27/98

SUPREME COURT OF VICTORIA

PERRY v VAN MAANEN

Hedigan J

17 June 1998 — (1998) 27 MVR 299

MOTOR TRAFFIC – DRINK-DRIVING – PERSON CONVICTED OF FIRST OFFENCE – APPEAL LODGED AGAINST CONVICTION – CHARGED WITH SECOND OFFENCE WHILST APPEAL EXTANT – CONVICTED OF SECOND OFFENCE – WHETHER SECOND OFFENCE A "SUBSEQUENT" OFFENCE FOR SENTENCING PURPOSES: *ROAD SAFETY ACT* 1986, S49, 50(1A)(b).

Where a person was found guilty of an offence under s49 of the *Road Safety Act* 1986 (Act) and lodged an appeal against the finding of guilt, and subsequently was charged and found guilty of another offence under s49 of the Act while the appeal was still extant, it was not open to the magistrate in dealing with the second matter to treat it as a subsequent offence under s50(1A)(b) of the Act.

***Bell v Feehan* [1985] VicRp 82; [1985] VR 841; (1985) 2 MVR; and**
***Kennan v Mears* MC 22/1990, referred to.**

HEDIGAN J: [1] This is an appeal under s92 of the *Magistrates' Court Act* 1989 against orders of the Magistrates' Court at Stawell made with respect to the appellant, Michael Wykeham Perry, arising out of the conviction of him of an offence under s49(1)(f) of the *Road Safety Act* 1986. The order of Master Wheeler made on 17 March of this year pronounced questions of law to be determined in the appeal and his orders were made on the basis of the affidavit of the appellant, Perry, and the various exhibits to it, which included the charge and summons under s49(1)(f) and the previous criminal record in respect of driving matters which was produced to the magistrate at Stawell on the day of the hearing and conviction. The magistrate became aware, as a consequence of the production of that document, that the then defendant, Perry, had a previous conviction for driving a motor car whilst his blood alcohol exceeded the prescribed concentration, and indeed with a blood alcohol content of .130 per cent according to the relevant document, and that Perry had previously had his licence cancelled and had been disqualified from obtaining a licence. The same document noted that in respect of the conviction made by the Prahran Magistrates' Court, appeal lodged, permission to drive granted 22 July 1996, the day on which the conviction was recorded.

This led to some debate before the magistrate at Stawell as to whether or not the conviction of the appellant which he was recording should be regarded and sentenced as a subsequent offence under s49 of the Act because of the conviction of the Magistrates' Court at **[2]** Prahran on 22 July, or it should have been treated as a first conviction, and the sentence imposed referring to the licence disqualification period in accordance with the provisions of the first schedule of the *Road Safety Act* as a first offence.

It is not necessary for me to consider that aspect in any detail, as Mr Read for the Director of Public Prosecutions does not contest that the magistrate misdirected himself as to the effect and impact upon the sentencing process upon which he was engaged by the knowledge that an appeal had been lodged against the Magistrates' Court at Prahran conviction. I have been told from the Bar table that in fact the appeal is still extant and has not been heard. The reason the Director of Public Prosecutions has taken that position is because of the current applicable authority to the matter. I have been referred to the decision of Gobbo J (as he then was) of this court, in *Bell v Feehan* [1985] VicRp 82; [1985] VR 841; (1985) 2 MVR 341, and a subsequent unreported decision of O'Bryan J (*Kennan v Mears*) of 25 January 1990. Consideration of those authorities makes it clear that, in effect, the Crown has accepted that so far as the disqualification of licence part of the sentencing process, the magistrate was in error. I conclude that he was in error, and that the appeal must therefore succeed. That will naturally lead to the setting aside of the disqualification order that was made, but there have been also associated with that some other matters raised with me this morning. The first relates to, since I will be making an order in

substitution, the date from which the **[3]** substitution order, namely disqualification for a period of 15 months, should run.

The magistrate, when making the order for the 30 month disqualification, made the commencing date of it some 38 days earlier than the date of the hearing. This was because, pursuant to s52 of the Act, the informant had, in effect, imposed a licence suspension. It seems to me that no different approach ought to be adopted by this court in that regard, and I propose to order that the date from which the substituted disqualification period runs to reflect the course followed by the magistrate, so that the commencing date will be 10 May 1998.

Mr Read, in the discharge of his duties, raised with me the query whether or not the matter of the imposition of the sentence ought be remitted back to the Magistrates' Court on the basis that the magistrate having, in effect, oversentenced the appellant because of his misunderstanding of the effect of the logic of an appeal against the earlier conviction, nevertheless, might possibly not view the matter as attractive of the lower end of the scale of, that is, only the minimum sentence that might be imposed. He referred me to statements made by O'Bryan J, in *Kennan v Mears* and generally to some sentencing principles that appear from *Veen v R (No. 2)* [1988] HCA 14; (1988) 164 CLR 465 at 477; (1988) 77 ALR 385; 33 A Crim R 230; 62 ALJR 224. Mr Hardy, on the other hand, pressed that the sentence ought to be the minimum sentence in respect of the first offence, having regard to the blood alcohol concentration that the evidence established and the short driving distance.

I do not propose to remit the matter back to the **[4]** Magistrates' Court. It would seem to me (whilst in many if not most cases that might be done) the magistrate himself, with respect to the sentence, selected the minimum period of disqualification on the basis of a second offence, thus giving some guide to me that he viewed the circumstances in which it occurred as not attracting the need to sentence at any greater period of disqualification than the minimum prescribed, even though he was in error as to what that minimum was.

Some reference was made by Mr Read to statements made by O'Bryan J in *Kennan v Mears* concerning continuing attitudes of disobedience of the law and the principles of retribution and deterrence. I have no disagreement with the general statement there made. I simply take the view in this case that I have a guide to what the Magistrates' Court then thought, and presumably would have done, had it not made the error that was made. I am also mindful of the fact that in this day and age, in particular, with the pressure upon court resources, and the cost of litigation, including litigation concerning the commission of crimes even at this level, that efforts should be made towards the economic dispatch of litigation, and I regard the orders I make as paying regard to that precept.

Accordingly, I do not find it necessary to specifically answer the questions of law to be determined on the appeal, some of them have not been found necessary to be addressed by either counsel. Strictly speaking, however, without making a formal answer to it, the question of law, if formally answered, would be that the magistrate was not entitled or obliged to treat the **[5]** offence with which the appellant was charged as a second and subsequent offence under s49 of the Act.

The order I make is as follows: that the sentencing order of the Magistrates' Court at Stawell with respect to the relevant offence, that order being made on 3 March 1998, in respect of the dealing with the cancellation of the licence of the appellant, Michael Wykeham Perry, is set aside, and in lieu of the orders concerning the appellant's licence to drive there be substituted therefor orders that:

1. The licence be cancelled and the appellant be disqualified from driving in the State of Victoria for a period of 15 months effective from 10 May 1998.
2. The order that fine and costs (ordered to be paid by the magistrate by monthly instalments commencing on 1 April 1998) be varied, and there be substituted therefor an order that the fine and costs be paid by monthly instalments of $100; first payment 1 July 1998.
3. I order that the respondent pay the appellant's costs of the appeal.

APPEARANCES: For the Appellant: Mr G Hardy, counsel. Einsiedels, solicitors. For the Respondent: Mr R Read, counsel. Director of Public Prosecutions.