25/05; [2005] VSC 396

SUPREME COURT OF VICTORIA

SMITH v COUNTY COURT of VICTORIA and PRIMROSE

Gillard J

23 August 2005

MOTOR TRAFFIC – CARELESS DRIVING CHARGE FOUND PROVED – DRINK/DRIVING CHARGE DISMISSED – DRIVER'S LICENCE CANCELLED AND DISQUALIFIED FOR THREE MONTHS – NO REFERENCE BY COURT TO EFFECTS OF CONSUMPTION OF ALCOHOL IN FINDING CHARGE PROVED – REFERENCE BY COURT TO EFFECTS OF ALCOHOL CONSUMPTION DURING SENTENCING PROCESS – WHETHER COURT TOOK INTO ACCOUNT IRRELEVANT MATTERS IN ARRIVING AT PENALTY – WHETHER DISQUALIFICATION ORDER SHOULD BE SET ASIDE: *ROAD SAFETY ACT* 1986 S65.

S. was found guilty in the Magistrates' Court of a drink/driving offence and careless driving. On appeal to the County Court, the Judge dismissed the drink/driving charge but convicted S. on the careless driving charge, cancelled his driver licence and disqualified him from obtaining another licence for 3 months. When finding the careless driving charge proved, the judge made no mention of whether the consumption of alcohol impaired S. in his driving. When determining the question of penalty, the judge took into account S.'s consumption of alcohol and whether if his licence was cancelled S. would be obliged to attend a drink/driving course. Upon appeal—

HELD: Order of cancellation of S.'s driver licence quashed.
1. It is well established by authority and accords with common sense, that if a person drives a motor vehicle, having consumed liquor to the point where his ability is impaired, that is a matter that goes to the question of whether or not he has acted as a reasonable person. It is relevant to the issue of careless driving. However, where the court made no reference to the effect of drinking but instead made findings on what would be described as the pure facts relating to the careless driving itself, it followed that in determining an appropriate penalty on that charge, the consumption of alcohol and its effect were not relevant to the sentencing exercise.

2. In determining penalty the judge took into account irrelevant matters namely, S.'s consumption of alcohol and whether he would be obliged to attend a drink/driving course if his licence was cancelled. Accordingly, there was an error of law in the decision-making process concerning penalty and it was appropriate to quash that part of the orders made concerning cancellation of S.'s driver licence.

GILLARD J:

1. In this proceeding instituted by originating motion the plaintiff seeks judicial review of a decision made by a Judge of the County Court pursuant to Order 56 of the Rules of Court. The proceeding before the County Court was an appeal from orders made by a Magistrate.

Parties

2. The plaintiff, Dennis Patrick Smith ("the plaintiff") is a truck driver aged in his fifties residing in Cranbourne.

3. The first defendant, the County Court of Victoria, is the Court whose decision is subject to the review. In accordance with the usual practice the Court has filed an appearance but informed this Court it will not appear and will abide by any decision of this Court. It also reserves the right to be heard on any question of costs.

4. The second defendant, Simon James Primrose ("the informant") is a member of the Victoria Police and the informant who brought charges against the plaintiff.

Proceeding in Magistrates' Court

5. The plaintiff was the defendant in the Frankston Magistrates' Court and was charged with two offences which allegedly occurred at Bonbeach on 10 February 2002. The first charge alleged that he drove a motor vehicle whilst the concentration of alcohol in his blood exceeded 0.5 grams per 100 millilitres of blood. The charge was brought pursuant to s49(1)(b) of the *Road Safety Act* of 1986 ("the Act"). The second charge was that on the same day at Bonbeach he drove

a motor vehicle on Bondi Road carelessly. This charge was brought pursuant to s65 of the Act. The charges came on for hearing at the Magistrates' Court at Frankston. The plaintiff pleaded not guilty to both charges. The learned Magistrate found him guilty of both charges. On the exceed .05 charge he was convicted and fined the sum of $500 with $55 statutory costs and additional costs in the sum of $350, his licence was cancelled and he was disqualified from obtaining any licence for a period of 18 months. In respect of the careless driving charge he was also convicted and fined $300, his licence was cancelled and he was disqualified from obtaining any other licence for a period of 18 months. On 30 June 2004 he lodged an appeal. The orders made against him were stayed pending the appeal.

