

34/04; [2004] VSC 384

SUPREME COURT OF VICTORIA

**ROADS CORPORATION v MAGISTRATES' COURT of VICTORIA;
PARSONS & HOLLOWAY**

Smith J

26, 27 August, 7 October 2004 — (2004) 42 MVR 105

MOTOR TRAFFIC – TRAFFIC INFRINGEMENT NOTICES – TWELVE DEMERIT POINTS ACCUMULATED – LICENCES SUSPENDED BY VIC ROADS – APPEAL TO MAGISTRATES' COURT – IDENTITY OF DRIVERS IN ISSUE – "MISCALCULATION" – MEANING OF – APPEALS ALLOWED BY MAGISTRATES – WHETHER MAGISTRATES IN ERROR: ROAD SAFETY ACT 1986, S26.

P. and H. each received a notice from Vic Roads to the effect that they had incurred 12 or more demerit points and that their driver licence was at risk of being suspended. P. and H. stated that on occasions they were not the driver of the motor vehicle when the demerit points were incurred. Both P. and H. appealed to the Magistrates' Court against the decision by Vic Roads to suspend their driver licences. The courts allowed the appeals. In P.'s case the magistrate upheld the appeal on the ground that P. was not the driver of the vehicle on two of the occasions which contributed to the accumulation of demerit points. In H.'s case, the magistrate accepted that H. was not the driver on a relevant occasion but focused on the issue of whether there was a miscalculation made by Vic Roads in assessing the demerit points. Upon an application to quash each decision—

HELD: Application refused.

1. Parliament has expressed an intention to create safety nets to deal with cases of injustice that may flow from the features designed to give efficiency. One of those safety nets is provided by s26(2)(a) of the *Magistrates' Court Act* 1989. The question to be decided is the scope of that safety net. It is capable of being interpreted to allow an inquiry as to who was in fact the driver when the demerit points were incurred.

2. Efficiency is a means to an end, not an end in itself and those efficient systems will on occasions result in injustices. The suspension of licences, in particular, can be a very serious matter for the individuals concerned. Ultimately, however, it is against the actual driver of the vehicle committing the offences under the Act that it is intended to operate. Therefore, to adopt the interpretation applied by the magistrates will serve the legislation. Further, it is important for compliance that there be community acceptance and confidence in the systems. For that to exist it is important that there be mechanisms for dealing with unjust results. Thus, it will strengthen the system and so serve its purposes to construe s 26(2)(a) in the way adopted by the magistrates.

3. In the H. matter, the Magistrate found that H. was not the driver on one of the occasions giving rise to demerit points but decided the appeal on the ground that there had been a "miscalculation". The normal meaning of the term "miscalculation" is to "calculate wrongly", or "wrong or faulty calculation". In those circumstances, the Magistrate did not interpret the term "miscalculation" correctly in s 26(2)(b). However, the decision was correct because of the construction the magistrate placed on s 26(2)(a), a construction which entitled H. to succeed on his appeal.

SMITH J:

The proceedings

1. The Roads Corporation, trading as Vic Roads, has brought proceedings under Order 56 of the *Rules of the Supreme Court* seeking to challenge two decisions of the Magistrates' Court. The decisions were made in two appeals brought pursuant to s26 of the *Road Safety Act* 1986 (the Act) arising out of decisions of Vic Roads to suspend driving licences following a number of traffic infringements.

(a) The Parsons Appeal. On 14 November 2003, the appeal of Francis E Parsons against the decision of the plaintiff to suspend his licence was upheld. In addition the Magistrates' Court directed that the demerit points recorded against Parsons in respect of two traffic infringement notices 0081636456 and 0072687761 be deleted by the plaintiff and recorded against the driver's licence of Felicity Anne Renowden, the person who had committed the traffic infringements.

(b) The Holloway Appeal. On 8 April 2004 the Magistrates' Court upheld the appeal of Malcolm Holloway against the decision of the plaintiff to suspend his driver's licence.

2. The plaintiff, Vic Roads, has issued two originating motions relating to the decisions in the above proceedings:

(a) The Parsons matters. In its originating motion, Vic Roads seeks a declaration that:

“(a) the plaintiff's suspension of the driver licence of the second defendant on 30 May 2003 is valid;

(b) the second defendant was the person against whom the plaintiff was required by the *Road Safety Act 1986* and the regulations made under that Act to record the demerit points which is recorded against his driver licence;

(c) the notice of suspension issued by the plaintiff to the second defendant on or about 30 May 2003 is valid.”

The plaintiff also seeks relief in the nature of *certiorari* to quash

“(a) the decision of the first defendant on 14 November 2003 to allow the appeal of the second defendant under s 26 of the *Road Safety Act (Vic) 1986* against the decision of the plaintiff to suspend the second defendant's driver licence from 30 May 2003 to 29 August 2003;

(b) the decision of the first defendant on 14 November 2003 to direct that demerit points recorded against the second defendant in respect of traffic infringement notices 0081636456 and 0072687761 be deleted by the plaintiff and recorded against the driver licence of Felicity Anne Renowden.”

The grounds relied upon are stated as follows.

