the stay. The courts have said on many occasions that it is highly desirable that both judges and magistrates and justices do give reasons for their decisions. This, of course, is not only so that justice can be seen to be done but also so that superior courts can review the decisions and see for themselves whether the court appealed from has made an error. This is not to say, of course, particularly in Magistrates' Courts, that reasons must be given in every case, because in a great number of cases, having regard to the nature of the case and the evidence, the mere decision will be abundant evidence of the reasons for making it. But where a decision is given which is in the exercise of a complete and unfettered discretion, as in the present case, it is desirable that magistrates and justices along with judges give reasons so that their reasons can be examined and their decision better understood by appellate courts.

Over the lunch hour I have carefully considered this case and I have come to the conclusion that the applicant should succeed. My reasons for thinking that the applicant should succeed are that I find it difficult on the facts of the present case to discover any good reason which the Justices could have had for refusing the application. A number of suggestions have been made in the course

of argument. One was that the Justices had the advantage of observing the applicant when he was in the witness box and of seeing his demeanour. But although that is so, I doubt very much that whether whatever opinion they formed of him that would be a justification for refusing the application. He had and has a right of appeal and he is entitled under the law to prosecute that appeal and have his case re-heard by a County Court judge. Any refusal to stay the operation of the suspension upon the basis of the Justices' opinion of his demeanour would in my opinion be tantamount to a predetermination of his prospects of success on appeal.

This is not a case where there was any indication that the applicant's lodging of notice of appeal was merely for the purpose of delay and gaining time. There must be many cases in which a Magistrates' Court might well and justifiably come to such a conclusion. For example, where a defendant does not give evidence himself in his own defence or where he does not attend the court but simply sends a solicitor or counsel to represent him or where he does not attend the court and allows the prosecution to go by default, and then, having heard that his licence has been suspended, makes application for a stay. In those circumstances a court might be justified in taking the view that the appeal was not *bona fide* and was instituted purely for the purposes of delay. In this case the applicant attended the court, he was represented by counsel and he gave evidence in his own defence. The decision depended entirely upon which version of the facts the court was prepared to accept and no-one knows whether a County Court judge will be prepared to say that he is satisfied beyond reasonable doubt that the evidence of the police should be preferred to that of the applicant.

Then it is suggested that the previous convictions of the applicant might well have formed a basis for refusing the stay. Again, there may be cases in which the evidence led against an applicant and his previous record might form a good reason for refusing the stay. One can imagine a case in which the police give evidence of a high-speed chase which ends in a motor car running up on to the footpath and crashing into a shop window, where the applicant is apprehended immediately and where there are various witnesses. In such a case, in my opinion, a magistrate or justices might be justified in refusing the stay on the basis that they are not persuaded that any appeal is taken *bona fide* and that by reason of the facts and of the applicant's previous record he should not be permitted to drive a motor vehicle in the interim.

Again, there were no circumstances like that in the present case, and particularly having regard to the previous convictions of the applicant, it appears to me that the Justices, in imposing their decision, imposed a very moderate penalty both by way of the fine and by way of the period of suspension. Having regard to his previous convictions for this very same offence, it would not have been surprising if the Justices had thought fit to suspend his licence for six months.

There was no evidence so far as I am aware that the applicant was driving dangerously, except that he was driving at a speed which was higher than that permitted by the law. He was on a one-way highway, and, again, the penalty imposed seems to me to reflect a moderate view taken by the Justices of the gravity of the offence. This being so, I find myself in the position of not being able to explain to myself any basis for the decision to refuse him the stay of the order pending the hearing of his appeal. If he prosecutes his appeal and it is dismissed the penalty will either be altered by the County Court judge or if it is not altered it will remain and he will then have to undergo the punishment which the Justices thought appropriate.

It occurs to me that, and I say this without disrespect to the Justices who, without any particular training, endeavour to do a job for the community, that they may well have thought that in making the application for a stay the applicant was asking for some special privilege whereas the provisions of s26(6) indicate quite clearly that the decision either to grant or to refuse a stay is one that is completely unfettered in its scope and a matter purely for the exercise of the discretion of the magistrates.

But the discretion must be exercised judicially. In the circumstances, not being able to conjecture any proper good and sufficient reason for refusing the applicant a stay it appears to me that the evidence before me indicates that the discretion of the two Justices in question must have miscarried. I, therefore, order that the order of the Justices refusing a stay of the suspension of the applicant's licence pending the hearing of his appeal be set aside. There is no purpose to be served in sending the matter back to the justices and I order that the order of the Magistrates' Court

whereby the applicant's licence was suspended for six weeks be stayed until the determination of his appeal against his conviction and sentence. (Discussion ensued).

I will add to my reasons by saying this; earlier in my reasons I had referred to the question of whether the previous convictions of the applicant would constitute good grounds for refusing the application for a stay and I had concluded that in the circumstances of this case the mere fact of his previous convictions would not constitute good grounds by reason of the fact that to act upon them would, in my opinion, be equivalent to prejudging his prospects on appeal. If he prosecutes his appeal the County Court judge will have the task of hearing the prosecution again. He will not have the knowledge of the previous convictions and if the applicant succeeds it will be demonstrated that it would have been unfair and unjust for him to have served a period of suspension for an offence in respect of which he has been acquitted. Reading paragraph 14 of the affidavit in support of the application again, it seems to me that it is intended to convey that the Justices did say that their reason was that the applicant had too many prior convictions and in that regard I should amend some of my previous remarks about their failure to give reasons, I do, however, consider that if that was their reason, those reasons were not sufficient and I will make the order that I have previously referred to. (Discussion ensued re costs). I will make the order absolute and order the respondent pay the applicant's costs fixed at $200. Liberty to the respondent to apply in relation to the *Appeal Costs Fund Act*.