County Court Appeal

6. The appeal to the County Court is a rehearing *de novo*. This means that the County Court hears the charges again and makes its decision on the evidence called before it. Being a rehearing it was unnecessary for an appellant to prove any error on the part of the Magistrate. The appeal was heard on 16 August and was heard over two days. The learned Judge delivered her reasons on 20 August 2004. She dismissed the .05 charge under s49(1)(b) of the Act. However, she convicted the plaintiff on the charge of careless driving, fined him the sum of $300, cancelled his licence and disqualified him from obtaining any licence for a period of three months.

Judicial Review

7. On 8 September 2004 the plaintiff instituted a proceeding in this Court. A stay of the operation of the orders made by the County Court was granted on 27 September 2004 by Master Wheeler. Hence the plaintiff was without his licence for a period of about 38 days. In this proceeding the plaintiff seeks orders in the nature of *certiorari* quashing the order of conviction and the penalty order, in particular, the cancellation of the plaintiff's licence. In addition, he also seeks declarations and an order in the nature of mandamus requiring the County Court to dismiss the careless driving charge.

8. This Court has jurisdiction to grant prerogative writ-type orders in respect of County Court proceedings and orders. See *R v Foster ex parte Isaacs*[1] and *R v Judge Dutton Briant ex parte Abbey National Building Society*.[2] The common law jurisdiction of this Court to review decisions and orders of inferior courts is subject to the procedure set out in Order 56 of the Rules of Court. The jurisdiction of the Court to review decisions and orders of inferior courts and tribunals is limited. The jurisdiction is supervisory and does not entitle the Court to canvass matters that it would on an appeal. This Court is exercising its common law jurisdiction. The jurisdiction is different to an appeal. An appeal is a creature of statute. See *Fox v Perry*.[3]

9. The judicial review procedure is concerned with jurisdiction and the legality of what was done by the court or tribunal and is not concerned with the merits of the decision under review. This is to be contrasted with an appeal where the question is usually whether the decision is right or wrong, whereas the question on the judicial review is whether the decision is made within jurisdiction and in accordance with the law. Importantly, it is essential to emphasise that judicial review is not concerned with whether the decision was fair or correct.

10. Order 56 is concerned with procedure. It abolishes the remedies in the nature of the old prerogative writs but nevertheless preserves the jurisdiction of the Court to make prerogative writ-type orders. It is clear that the rules do not affect the common law jurisdiction of the Court and it is equally clear that this Court has jurisdiction to make an order in the form similar to the old prerogative writ of *certiorari* in quashing the decision under review.

11. The scope of the jurisdiction was discussed by the High Court in *Craig v South Australia*.[4] In a joint judgment the Court said:

> "Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of an impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and 'error of law on the face of the record'. Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, a superior

> court entertaining an application for certiorari can, subject to applicable and procedural evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the 'record' of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record."
> (Emphases added).

12. In *Chief Constable of North Wales Police v Evans*[5] Lord Brightman said:[6]

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

13. In *R v District Court; Ex parte White*,[7] Justice Windeyer said:[8]

> "We do not sit in this court to weigh the evidence and decide whether or not the applicant should be exempt from military service. That decision has been committed by Parliament to a magistrate, with an appeal to a court of review constituted by a District Court or Supreme Court judge. The court of review has given its decision. Parliament has said that its decision is 'final and conclusive'. It is not for us to say whether it was right or wrong. Nevertheless the applicant seeks to bring the case before us, alleging an error of law which it is claimed entitles him to an order either for certiorari or prohibition. ... I am not disposed to a narrow view of the scope of either certiorari or prohibition or of the power of this Court to use these writs and also mandamus to ensure that administrative tribunals exercising functions under Commonwealth law proceed according to law and keep within the law. But we must not use these writs to give an appeal on the facts."
> (Emphasis added).

14. In my opinion, the words of Sir Victor Windeyer are apposite to the present case in relation to one of the grounds of review. The plaintiff has no right of appeal against the orders made by the County Court. The only avenue open to him is to establish that the learned County Court Judge made an error in jurisdiction or a legal error in the decision-making process, or that there is some other recognised ground justifying the exercise of the supervisory jurisdiction of this Court. This Court is only concerned with the legal correctness of what the learned Judge did. The High Court in *Craig's* case,[9] identified the most important established grounds, namely, jurisdictional error, failing to observe some applicable requirement of procedural fairness, fraud and error of law on the face of the record.

15. This Court is not concerned with examining whether in fact the Judge made the right decision or whether she misapplied some principle of law but is concerned with ensuring she acted within jurisdiction and that in performing her decision-making process she complied with the law.