“1. Misapprehended or disregarded the nature or limits of its functions or powers under sections 26(2) and 24(4) of the *Road Safety Act 1986*;

2. erred in admitting evidence during the hearing of the appeal referred to in paragraph 2(a) above from the second defendant and Ms Renowden as to the identity of the driver when Traffic Infringement Notices 0081636456 and 0072687761 were incurred;

3. erred in finding that Regulation 301 of the *Road Safety (Drivers) Regulations 1999* does not impose an obligation on the plaintiff to record points against an owner of a motor vehicle who has received a Traffic Infringement notice where that Notice has been paid by someone other than the owner;

4. erred in finding that the second defendant had a right of review pursuant to Regulation 402 of the *Road Safety (Drivers) Regulations 1999* with respect to the obligations imposed on the plaintiff by section 24(1) of the *Road Safety Act 1986*;

5. erred in finding that the absence of any reference to a right to review pursuant to Regulation 402 of the *Road Safety (Drivers) Regulations 1999* in the Notice of Suspension sent by the plaintiff to the second defendant on or about 30 May 2003 rendered that Notice unlawful;

6. erred in finding that a failure by Vic Roads to exercise the powers conferred on it by Regulation 402 of the *Road Safety (Drivers) Regulations 1999* resulted in an inaccurate register of demerit points; and

7. erred in find that the power to review a decision to suspend a driver licence conferred on the plaintiff by Regulation 402 of the *Road Safety (Drivers) Regulations 1999* includes:

(a) a power to consider who the identity of the actual driver was when a Traffic Infringement Notice was incurred, and

(b) a power to vary the allocation of a Traffic Infringement Notice or the allocation of demerit points pursuant to a Traffic Infringement Notice.

(b) The Holloway originating motion. The plaintiff seeks a declaration that:

“(a) the plaintiff's decision to suspend the driver licence of the second defendant on 29 January 2004 is valid;

(b) the second defendant was the person against whom the plaintiff was required by the *Road Safety Act 1986* and the regulations made under that Act to record the demerit points which it recorded against his driver licence; and

(c) there was no miscalculation made in assessing the total number of demerit points incurred by the second defendant.”

In addition, relief in the nature of *certiorari* is sought:

"To quash the decision of the first defendant on 8 April 2004 to allow the appeal of the second defendant under s26 of the *Road Safety Act* (Vic) 1986 against the decision of the plaintiff to suspend the second defendant's driver licence."

The grounds relied upon are that the first defendant made a jurisdictional error and/or error of law on the face of the record in that it:

1. misapprehended or disregarded the nature or limits of its functions or powers under sections 26(2) and 26(4) of the *Road Safety Act* 1986;
2. erred in admitting evidence during the hearing of the appeal referred to in paragraph 2 above from the second defendant as to the identity of the driver when Traffic Infringement Notice 009654096 was incurred;
3. erred in finding that there had been a miscalculation in assessing the total number of demerit points incurred by the second defendant for the purposes of section 26(2)(b) of the *Road Safety Act* 1986;
4. erred in treating as relevant the question of whether or not Traffic Infringement Notice 009654096 was sent to the second defendant's correct address;
5. erred in not treating as relevant the finding that there was no miscalculation by the plaintiff when it recorded the demerit points against the driver licence of the second defendant."

The provisions of Section 26 of Act

3. Before addressing the details of the proceedings, it is necessary to set out the provisions of s26 of the Act under which the appeals to the Magistrates' Court were brought.

26. Appeal to Magistrates' Court

(1) If the Corporation decides to—

- (a) refuse an application for a driver licence, a driver licence variation or a permit; or
- (b) in accordance with section 24, suspend, cancel or vary in any way a driver licence or permit; or
- (c) in accordance with section 25(3B)(a), (3B)(ab) or (3D)(a), suspend a driver licence or learner permit—the applicant or holder may, in accordance with the regulations and subject to sub-section (2), appeal against that decision to the Magistrates' Court.

(2) An appeal under sub-section (1)(c) may only be made on either or both of the following grounds:

- (a) That the appellant was not the person against whom the Corporation was required by this Act and the regulations to record certain demerit points;
- (b) That a miscalculation has been made in assessing the total number of demerit points incurred by the appellant.

(3) The giving, in accordance with the regulations, of a notice of appeal under sub-section (1)(c) stays the suspension of the licence or learner permit until—

- (a) the date on which the appeal is determined; or
- (b) if the appeal is discontinued, the date on which notice in writing of discontinuance is given in accordance with the regulations to both the Magistrates' Court and the Corporation.

(4) On an appeal under sub-section (1) the court must—

- (a) re-determine the matter of the refusal, suspension, cancellation or variation; and
- (b) hear any relevant evidence tendered by the appellant or the Corporation; and
- (c) without limiting its discretion, take into consideration anything that the Corporation ought to have considered.

(5) If the court is satisfied that the refusal, suspension, cancellation or variation—

- (a) results from a driving disqualification of the appellant in another State or Territory of the Commonwealth; or
 - (b) was required by the regulations or section 25—
- the court must confirm the decision of the Corporation.

(6) On an appeal under sub-section (1)(c) the court may— (a) in allowing the appeal, give to the Corporation any directions it thinks proper for the amendment of the Demerits Register; or (b) in dismissing the appeal, order that the suspension take effect from a date specified in the order. (7) Every decision of the Magistrates' Court on an appeal under this section is final and conclusive and must be given effect to by the Corporation."

It is common ground in each proceeding that in the circumstances of each case, the right of appeal to the Magistrates' Court was that spelt out in s26(1)(c) which right of appeal was also subject to the limitations contained in s26(2). Thus it is, that the questions of law that arise in these proceedings concern the interpretation in particular of paras (a) and (b) of s26(2). A point common to both matters is the interpretation of s26(2)(a).

Background to the proceedings

4. The Parsons matter. On about 4 April 2003, Mr Parsons received a notice under s25(3) and 25(3D) of the *Road Safety Act* 1986 advising him that the Vic Roads Demerit Points Register showed that he had incurred 12 or more demerit points and advising him of the options available under the legislation, namely,

- not having the licence suspended but running the risk that if he incurred further points within 12 months of 29 April 2003 the licence would be suspended for six months, or
- simply allowing it to be suspended.

