12/04; [2004] VSC 139

SUPREME COURT OF VICTORIA

DUNLOP v ANSTEE

Balmford J

7 April 2004

SENTENCING – DRINK/DRIVING OFFENCE – OFFENDER SENTENCED TO A TERM OF IMPRISONMENT IN ADDITION TO THE IMPOSITION OF A FINE – MEANING OF "OR" – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, S49(3)(b).

Section 49(3) of the *Road Safety Act* 1986 ('Act') provides:

"A person who is guilty of an offence under paragraph (f) ... of sub-section (1) ... is liable—
...(b) in the case of a subsequent offence, to a fine of not more than 25 penalty units or imprisonement for a term of not more than 3 months."

1. There are two categories of circumstances in which courts have been prepared to read the word "or" in a statute as meaning "and" and vice versa. The first is where the court is persuaded that the legislature has made a mistake in the Act and the wrong conjunction has been used. The second is by reading the words in context, as where a list of items joined by "and" is governed by words showing that the list is a list of alternatives. Neither of these circumstances were present in this case. There was no reason to suppose that the word "or" in s49(3)(b) of the Act was to be read as meaning "and".

2. Accordingly, a magistrate did not have power pursuant to the said section to sentence a defendant to a term of imprisonment in addition to imposing a fine.

BALMFORD J:

1. This is an appeal under section 92 of the *Magistrates' Court Act* 1989 against a final order made on 3 February 2003 by the Magistrates' Court at Colac whereby the appellant, having pleaded guilty to an offence under section 49(1)(f) of the *Road Safety Act* 1986 ("the Act") was sentenced to pay a fine of $1250 and to a term of imprisonment of 2 months, wholly suspended for a period of 12 months. No appeal is brought against the conviction, or against the component of the sentence involving cancellation of all licences held by the appellant and disqualification from driving for a period of 24 months.

2. On 4 April 2003 Master Wheeler ordered that the question of law raised by this appeal was

> Did the learned magistrate have power to sentence the appellant to a term of imprisonment in addition to imposing a fine on the appellant? (see section 49(3)(b) *Road Safety Act* 1986).

3. On other occasions judges of this Court have expressed the view and acted upon the principle that in that situation a judge is not authorised to amend an order made by the Master; but that Rule 58.13 of the *Supreme Court (General Civil Procedure) Rules* 1996 empowers the Court in the words of Mandie J in *DPP v Hinch*[1]:

> to direct, in an appropriate case, that the appeal be decided upon the questions of law identified and canvassed in the arguments advanced, where this is necessary to achieve the effective, complete and economic determination of the appeal and is otherwise just and convenient.

See also, *Buckman v Barnawartha Abattoirs*[2], and *Popovski v Ericsson Australia Pty Ltd*[3]. I find this to be an appropriate case for such a direction, and on the basis of those authorities, and with the agreement of counsel, I direct that the appeal be decided as though the question of law was expressed as follows:

> Did the learned magistrate have power pursuant to section 49(3)(b) of the *Road Safety Act* 1986 to sentence the appellant to a term of imprisonment in addition to imposing a fine on the appellant?

4. Section 49(3) of the Act reads, so far as relevant:

> (3) A person who is guilty of an offence under paragraph ... (f) . .. of sub-section (1) . .. is liable—
> (a) ...
>
> (b) in the case of a subsequent offence, to a fine of not more than 25 penalty units or to imprisonment for a term of not more than 3 months.

5. It is not in issue that the offence in question was a "subsequent offence" within the meaning of that provision.

6. Section 49 of the *Sentencing Act* 1991 ("the Sentencing Act") reads:

> **49. Power to fine**
> (1) If a person is found guilty of an offence the court may, subject to any specific provision relating to the offence, fine the offender in addition to or instead of any other sentence to which the offender may be liable.
>
> (2) The maximum fine that a court may impose under sub-section (1) is the appropriate maximum specified in the specific provision or, if no maximum is specified there, then that specified in section 52.

7. However, that provision is expressed to be subject to "any specific provision relating to the offence", and in this case section 49(3) of the Act is such a specific provision. Accordingly, section 49 of the *Sentencing Act* has no application to the question before me, and the power to impose a penalty for the offence in question derives solely from section 49(3) of the Act.

8. In *Re The Licensing Ordinance*[4] Blackburn J pointed out that there are two categories of circumstances in which courts have been prepared to read the word "or" in a statute as meaning "and" and vice versa. The first is where the court is persuaded that the legislature has made a mistake in the Act and the wrong conjunction has been used. The second is by reading the words in context, as where a list of items joined by "and" is governed by words showing that the list is a list of alternatives. Neither of these circumstances is present here. There is no reason to suppose that the word "or" in section 49(3)(b) is to be read as meaning "and".

9. This view is strengthened by a comparison with section 64 of the Act, which reads, so far as relevant:

> **64. Dangerous driving**
> (1) A person must not drive a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case.
>
> (2) A person who contravenes sub-section (1) is guilty of an offence and is liable to a fine of not more than 240 penalty units or to imprisonment for a term of not more than 2 years or both and ...

Thus section 64(2), in contrast to section 49(b), expressly provides for a penalty of a fine or imprisonment or both.

10. Hodges J said in *Craig Williamson Pty Ltd v Barrowcliff*[5]:

> I think it is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words wherever those words occur in that document, and that that applies especially to an Act of Parliament, and with especial force to words contained in the same section of an Act. There ought to be very strong reasons present before the Court holds that words in one part of a section have a different meaning from the same words appearing in another part of the same section.

Mason J said in *Registrar of Titles (WA) v Franzon*[6]:

> It is a sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise.

11. Those passages encourage a reading of section 49(3)(b) on the basis that, had the legislature intended there to provide for a penalty of a fine or imprisonment or both, it would have used

similar words to those appearing in section 64.

12. Both counsel were effectively in agreement that, for the reasons which I have set out, the answer to the question as enunciated in [3] above should be No, and accordingly that the appeal should be allowed.

13. It appears that no transcript of the hearing before the Magistrate is available. That being so, it would seem appropriate, having allowed the appeal, to remit the matter to the Magistrates' Court for the appellant to be further sentenced according to law. There will be orders to that effect, and that the respondent pay the appellant's costs of the appeal together with costs thrown away by reason of the re-hearing before the Magistrates' Court.

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[1] Unreported, decided on 5 August 1994.
[2] Unreported decision of Smith J, decided on 14 July 1994.
[3] [1998] VSC 61 (Ashley J).
[4] (1968) 13 FLR 143.
[5] [1915] VicLawRp 66; [1915] VLR 450 at 452; 21 ALR 349; 37 ALT 62.
[6] [1975] HCA 41; (1975) 132 CLR 611; 7 ALR 383; (1975) 50 ALJR 4 at 6.

APPEARANCES: For the appellant Dunlop: Mr SP Hardy, counsel. Patricia Roberts, solicitors. For the respondent Anstee: Mr RA Elston, counsel. Solicitor for Public Prosecutions.