16. The limited nature of the jurisdiction was stated by the High Court in *Craig's* case[10] where the Court drew a distinction between tribunals and inferior courts.[11] After giving examples of jurisdictional error by a tribunal the Court said:[12]

> "In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error."
> (Emphases added).

17. It is to be observed that the High Court was guarded in stating the principles as general propositions. However, the observations are indeed compelling in a review such as the present. The rationale for the supervisory jurisdiction is that inferior courts must, in exercising their

decision-making process, act within jurisdiction and in accordance with the law and principles of procedural fairness. But the supervisory jurisdiction is more limited in respect to inferior courts compared with administrative tribunals.

18. Sometimes there is controversy about what constitutes the record in cases where *certiorari* is sought to quash an order on the ground of error on the face of the record but by reason of s10 of the *Administrative Law Act* 1974 the reasons for the decision form a part of the record. Indeed, in the present case, bearing in mind what I propose to do, I do not need to say anything more about what constitutes the record.

19. As the principles stated by the High Court clearly demonstrate, where the allegation is that there has been jurisdictional error by the inferior court in the case where the court does in fact have jurisdiction and was exercising it, it is a difficult task to establish that there was any jurisdictional error even though it is shown that an error occurred in the course of the proceeding. The narrowness of the jurisdiction is exemplified by what the High Court said recently in *Coal and Allied Operations v AIRC*[13] where Gleeson CJ, Gaudron and Hayne JJ said in relation to jurisdictional error:

> "There would only have been jurisdictional error on the part of the Full Bench if it had misconceived its role or if, in terms used by Jordan CJ in *Ex parte Hebburn Limited v Kearsley Shire Council*, it "misunderstood the nature of its jurisdiction ... or misconceived its duty or failed to apply itself to the question which the Act prescribes ... or misunderstood the nature of the opinion which it was to form'."

20. I emphasise what was said by the High Court in *Craig's* case[14] in stating that whether or not it was a jurisdictional error to take into account something that was irrelevant to the question will not ordinarily involve jurisdictional error. However, as the High Court pointed out, that was the general rule and clearly each case must be considered on its own particular facts.

21. Order 56 obliges the plaintiff to state the grounds upon which relief is sought.

Rule 56.01(4)

22. Rule 56.01(4) of the Rules of Court requires that the grounds upon which the relief is sought must be specified in the motion and, importantly, where any mistake or omission in the order or other proceeding is relied upon, the ground must specify the alleged mistake or omission. Most of the grounds relied on in the originating motion in this proceeding do not comply with the sub-rule. They fail to specify the ground and the alleged mistake or omission. By way of example, the first four grounds assert general propositions without particularising any error on the part of the learned County Court Judge. Ground 11(a) asserts that her Honour erred in law in refusing to dismiss the charge of careless driving; ground 11(b) asserts the appellant was denied procedural justice; ground 11(c) asserts he was denied natural justice; and ground 11(d) asserts that there was an error on the face of the record. There are no particulars given of these general grounds. The Court raised the omissions with counsel for the plaintiff and Mr Billings on his behalf informed the Court that the real grounds were those in paragraphs 11(e) and (f) of the grounds set out in the originating motion.

Jurisdiction

23. Clearly her Honour had jurisdiction to hear and determine the appeal.[15] There is no suggestion she was acting outside the jurisdiction of the Court and accordingly the plaintiff does assume a heavy burden in establishing error in the course of a hearing which is within jurisdiction.

24. Grounds 11(e) and (f) allege a denial of natural justice. They are the grounds that are relied upon by the plaintiff but they also assert that the learned Judge made errors of law. Ground 11(e) is as follows:

> "(e) The firstnamed defendant denied the plaintiff procedural fairness and/or natural justice and/or erred in law in convicting the plaintiff of an offence under s65 of the *Road Safety Act* 1986 where the evidence did not support the charge alleged and/or there was uncontradicted evidence from the plaintiff and his witness."