On 12 April and 16 April 2003, respectively, Ms Renowden and Mr Parsons swore statutory declarations stating that it was Ms Renowden not Mr Parsons who was driving the motor vehicle on the occasion of the two above traffic infringements. There then followed confused attempts to organise both an internal review by Vic Roads and an appeal to the Magistrates' Court. Vic Roads did not deal with the internal review within the prescribed times set out in the Regulations with the result that the initial decisions were deemed to have been affirmed by Vic Roads. It so advised Mr Parsons' solicitors by letter dated 1 July 2003. In the meantime, on 19 June 2003, Mr Parsons had filed a notice of appeal to the Magistrates' Court against the decision of Vic Roads to suspend his licence. He used what appears to be an official printed form. He relied on two grounds:

“(a) I was not the person against whom Vic Roads was required to record demerit points;

(b) Vic Roads made a miscalculation in assessing the total number of points incurred by me.”

The matter came on for hearing on 9 July 2003 and 28 July 2003. On 14 November 2003 the learned Magistrate published his reasons for decision.

5. His Worship identified a single ground of appeal, namely, that Mr Parsons was not the driver of the vehicle on the days in question and that Ms Renowden was. He then made the following findings of fact:

“(i) The applicant was not the driver of vehicle CSN 091 on 11 September 2000 nor was he the driver on 12 December 2002. The driver and the person who committed the offences on both those days was Felicity Anne Renowden.

(ii) Traffic Infringement Notices sent to the defendant's address were intercepted by his wife and did not come to his notice until very much later and after the fines in both cases were paid by Felicity Anne Renowden.

(iii) Whilst a notice under s 25(3) and 25(3D) of the *Road Safety Act* was sent to the applicant on the 18th March 2003, it seems to me that it was probably unlawful in that it did not notify the applicant of his right to review under Regulation 401 of the *Road Safety (Drivers) Regulations*^[1]

(iv) The applicant initially lodged an appeal under s 26 of the *Road Safety Act* which he then withdrew after he became aware of 401 - 405 of the above mentioned regulations.^[2]

(v) Vic Roads did not:

- (a) review its decision to suspend the applicant's licence;
- (b) notify the applicant of any decision;
- (c) comply with Regulation 405 of the Regulations.

(vi) In my opinion, if any reasonable person had reviewed the decision to suspend the applicant's licence they would have simply assigned or allocated the demerit points from Mr Parsons to Ms Renowden after they received the relevant statutory declarations.”

6. In his reasons, his Worship canvassed a number of matters, not all of which need to be considered in this proceeding. I note the following, however, which are of particular relevance.

7. His Worship referred to a number of submissions made on behalf of Vic Roads, and in particular, the following:

(a) "that if it could be shown that Vic Roads was required to record demerit points against the applicant, then the appeal must fail."

His Worship commented:

"However, it should be noted that Regulation 301 provides that Vic Roads must record against a driver the appropriate number of demerit points if the driver pays the penalty specified in an infringement notice issued to the driver in respect to a relevant offence. In this case the driver did pay the penalty specified in the notice, however that person was not the applicant although he was the person whom demerit points were recorded against."^[3]

(b) Vic Roads had submitted that s66(1) of the *Road Safety Act* deems the owner of the vehicle guilty of an offence if he fails to nominate another driver. His Worship noted that Vic Roads went on to argue that

"while a person may seek internal reconsideration by the Victorian Police Penalty Review Board the Act does not provide for any further challenges to the imposition of the T.I.N."

His Worship rejected this submission on the basis that:

"Once a notice suspending a person's licence has been received, a person has a right to an internal review of that decision and accordingly a variation could be made. In this case it would have been fair and reasonable to re-allocate the demerit points. However if Vic Roads was not satisfied that the person who was initially allocated the points had not notified them that he was not the appropriate person then they could have affirmed their original decision. After all the person who signed the statutory declaration would have been guilty of perjury if they had signed an incorrect declaration."

(c) Referring to the second written submission of Vic Roads of 4 August 2003, his Worship noted that it relied upon s89 of the *Road Safety Act* which provides that, if the penalty is paid, no further proceedings may be taken in respect to the infringement. His Worship went on to note that:

"[The section] does not say that if as a result of that infringement a notice is sent suspending a licence a person cannot have that decision internally reviewed pursuant to Part IV of the *Road Safety (Drivers) Regulations* 1999. Even though such a review was requested this was not done. Indeed, an accurate register cannot be kept unless all the appeal and review procedures are adhered to."

8. As to other matters, his Worship commented that he was "quite satisfied" that the appellant had a right of appeal under s26 of the Act:

"... because Vic Roads has not complied with Regulation 403 in that it has not notified the applicant of its decision as required by Regulation 402(4). It is also obvious to me that the appeal was not acted upon, a decision was not made and obviously no reasons are available for its rejection according to the submission on behalf of the respondent."

In considering the substantive merits of the competing constructions, his Worship went on to say that if Vic Roads knew that a person who has demerit points recorded against him is not the person who should have those points, then

"... surely the register is inaccurate and should be amended or varied so that it is accurate."

His Worship also noted that it made "good sense" to have the Regulations allowing a review in that they operated:

"... as a safety net in respect to the Victoria Police Penalty Review Board ... It follows, therefore, that if demerit points are unjustly recorded against a person and that Review Board fails to reallocate points then a driver should be able to challenge that decision if and when a notice suspending their licence is received."

He noted that, in view of the inability to have the issues reconsidered on their merits by the Victoria Police Penalty Review Board process where the penalty has been paid:

"... there then seems to be good reason why Vic Roads can vary its decision to suspend a licence once all the facts and circumstances are known."

9. While a number of issues are raised in the grounds supporting the originating motion, the points of law that arise for consideration concern the extent of the right of appeal given by s 26 of the Act in the circumstances of this case. Plainly, his Worship considered that Mr Parsons had a right of appeal which covered the circumstances he sought to raise - namely that there should not be a suspension of his licence because he was not the driver of the vehicle on two of the occasions which contributed to the total of 12 points and so gave rise to the suspension. This issue involves an extensive consideration of the legislation - and the regulations.

