

25/97

SUPREME COURT OF VICTORIA

ORLANDO v ROADS CORPORATION

Nathan J

4 March 1997 — (1997) 92 A Crim R 87; (1997) 25 MVR 528

MOTOR TRAFFIC – SUSPENSION OF DRIVER LICENCE – DEMERIT POINTS – WHEN INCURRED – WHETHER AT TIME OF COMMISSION OF OFFENCE OR CONVICTION: ROAD SAFETY ACT 1986, S25(3A), (3B); ROAD SAFETY (PROCEDURES) REGULATIONS 1988, R230(2).

In relation to demerit points, the operative part of s25(3B) of the *Road Safety Act 1986* is the commission of an offence within a stated period. It is the offence which gives rise to the demerit point. The demerit point is thus incurred or earned at the time of the commission of the offence and not at the time at which conviction in respect of the offence is imposed.

NATHAN J: [1] This case displays the especial vulnerability of taxi drivers to the provisions of the *Road Safety Act* (the Act), particularly those sections which bring about automatic suspension and cancellation of drivers' licences when demerit points are accrued. Mr Orlando, the appellant holds a taxi driver's licence as well as an ordinary driving licence. Between March 1994 and January 1995 he "earned", as it is inappropriately and commonly called, 12 demerit points. Under the provisions of the Act s25(3), he was served with a notice advising him that he had accumulated 12 or more demerit points within a three-year period and accordingly pursuant to the provisions of s25(3A) of the Act he could, upon application, extend the demerit point period. He did so. The significance of the election is that in the event of 1 or more demerit points being earned within the prescribed period, the respondent corporation must proceed to the suspension of that person's licence.

On 26 January 1996, Mr Orlando committed a further offence under the Act, when he disobeyed a traffic control signal. Three demerit points attached to this offence. I have heard him give an explanation of that offence which I accept. In the early hours of the morning when little traffic was about, he came to a city intersection and noticed a policeman on the opposite corner, but nevertheless decided to ease around the corner in disregard of the signal. That behaviour resulted in him being proceeded against under the terms of the Act earning a [2] further conviction, and a further three demerit points. In respect of that offence he was convicted before the Magistrates' Court at Prahran on 29 July 1996. On 10 September 1996, the corporation sent him a notice under the terms of s25(3B) of the Act advising him that his licence to drive would be suspended as from the following day. It is necessary to refer to that section. It reads:

"If a person notifies the Corporation of his or her election under sub-s(3A), the Corporation must, if the person incurs 1 or more additional demerit points in relation to any offence committed within the 12 month period after the date of the notice under sub-s(3)—

(a) by notice in the prescribed form served on the person, suspend his or her driver licence for 6 months."

On 8 October 1996 Mr Orlando appealed against the suspension and the matter came on for hearing before the magistrate at Prahran. The magistrate held, and as I shall go on to rule, correctly held, that the demerit points accrued under the terms of the Act, accrued at the time the offence was committed and not at the time when the conviction in respect of the offence was recorded.

The question of law that has come before me is as follows. Whether for the purposes of s25(3B) of the Act, Regulations 5/1996 and Regulation 230(2A) of the *Road Safety (Procedures) Regulations 1988*, demerit points incurred prior to the date of proclamation of the latter, that is 1 February 1996, are to be taken into account. It can be seen that the question of law makes reference to Regulation 230(2A) which, it is not contested, came into effect on 1 February 1996.

That Regulation finds itself in Regulation 230 as a whole, which is entitled “:How [3] demerit points are incurred”. I note and stress the use of the word ‘incurred’. Sub-r2 of the Regulation reads:

“The Corporation must record the appropriate number of demerit points against a person if the person—

(a) is convicted of a relevant offence; or

(b) pays the penalty specified in an infringement notice issued in respect of a relevant offence.”

Sub-r2(c) is irrelevant. Sub-r2A reads:

“Demerit points recorded under sub-regulation (2) must be recorded as having been incurred on the date on which the relevant offence is alleged to have occurred”.

The argument advanced before the magistrate and again by Mr Orlando before me, was that sub-regulation 2A is not applicable and that prior to that sub-regulation’s enactment it must have been that a demerit point could only be incurred when the conviction in respect of it was recorded or alternatively when payment of an infringement notice in respect of it was made. The significance of this is as follows. Mr Orlando’s argument was that the Roads Corporation had incorrectly recorded demerit points against him in respect of the offence that had occurred on 26 January 1996. That is, easing around the corner in disregard of the traffic light and that that should have been noted as being the date of conviction, that is 29 July 1996. The 12 month period elapsed under his election on 20 July 1996, that is nine days prior to the relevant court conviction and it is that conviction which led to the suspension of the licence.

I have come to the view that the Act and of course the Regulations made under it, must be read as a whole including the Regulation (2A) introduced on 1 February [4] 1996. Despite the Regulation not being in force at the time the offence was committed, I do not accept the argument that it must have been introduced to remove confusion which then and there existed and that the introduction of (2A) somehow or other changed the position prior to its enactment. In my view the Regulation merely clarified a pre-existing position. I must pay greater emphasis to the provisions of the section rather than the Regulations and interpret it in its own terms. Accordingly, I return to the provision s25(3B). It reads:

“If the person incurs 1 or more additional demerit points in relation to any offence committed within the 12 month period.”

The operative part of the provision is the commission of an offence within a stated period. It is the offence which gives rise to the demerit point. The demerit point is thus incurred or earned at the time of the commission of the offence and not at the time at which conviction in respect of which the offence is made. The “incurring” referred to in the provision must relate to the accrual of a demerit point in respect of an offence. In the section itself the offence is described as one committed within the 12 month period. In my view, the terms of the section are pellucid and are not constrained or distorted by the clarification of them by a subsequently enacted sub-regulation.

It is to be noted that the sub-regulation 230(2A) was enacted at the time of another series of amendments to the Act all of which were illustrative and not substantive. It must be that Regulations can be amended from time to time to make them more clear, often of course [5] having the reverse effect, but that is the very nature of the Regulation-making power, and it is to be distinguished from the legislative function and the amendments to Acts of Parliament.

I am satisfied that commonsense directs that the section be interpreted in the way I have suggested, otherwise the provisions of the Act, which penalise poor behaviour within given time periods could be brought to nothing. Adjournments or extensions of time to bring about conviction after the period of prescribed notices would otherwise be commonly sought and presumably granted in order to thwart the self-executing provisions of the Act. Those statutory periods are at the heart of the Act. They are self-effluxing, by that I mean that at the expiration of a particular period, prior offences under the Act in respect of demerit points become spent. The periods of aggregation are at the very core of the Act and it must be that the Act is directed to those periods of aggregation and not to periods of or dates of conviction.

For these reasons the appeal must be dismissed. The Magistrate's decision is affirmed. I will hear counsel as to costs, but I am not attracted to burdening the appellant with further costs, in view of the fact that the nature of the penalty, which attaches to him for easing around the corner in relatively safe circumstances against the provisions of a traffic control signal, have resulted in his capacity to earn being extinguished. What you have sought and obtained from the court is clarification of a legislative provision which will have a general community [6] effect and it will relate to all taxi drivers and all other drivers in all circumstances. It seems unfair that the citizen enmeshed in this type of litigation should bear costs. I do not propose to make an order for costs, unless you can now persuade me otherwise, which opportunity I now give you.

APPEARANCES: Appellant in person. For the Respondent: Ms L Hannan, counsel. Phillips Fox, solicitors.