25. It is noted that there are two alleged errors. The first is that the evidence did not support

the charge alleged. Secondly, there was uncontradicted evidence from the plaintiff and his witness who happened to be his wife. When one considers the reasons given by the learned Judge relating to careless driving, in my view there was evidence of careless driving before her and it was a matter for her Honour to determine whether or not the charge had been made out beyond reasonable doubt. The question is a factual one. In her reasons, the learned Judge set out the facts concerning the accident. They reveal that the plaintiff turned his vehicle right into Bondi Road. He was aware that there was a panel van behind him which appeared to want to pass him, that he was proceeding at about 40 to 50kph in what was a narrow street, that the panel van overtook him on the driver's side and he said, it cut across him, and this caused him to swerve to the right to avoid the accident. Mr Billings submitted that given the version by the plaintiff and his wife which basically stated those facts, one could not infer that he was guilty of careless driving. Her Honour said:

> "In my view the appellant failed to slow down appropriately to avoid the accident. By his own account he was driving slow – 40 to 50kph – when the white car overtook him and cut him off. At that speed I do not accept that the appellant could not have slowed his vehicle sufficiently to allow the other driver to move on. By driving his car over to the wrong side of the road and colliding with the stationary vehicle which was parked facing east in Bondi Road, the appellant failed to exercise the degree of care and attention that a reasonable and prudent driver would exercise in the circumstances."

26. The learned Judge also referred to what the plaintiff had said. In my view, her Honour properly directed herself on matters of law and as this Court is not concerned with whether or not the decision was correct, in my view it has not been demonstrated that she made any error of law in performing the task of determining the charge beyond reasonable doubt. The argument put forward that there was uncontradicted evidence in my view does not in any way advance the argument put on behalf of the plaintiff. It was upon that evidence that her Honour came to the conclusion she did. As I have stated, this is a narrow jurisdiction. It is supervisory. I am not persuaded at all that her Honour failed to determine the decision in accordance with the law. I would go a step further. The learned Judge's decision was supported by the evidence and was correct.

27. Ground 11(f) is in these terms:

> "(f) The firstnamed defendant denied the plaintiff procedural fairness and/or natural justice and/or refused to exercise jurisdiction the Court had and/or erred at law under the circumstances in sentencing the plaintiff by convicting the plaintiff at sentence (sic) an offence under s65 of the *Road Safety Act* 1986 and/or cancelling all driving licences held by the plaintiff and disqualifying him from obtaining such licences for a period of three months."

28. The learned Judge was bound, having found the charge proven, to determine what penalty she should impose. She convicted the plaintiff. This was open to her. Secondly, she cancelled his licence and disqualified him from obtaining another licence for a period of three months. Again, this penalty was open to the learned Judge.

29. The evidence before the Court, however, shows that in the course of the plea her Honour made a number of observations about alcohol before she pronounced the penalty. The learned Judge had dismissed the .05 charge. In arriving at her decision on the careless driving charge, in her reasons she did not make any reference to the plaintiff's consumption of alcohol prior to the collision. In a number of paragraphs she carefully considered the facts relating to the charge of careless driving, but at no stage did she refer to the question of consumption of alcohol and its effect. She made no mention of whether it had impaired the capacity of the plaintiff in his driving. It is well established by authority and accords with common sense, that if a person drives a vehicle, having consumed liquor to the point where his ability is impaired, that is a matter that goes to the question of whether or not he has acted as a reasonable person. It is relevant to the issue of careless driving. However, her Honour did not make any reference to the effect of drinking but instead made her findings on what I would describe as the pure facts relating to the collision itself.

30. It follows, based on what the learned Judge had found concerning the relevant facts of the careless driving, that in determining an appropriate penalty the consumption of liquor and its effect were not relevant to the exercise. Having said that, of course, there will be cases where it

might be relevant but the way the learned Judge dealt with the matter, it was not. In particular, one must not overlook the fact that she dismissed the .05 charge and in the course of considering that charge it was noted that there was a dispute of fact as to the amount of alcohol that the plaintiff had consumed on that night before the accident.

31. Further, the Judge had jurisdiction to convict, fine, and in an appropriate case, suspend or cancel the licence.[16] In my opinion, the penalty of cancellation of a licence with disqualification for a period of time is a more severe penalty than a suspension of a licence for the same period of time. To obtain a new licence it is necessary to apply for one and I was informed by Mr Gibson of counsel who appeared for the informant, that a procedure must be followed which involves making application and an official making a decision whether to grant the licence and if so, whether or not some condition should be imposed. One compares that with what happens when a licence is suspended. The minute the suspension expires, the driver may then take up driving again without going through any procedures at all. It follows that in my opinion the learned Judge, in determining the penalty for careless driving, was required as a matter of law to consider and take into account all matters relevant to the offence as she found them. Having been acquitted of the drink driving offence, she was not permitted, in my view, to take into account the consumption of liquor bearing in mind how she determined the guilt on the charge of careless driving. It would have been different if the Judge had made findings concerning the consumption of liquor, the amount and the effect on the driving as a result, when determining the careless driving charge.