The Holloway originating motion.

10. In the Holloway matter, the learned Magistrate found that Mr Holloway received a notice in the mail about a speeding offence and lodged his Notice Of Objection to it but that notice was out of time. The reason for the delay was that the notice had gone astray having been sent to PO Box 1863 Belmont rather than PO Box 1863 Geelong. Subsequently, presumably after further breaches, he received notice that his licence had been suspended. He also appealed to the Magistrates' Court pursuant to s26. The Notice of Appeal, however, raised two grounds:

- (a) "I was not the person driving the vehicle" and
- (b) "the original infringement notice was incorrectly addressed."

The issue raised in fact was the same – that someone other than Mr Holloway was driving the vehicle on the relevant occasion and Mr Holloway gave evidence to that effect and the person who actually drove the vehicle was present in court to give evidence if necessary.

11. His Worship plainly accepted Mr Holloway's case that he was not the driver and appeared to have little difficulty in concluding that he had a right pursuant to s26 to appeal against the suspension on that basis. In his reasoning, however, he appears to have focused on the issue of whether there was a miscalculation made in assessing the points.

12. It is plain from his Worship's reasons that the basis for saying that there was a miscalculation was that Mr Holloway was not the driver on the occasion in question and that "the points were not incurred by him but by someone else". His Worship noted that the miscalculation was made by Civic Compliance, the organisation that processes the initial infringement, and not Vic Roads but he had earlier expressed the view in his reasons that the section in question, s26(2)(b) of the Act did not purport to differentiate between the authors of any miscalculation. It should also be noted that earlier in his reasons his Worship commented that Vic Roads could not be criticised for recording the demerit points it did because it relied upon the information from Civic Compliance. He likened it to a situation of "garbage in . . . garbage out" but noted that a consequence was that it "is unjust and takes away the rights of the citizen by removing their licence in circumstances where, arguably, they shouldn't."

He then went on to say:

"Now, if this State is in the situation, I talk about the State of Victoria, whereby it is stuck with information that is wrong, that is a lie, and that decisions are made on that to affect the rights of the citizen, if that's the state of this State then we're in real trouble and if that means that I, as a Magistrate can't sit here and listen to cases and make decisions based on concept of justice and what is fair and right then the situation is terribly wrong. It is up to this Court, and that is why I am here and that is why the section is there which says Appeals to Magistrates' Court, it is up to this Court to review these things."

13. Here too, therefore, the central question is the construction of s26 in its application to cases of this kind where demerit points have been recorded against a person who was not in fact the driver on the occasion in question and who, for one reason or another, has not had the Demerits Register corrected prior to his or her points totalling 12, a number which prompts Vic Roads to issue the suspension notices. The case of Holloway throws up a further issue, however, namely, the meaning of "miscalculation" in the section.

14. Before proceeding any further it is necessary to set out the extensive statutory and regulatory provisions that are relevant.

The legislative provisions – Traffic Infringements and Penalties

15. The service of traffic infringement notices is provided for in s88 of the Act. It provides as follows:

“88. Traffic infringements

(1) A person who is referred to in section 77(2)(a), (c) or (d) who has reason to believe that a person has committed a traffic infringement of a kind that is prescribed for the purposes of this Part may issue or cause to be issued and serve or cause to be served on that person a traffic infringement notice in accordance with the regulations. . . .

(3) A traffic infringement notice may be withdrawn, whether the appropriate penalty has been paid or not, at any time within 28 days of the service of the notice (or, at the request of the person on whom the notice was served, at any later time), by serving on the alleged offender, in accordance with the regulations, a withdrawal notice which contains the prescribed particulars and is signed by a prosecution officer.

(3AA) Despite sub-section (3), a traffic infringement notice cannot be withdrawn under that sub-section where the infringement penalty is registered under Schedule 7 to the Magistrates' Court Act 1989. (3A) Despite sub-section (3), a withdrawal notice in relation to a traffic infringement notice of a kind referred to in sub-section (1A) must be signed by a member of the police force.

(4) If the appropriate amount specified in the notice as the penalty for the infringement has been paid before the notice is withdrawn the amount so paid must be refunded upon the notice of withdrawal being given.

(5) The penalty for the purposes of this section in respect of any traffic infringement is the amount prescribed in respect of that infringement.

(6) A person referred to in section 77(2)(a), (c) or (d) who has reason to believe that a person (other than the driver of a motor vehicle) has committed a traffic infringement may require that person to state his or her name and address.

(7) A person must not refuse or fail to state his or her name and address, or state a false name or address.”

There are then provisions for the payment of penalties and the consequences of doing so contained in s89 which provides:

“89. Payment of penalty

(1) Subject to sub-section (4), if before the expiration of the period specified in the infringement notice for the payment of the penalty or, where the person giving the notice so allows, at any time before the service of a summons in respect of the infringement, the amount of the penalty shown on the notice is paid at the appropriate place-

- (a) the offender must be taken to have expiated the infringement by payment of the penalty; and
- (b) no further proceedings may be taken in respect of the infringement; and
- (c) no conviction for the infringement may be regarded as having been recorded.

(2) Every penalty paid pursuant to this section must be applied in the same manner as if the offender had been convicted of the infringement in the Magistrates' Court on a charge filed by the member of the police force or authorised officer who served the infringement notice or caused it to be served.

(3) Payment of any penalty under this section may be effected in accordance with the regulations.

(4) If an infringement notice has been served and the amount of the penalty is not paid before the expiration of the period specified in the notice as the time for payment or where, in the case of a traffic infringement notice, the notice has been withdrawn, nothing in this section in any way prejudices the institution or prosecution of proceedings for the infringement in question (whether pursuant to Schedule 3 to the *Magistrates' Court Act 1989* or otherwise) but in any case, where the court is satisfied that an infringement notice was served in respect of the infringement and has not been withdrawn, the conviction imposed by the court must not be taken to be a conviction for any purpose (including, without limiting the generality of the foregoing, the purposes of any enactment imposing, authorising or requiring the imposition of any disqualification, disability or higher penalty on convicted people or people convicted on more than one occasion) except in relation to—

- (a) the making of the conviction itself; and
- (b) any subsequent proceedings which may be taken in respect of the conviction itself, including proceedings by way of appeal or order to review.

(5) Despite anything to the contrary in this section, the regulations may provide that demerit points are incurred under section 25 in respect of a traffic infringement by a person to whom sub-section."

Legislative Provisions - Demerit points, the Register and Suspension.

16. The regulations provided for demerit points to be incurred in respect of the offences in question in the present cases.

17. The Act contained provisions concerning the suspension of licences and other matters. It provided as follows:

"24. Cancellation, suspension or variation of licences and permits by Corporation

(1) The Corporation must, if required by the regulations or section 25 to do so- (a) suspend for the prescribed time the driver licence or permit of any person; . . .

(2) The Corporation may, in accordance with the regulations-

(a) suspend for any time that it thinks fit the driver licence or permit of any person; . . .

(3) In suspending, in accordance with the regulations, a driver licence or permit on the ground that it would be dangerous for the person to drive a motor vehicle because of illness or bodily infirmity, defect or incapacity or because of the effects of treatment for any of those things, the Corporation may do so on the basis of a report given by a registered medical practitioner and without conducting any other hearing or investigation into the matter before the suspension is imposed."

18. The Act expressly provided also for a "Demerits Register", a procedure to be followed when demerit points exceed 12 in number and the suspending of licences:

"25. Demerits Register

(1) The Corporation must keep a Demerits Register and must record against a person any demerit points that are incurred by that person.

(2) The circumstances in which demerit points are incurred, the number of points incurred, the determination of the date on which points are to be recorded as incurred and the circumstances in which, if points are incurred before a conviction or finding of guilt is recorded or made, the points may be cancelled are as prescribed (2A) ... (2B) ...

(3) The Corporation must serve a notice containing the prescribed particulars on the holder of a driver licence or learner permit who incurs 12 or more demerit points within any 3 year period;

(3A) A person on whom that notice is served may, within 21 days after service of the notice, notify the Corporation that he or she elects to extend the demerit point period.

(3B) If a person notifies the Corporation under sub-section (3A) that he or she elects to extend the demerit point period, the Corporation must, if the person incurs 1 or more additional demerit points in relation to any offence committed within the 12 month period commencing on the date determined by the Corporation and specified in the notice served under sub-section (3) as the commencement date of the 12 month period—

(a) suspend his or her driver licence or learner permit for 6 months and an additional 2 months for each 4 demerit points in excess of 12 recorded against the person as at the date of issue of the notice under sub-section (3).

(b) when calculating demerit points recorded against that person at any time after the end of the period of suspension, disregard all demerit points recorded against the person as at the date of issue of the notice under sub-section (3); and

(c) serve on the person a notice containing the prescribed particulars.

(3C) If a person notifies the Corporation under sub-section (3A) that he or she elects to extend the demerit point period, the Corporation must, if the person incurs no additional demerit points in relation to any offence committed within the 12 month period commencing on the date determined by the Corporation and specified in the notice served under sub-section (3) as the commencement date of the 12 month period, when calculating demerit points recorded against that person at any time after the end of that 12 month period, disregard all demerit points recorded against that person as at the date of issue of the notice under sub-section (3).

(3D) If a person on whom a notice under sub-section (3) is served does not, in accordance with sub-section (3A), notify the Corporation that he or she elects to extend the demerit point period, the Corporation must—

- (a) suspend his or her driver licence or learner permit for 3 months and an additional 1 month for each 4 demerit points in excess of 12, recorded against the person as at the date of issue of the notice under sub-section (3); and
- (b) when calculating demerit points recorded against that person at any time after the end of the period of suspension, disregard all demerit points recorded against the person as at the date of issue of the notice under sub-section (3).
- (4) The suspension of a driver licence or learner permit under this section takes effect on and from the date determined by the Corporation and specified in the notice served under sub-section (3) or (3B)(c). . . . (5) The circumstances in which demerit points are cancelled are as prescribed. . . .”

Legislative provisions – Photographic Detection and Owner Onus

19. Special provisions are contained in the Act dealing with offences detected by photographic detection devices. It introduces an owner/onus system in such cases, a system that applied to Mr Parsons and Mr Holloway.

20. Section 66 provides:

“66. Offences detected by a photographic detection device

(1) If—

(a) a prescribed offence occurs; and

(b) the offence is detected by a prescribed detection device or by a prescribed process—

the person who at the time of the occurrence of the offence is the owner of the motor vehicle or trailer involved in the offence is guilty of an offence as if that person were the driver of the motor vehicle or trailer at the time of the offence unless the court is satisfied that the motor vehicle or trailer was a stolen motor vehicle or trailer or that the number plates displayed on the motor vehicle or trailer were stolen.

(2) Nothing in sub-section (1) affects the liability of the actual driver, but if—

(a) in the case of a monetary penalty, the full amount of the penalty is paid by the actual driver or owner in relation to the offence (whether under Part 7 or on the order of the Magistrates’ Court) and has not been refunded under section 88(4); and

(b) in the case of a penalty involving the imposition of demerit points, the demerit points are recorded against the actual driver or owner in relation to the offence; and

(c) in the case of a penalty involving both a monetary penalty and the imposition of demerit points—
(i) the full amount of the penalty is paid by the actual driver or owner in relation to the offence (whether under Part 7 or on the order of the Magistrates’ Court) and has not been refunded under section 88(4); and

(ii) the demerit points are recorded against the actual driver or owner in relation to the offence—no further penalty must be imposed on or recovered from the owner or actual driver in relation to the offence.