32. The other matter that cannot be overlooked is that the learned Judge did have, as a matter of discretion, to determine whether or not to take any action against the licence and if she came to the view that the licence should be taken for a period she then had to make up her mind whether it should be suspended or cancelled. In determining that question, the Judge was required to consider the effect of cancelling and disqualifying for a particular period compared with suspension for a period.

33. The Judge's reasons which she published some days after she had pronounced her orders do not refer to what she took into account on penalty, but the discussion between Bench and counsel indicates she did take into account, in my view, irrelevant matters, namely, the plaintiff's consumption of alcohol and whether if she did cancel the licence he would be obliged to attend a drink driving course.

34. The plaintiff in this proceeding filed two affidavits. In the second affidavit sworn 7 June 2005 he deposes to what took place before the learned Judge on the plea. In the course of the plea reference was made to the discretionary nature of the penalty concerning any interference with the licence. The Judge pointed out that the plaintiff had been drinking and must have had alcohol in his blood. Submissions were put that this matter was irrelevant. Her Honour observed that it appeared that the plaintiff agreed with her that if he drove at .05% it would affect his driving. It was pointed out that there was real dispute as to the amount and quantity of liquor that he had taken. A submission was made that the careless driving was not a serious offence in the circumstances. The question of taking the licence was raised. The affidavit then goes on to state:

> "(m) The learned judge then asked the prosecutor the following question: 'If I cancel his licence doesn't he have to do a drink driving course to get it back?' The prosecutor replied saying words to the effect: "Yes, Your Honour, that's my understanding'."

35. It appears that plaintiff's counsel sought to correct that statement but was told by the learned Judge to resume his seat. The Judge pronounced her orders of conviction and fine, cancelled the licence and disqualified the appellant from obtaining a licence for a period of three months.

36. It appears to me on that material that the learned Judge did take into account irrelevant matters in arriving at the penalty. The Judge had been informed that if she cancelled the licence the applicant would have to undergo a drink-driving course. I interpolate to observe that the parties agree this was incorrect. Whether or not it was correct, there is enough material before me to lead to the conclusion that her Honour did take that matter into account in arriving at the cancellation. I say that because if the charge of careless driving is considered, as found by

the Judge and bearing in mind the age of the plaintiff, his driving over 20-odd years, one prior conviction that went back about 28 years which her Honour said she would not take it into account, cancellation is a severe penalty. If it was appropriate to take the licence one might then ask the question, why not suspend rather than cancel? One is then driven, in my view, to the conclusion that her Honour had in mind that because of the .05 charge the consumption of liquor and the circumstances of the accident, that the plaintiff should do a drink-driving course before he would get his licence back. In my view, that was an irrelevant matter, as was the effect of the alcohol in the circumstances because of the Judge's findings on careless driving. So nobody misunderstands me, alcohol could have been a relevant factor but because of the way the learned Judge dealt with the matter it is my view that she should not have taken it into account. This demonstrates that she did make an error in her decision-making process. She took into account irrelevant matters which she was not entitled to consider, when determining what was the appropriate penalty. The result supports that view. One might think, given all the circumstances, that if it was appropriate to take some action concerning the licence, suspension would have been appropriate.

37. In my view the evidence establishes there was an error of law in the decision-making process concerning penalty.

38. The question now arises whether the Court can interfere in the exercise of its judicial review jurisdiction when a judge of the County Court has taken into account an irrelevant consideration which results in what may be described as a severe penalty. There is an interesting decision of Lord Denning, MR, as a member of the Court of Appeal in *R v Barnsley Metropolitan Borough Council ex parte Hook*.[17] In that case a man was very harshly dealt with for urinating in the street. The local authority took away his livelihood by revoking his right to run a stall in a local market. Lord Denning MR had this to say about the harshness of the penalty and what could be done:[18]

> "Now, there are old cases which show that the court can interfere by *certiorari* if a punishment is altogether excessive and out of proportion to the occasion. In one case the Commissioners of Severn imposed an excessive fine; and it was quashed by the Court of King's Bench on the ground that in law their fines ought to be reasonable: See *R v Northumberland Compensation Appeal Tribunal ex parte Shaw* [1951] 1 KB 711. So in this case if Mr Hook did misbehave, I should have thought the right thing would have been to take him before the justices under the byelaws, when some small fine might have been inflicted. It is quite wrong that the corporation should inflict on him the grave penalty of depriving him of his livelihood. That is a far more serious penalty than anything the justices could inflict. He is a man of good character and ought not to be penalised thus. On that ground alone, apart from the others, the decision of the corporation cannot stand. It is said to be an administrative decision; but even so, the court has jurisdiction to quash it. *Certiorari* will lie to quash not only judicial decisions, but also administrative decisions."