(2A) . . . (3) Notwithstanding anything in sub-section (1) or (2), an owner of a motor vehicle or trailer is not by virtue of sub-section (1) guilty of an offence if—

(a) before or within 28 days after the service on the owner of

(i) a summons

(ii) . . .

(iii) . . .

in respect of the offence, the owner supplies to an enforcement official in a sworn statement in writing or in a statutory declaration the name and address of the person who was driving the motor vehicle or trailer at the relevant time; or

(b) the owner satisfies an enforcement official by sworn statement in writing or by a statutory declaration that the owner did not know and could not with reasonable diligence have ascertained the name and address of the person who was driving the motor vehicle or trailer at the relevant time.

(3A) A proceeding against the person named in a statement or declaration supplied under sub-section (3)(a) for an offence arising out of the driving of a motor vehicle at the relevant time may be commenced not later than 12 months after the date on which the statement or declaration was supplied. (4) A statement or declaration purporting to be made under sub-section (3)(a), (aab) or (ab) if produced in any proceedings against the person named therein and in respect of the offence concerned is, in the absence of evidence to the contrary, proof that that person was driving the motor vehicle or trailer at all relevant times relating to the offence. . . .”

Legislative Provisions – Internal Review

21. The Act did not itself refer to an internal review process within Vic Roads. There were provisions, however, in the *Road Safety (Drivers) Regulations* 1999 applying at the time which set up such a review process.

“PART 4 REVIEW RIGHTS

401. Corporation to ensure notification of review rights

(1) In this Part, “affected person” means a person referred to in regulation 402(1) or section 26 of the Act.

(2) The Corporation must notify an affected person of his or her right under regulation 402 or section 26 of the Act to apply for review of a decision.

(3) The time period specified in regulation 402(4) is taken not to have commenced until an affected person is notified in accordance with sub-regulation (2).

402. Application for internal review (1) The holder of a driver licence or learner permit or an applicant for a driver licence or learner permit affected by a decision of the Corporation to—

(a) refuse an application for a driver licence or a learner permit or an application for a variation or renewal of a driver licence; or

(b) suspend, cancel or vary in any way a driver licence or learner permit in accordance with section 24—may, within 28 days after the day he or she is notified of the decision, apply to the Corporation for an internal review of that decision. (2) A decision cannot be reviewed by the person who made the decision. (3) After considering an application for review, the Corporation must—

(a) affirm the decision; or

(b) vary the decision; or

(c) revoke the decision.

(4) The Corporation must notify the affected person in writing of its decision under sub-regulation (1) within 28 days after the day on which the request for internal review is received by the Corporation. (5) A decision subject to internal review under this regulation is taken to be affirmed by the Corporation if the Corporation does not give written notice of its decision under sub-regulation (4) to the affected person within 28 days. (6) The making of an application for internal review of a decision does not stay the operation of the decision.

403. Appeal to the Magistrates' Court

(1) An appeal to the Magistrates' Court under section 26 of the Act must be made within 28 days after—
(a) the affected person is notified of the Corporation's decision, if the decision was not reviewed under regulation 402; or

(b) the affected person is notified of the Corporation's decision under regulation 402(3), if the decision was reviewed under regulation 402.

(2) If the Corporation fails to notify the affected person of its decision as required by regulation 402(4), the person may appeal to the Magistrates' Court within 28 days after the end of the period mentioned in that sub-regulation. (3) The Magistrates' Court must cause particulars of an order made on an appeal to be sent immediately to the Corporation. (4) A person who appeals to the Magistrates' Court under section 26 of the Act must—

(a) provide notice in writing of the appeal to the clerk of the Magistrates' Court, requesting the clerk to endorse a copy of the notice with the date on which the appeal is to be heard; and

(b) serve on the Corporation the endorsed copy of the notice, not less than 14 days before the hearing date.

404. Appeals about demerit points

(1) For the purposes of section 26(3) of the Act, notice of appeal is given when notice in writing of the appeal, endorsed by the clerk of the Magistrates' Court in accordance with regulation 403, is served on the Corporation.

(2) Notice in writing of discontinuance of appeal must be—

(a) lodged with the clerk of the Magistrates' Court; and

(b) served on the Corporation—
not less than 4 days before the hearing day

405. Affected person entitled to be given reasons

(1) If an affected person is entitled to apply for review of a decision of the Corporation, the affected person may apply to the Corporation for written reasons for the decision.

(2) The Corporation must, within 14 days of receiving an application under sub-regulation (1), provide to the affected person— (a) the decision of the Corporation and the reasons for that decision; and (b) the name or position of the person who made the decision.

(3) An affected person cannot make an application under this regulation if the Corporation has already provided the person with the details prescribed in sub-regulation (2).”

The construction of section 26(2)(a) of the Act

22. As noted above the questions of law that arise in these proceedings concern the interpretation in particular of paras (a) and (b) of s26(2). A point common to both matters is the interpretation of s26(2)(a).

23. The plaintiff submitted that s26(2)(a) should be read as relating to the factual situation presented to the Corporation at the time it recorded the demerit point or issued the suspension notices and applied the relevant regulations. It argued that that defines the person "against whom the Corporation was required ... to record ... demerit points". Thus, it is argued, that it is not appropriate to go behind the facts then presented to the Corporation and the appeal is limited to clerical errors where, for example, the Corporation has misdescribed the person to receive the demerit points. For Parsons and Holloway, however, it is argued that the provision is concerned with the true identity of the driver and allows an appeal, if Vic Roads decides to suspend the licence, where the appellant was not on the true facts the person against whom the Corporation was required by the Act and Regulations to record "certain demerit points".