39. Sir John Pennycuick also based his decision on that ground.[19] I refer to that case to show that in certain circumstances a *certiorari* type order may lie in relation to a harsh decision. In this review the penalty was severe when considered in light of the facts found on the careless driving charge and the plaintiff's driving record. That conclusion does provide some support for the conclusion that the learned Judge took into account irrelevant matters in determining the penalty. On the other hand I would not conclude that the actual penalty *per se* would support the conclusion that error was made in the penalty process.

40. The case establishes two propositions. First, that in the absence of reasons given for a penalty, where the penalty is harsh and out of all proportion to the gravity of the offence, the Court may infer from all the circumstances that the decision maker erred in the course of arriving at the decision. However, such a conclusion would have to be patently obvious. I do not wish to be taken as endorsing the proposition that judicial review is open because a person is aggrieved by the penalty imposed. Secondly, the decision recognises the jurisdiction of this Court to quash a decision relating to penalty. In my opinion, the Court should intervene.

41. The question is what can be done. Under the old law a writ of *certiorari* was directed to bringing up the whole of the order before the Court and have it quashed. This, like other features of the prerogative writ jurisdiction, at times could produce an unsatisfactory result. Order 56 was aimed at overcoming some of the technicalities of the judicial review jurisdiction.

42. Now the Court can make a judgment or order which is in the nature of the old prerogative

writs, but the Court is no longer bound by the old procedures. What is a proper order in the circumstances? Mr Gibson who appeared for the informant, told the Court that he had had discussions with the informant who expressed the opinion that if the order of cancellation was set aside he did not wish the matter to be returned to the County Court for further consideration.

43. I think the proper order in the circumstances is to quash that part of the orders made below concerning the cancellation of the plaintiff's licence but otherwise to not interfere with the balance of the orders. It seems to me to be a practical course to follow and is appropriate in the circumstances. It would be a waste of money and time if this matter had to be referred back to the County Court. The informant agrees. The plaintiff has been deprived of his licence for a period of 38 days which is a punishment in itself. Justice is best served by taking that course.

44. I note that Justice Cummins took a practical approach to a similar-type question in *Cooper v County Court of Victoria and Gallagher*.[20] In my view, I do have jurisdiction to quash that part of the order which relates to the cancellation. I do so on the limited ground that in the circumstances the learned Judge erred in taking into account irrelevant matters which affected the decision she made concerning the licence.

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[1] [1941] VicLawRp 16; [1941] VLR 77; [1941] ALR 89.
[2] (1957) 2 QB 497.
[3] (2003) HCA 22 at [20]; (2003) 214 CLR 118; (2003) 197 ALR 201; (2003) 77 ALJR 989; (2003) 38 MVR 1; (2003) 24 Leg Rep 2.
[4] [1995] HCA 58; (1995) 184 CLR 163 at 175-6; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[5] [1982] UKHL 10; [1982] 3 All ER 141; (1982) 147 JP 6; (1982) 1 WLR 1155.
[6] At 1173.
[7] [1966] HCA 69; (1966) 116 CLR 644; [1967] ALR 161; (1966) 40 ALJR 337.
[8] At 655.
[9] *Supra* at 176.
[10] At 176 *et seq*.
[11] See particularly pp177-9.
[12] At 179-80.
[13] [2000] HCA 47; (2000) 203 CLR 194; (2000) 174 ALR 585; (2000) 74 ALJR 1348 at 1356; (2000) 21 Leg Rep 14; (2000) 99 IR 309.
[14] At 180.
[15] See ss83, 85 and 86 of the *Magistrates' Court Act* 1989.
[16] See s28 of the *Road Safety Act* 1986.
[17] (1976) 3 All ER 452; [1976] 1 WLR 1052.
[18] At 456.
[19] See p461.
[20] [1998] VSC 149.

APPEARANCES: For the plaintiff Smith: Mr P Billings, counsel. Waters Timms Pty Ltd, solicitors. For the second defendant Primrose: Mr M Gibson, counsel. Solicitor for Public Prosecutions.