24. I can well understand their Worships taking the approach they did to the construction of s26(2)(a), the construction then and now advanced for Mr Parsons and Mr Holloway. At first reading, the section appears to be directed to the realities of the situation. This construction in turn makes much sense in that with the owner/onus provisions and the extensive use of the mail system for delivering notices, there is every chance that some errors will be made and not corrected before the 12 demerit point situation is reached. One might expect the Parliament to seek to introduce a safety net for those who find out for the first time that they have received demerit points when their licences are about to be, or have been, suspended. Driving licences, while a privilege, can be critical to peoples' livelihoods. Suspension of a licence can have catastrophic consequences for licence holders. It would also, in my view, be surprising if an appeal procedure to the Magistrates' Court should have been set up to deal only with clerical errors when those responsible for the drafting of the legislation would have been well aware that the system carried with it the risk of serious injustice where the owner was not in fact the driver who infringed.

25. The plaintiff submitted that to interpret s26(2)(a) to refer, *inter alia*, to the person who was in fact driving, would produce unintended results. Counsel argued that the Demerits Register was intended to be harmonious with and reflect the outcome of the quasi curial and administrative processes introduced by the Act and Regulations to deal with traffic offences.^[4] Counsel submitted that his Worship's interpretation of Regulation 301, quoted above, a regulation the Corporation was obliged to apply, would bring about a conflict between the Demerits Register and the system because his Worship appeared to be of the view that Regulation 301 required Vic Roads to record the demerit points against the actual driver. This meant that Vic Roads, in each case, had to form a view as to who was the driver, a task it was not in fact required to perform under the scheme.

26. Regulation 301 provides:

"301 Demerit points

(1) In this regulation— "appropriate number of demerit points", in relation to a relevant offence, means the number of demerit points specified, in relation to that offence, in column 3 of Table 301; "relevant offence" means an offence described in column 1 of Table 301 or an offence against the law of another jurisdiction which corresponds to such an offence.

(2) A summary of an offence in column 1 of Table 301 is not to be taken to affect the nature or elements of the offence to which the summary refers or the operation of these Regulations.

(3) The Corporation must record against a driver the appropriate number of demerit points if the driver—

- (a) is convicted, or found guilty, of a relevant offence; or
- (b) pays the penalty specified in an infringement notice issued to the driver in respect of a relevant offence; or
- (c) is convicted within the meaning of section 89(4) or 89A(2) of the Act with respect to a relevant offence;
- (d) is a person against whom an enforcement order has been made and not revoked under Schedule 7 to the *Magistrates' Court Act* 1989 with respect to a relevant offence; or

(4) . . . (5) . . . (6) The Corporation must record demerit points in the Demerits Register in respect of the day on which the offence was committed."

I note that no time is specified for recording demerit points. Counsel for the plaintiff submitted that the statutory scheme breaks the process up into two distinct parts.^[5] At the first stage, infringement notices are sent out and compliance officers process responses to those notices including the receipt of information about the identity of the actual driver. The scheme envisages that they will then pass the information on to Vic Roads to be recorded in the Demerits Register. It is put that the Vic Road function is a purely administrative one and not an investigative one. It is further argued that the scheme, therefore, did not envisage Vic Roads engaging in any investigative processes and the question for the Magistrates' Court was whether Vic Roads was required to do more (s 26(2)(a) and (5)).

27. I do not interpret their Worships' remarks (particularly in the Parsons case) as imposing an initial burden on Vic Roads to investigate the identity of the actual driver prior to the suspension stage. Their Worships' interpretation does not add to Vic Roads obligations – it would initially simply act on the evidence placed before it which it would assume to be correct. As I see it, in the Parsons case, his Worship referred to Regulation 301 to emphasise his view that the ultimate objective of the Act and Regulations is to have demerit points recorded against the actual driver.

28. Counsel for the plaintiff developed the argument further that, in Parsons' case, his Worship's interpretation of s26(2)(a) was inconsistent with the statutory scheme. Counsel relied upon the purposes and objects stated in the Act and Regulations. Counsel relied upon the provisions of the *Interpretation of Legislation Act* 1985 s35. The purposes are described in s1 of the Act in the following terms:

“(1) The purposes of this Act are—

(a) to provide for safe, efficient and equitable road use; and

(b) to improve and simplify procedures for the registration of motor vehicles and the licensing of drivers; . . .”

Counsel submitted that the infringement notice system established by the Act gave effect to a choice by Parliament, namely a compromise between accuracy and efficiency in identifying and penalising traffic offenders. Counsel submitted that to interpret s26(2)(a) in the manner contended for would tamper with the method chosen by Parliament to achieve its policy goals. He described those goals as the enhancement of road safety and the reduction of pressure and strains on the law enforcement bodies and the courts. Counsel submitted that it was part of the traffic infringement notice system that offences would be attributed to persons through the Demerits Register other than the actual driver and that was part of the legislative compromise. In addition, counsel submitted that the photographic detection device system through s66 provided that the owner of a motor vehicle involved in an offence detected by photographic detection devices would be guilty of an offence as if that person were the driver. That person will be guilty of the offences unless the steps are taken referred to in s66(3). The Act then sets out a statutory procedure to be followed if the owner wishes to alter that situation. Counsel submitted that s66(1) effectively collapsed the distinction between deemed drivers and actual drivers subject only to the provisions in ss66(3)^[6] and 28(6)^[7] of the Act which allowed a limited form of correction.

29. The foregoing propositions of the plaintiff, if accepted, do not carry with them the consequence that an appeal procedure made available in different circumstances, namely, where a licence has been suspended, should not enable the correction of an allocation of demerit points to the wrong person. Efficiency is very important. So too are just outcomes. Parliament has expressed an intention to create safety nets to deal with cases of injustice that may flow from the features designed to give efficiency. One of those safety nets is provided by s26(2)(a) of the Act. The question to be decided is the scope of that safety net. It is capable of being interpreted, as their Worships did to allow an inquiry as to who was in fact the driver and in the narrower way put forward by the plaintiff. In making a choice, the workability of the interpretations is an important consideration.^[8]

30. As to that consideration, counsel for the plaintiff submitted that the Magistrates' interpretation would be unworkable. Counsel submitted that the power conferred by s25 to maintain the Demerits Register was essentially administrative in nature and concerned the keeping of an accurate register on which was recorded information supplied to Vic Roads by the relevant officers and other authorities. Counsel submitted that it could not have been contemplated that

that task would encompass an inquiry into the identity of drivers apprehended, for example, by photographic detection.

31. The interpretation adopted by their Worships, and advanced for the defendants, does not require such an extreme position to be taken. It is not put, as I understand the argument, that in every instance Vic Roads must satisfy itself as to the identity of the driver apprehended, for example, by photographic detection. The essential administrative task will be to receive information from the relevant authorities and record it in the Demerits Register. In a number of cases, owners receiving the infringement notices will file the necessary information with the authorities as to who was the actual driver with the result that the correct information will be supplied by the relevant authorities to Vic Roads for entry in the Demerits Register. There will, however, be some cases where the information received by the Corporation is incorrect in the sense that the name given of the person driving was the name of the owner and not that of the driver. In those limited circumstances the Corporation should be well able to handle the inquiry. This in fact would appear to be the expectation embodied in the internal review process. I refer in particular to Regulation 401 which clearly intends that the internal review process set up under the Regulations should be available to persons with rights of appeal under s26 of the Act and anyone whose licence is suspended.

32. Counsel for the plaintiff also submitted that the construction adopted by their Worships envisaged that there would be cases where Vic Roads, in its internal review process, would go behind court orders which had resulted in the particular person appealing receiving demerit points.^[9] As to the Magistrates' Court, the construction adopted could theoretically require it to re-hear the relevant aspects of a previous court case. The typical case where the issue will arise, however, is the photo detection case.

33. The argument advanced for the plaintiff in relation to Magistrates' Court appeals assumes a much wider operation for s26(2)(a) than in fact exists. Section 26(2)(a) appeals are confined to the issue of whether the person appealing was the driver in circumstances where there has been a suspension of the licence as a result of the accumulation of demerit points. If the issue of who was the driver had been earlier resolved by a court after a full hearing against the appellant, and that decision had not been appealed, it would be expected that the Magistrate would not entertain the appeal because it would be an abuse of process.^[10] The issue could arise where a Court has recorded convictions incorrectly against a person in that person's absence, resulting in demerit points, and that person is appealing against the suspension of his or her driver's licence by Vic Roads. In that situation I have no difficulty with the suggestion that Parliament, intending to provide a means of addressing injustices flowing from the efficiencies of the system, would contemplate a limited appeal.

34. In the present case, the relevant question is whether an appeal could be brought to a Magistrates' Court under s26(1)(c) to investigate the issue of the actual identity of the driver on one or more of the occasions on which demerit points were incurred. In my view such an appeal can be brought. This accords with the natural and ordinary meaning of the provision. Further, the plaintiff's argument requires that Parliament would not have intended to provide a remedy to a person who did not know anything about the receipted demerit points which had been wrongly attributed to that person but finds that his or her licence has been suspended. Parliament has provided two grounds only upon which such a person could go before the Magistrates' Court. They are two very narrow grounds. One is whether that person was the driver and the other is whether there has been a miscalculation at any stage.

35. Finally, it was put in the Parsons' case that there was nothing in the legislation that enables Vic Roads or the Magistrates' Court, to do what the Magistrate did in Parsons' case – namely, direct that the demerit points should be allocated to the person who was actually the driver, Ms Renowden. Thus demerit points removed could not be allocated to the actual driver.

36. If Vic Roads has no power to allocate the demerit points to the correct person as a result of an internal review that consequence will apply in all cases including those cases where the plaintiff concedes some scope for the review process – the clerical error cases. Thus on the plaintiff's own interpretation, it is part of the legislative scheme that such demerit points will not be re-allocated. But, I have come to the conclusion that the Act and Regulations do permit re-allocation of the demerit points in certain circumstances.

37. Regulation 301 does not impose any time limits. If a driver has paid the penalty and the demerit points have not been allocated to that driver, the obligation on the Corporation to do so exists and must be discharged. If such facts emerge in the course of an internal review, the Corporation, absent any other provisions, would be obliged to discharge its obligation by recording the demerit points against the person who, on the evidence before it, at the time was such driver. But it seems to me that s66(2)(c) of the Act prevents that occurring in the case of offences detected by a photographic device. For example, in the present case involving Ms Renowden, the fine having been paid by her, no further penalty (monetary or demerit points) can be imposed on the actual driver. Thus to that extent, the challenge to the decision is made out. Parliament presumably considered that the no further penalty provision was a reasonable price to pay for an owner/onus system.

38. The legislation and regulations are extremely complex and difficult to understand and apply. The odd anomaly is to be expected. It is difficult to discern and articulate all the underlying purposes and objectives of the legislation. I venture to suggest, however, that the demerit system was intended to discourage drivers from breaching the law but was also intended to punish and remove from the roads those who by their conduct have incurred 12 demerit points in the prescribed period. It is also reasonably clear that various devices have been employed to achieve the efficiencies required because of the sheer volume of potential infringements and court business such as the photographic detection system and the PERIN system. But efficiency is a means to an end, not an end in itself and those efficient systems will on occasions result in injustices. The suspension of licences, in particular, can be a very serious matter for the individuals concerned. Ultimately, however, it is against the actual driver of the vehicle committing the offences under the Act that it is intended to operate. It seems to me, therefore, to serve the legislation to adopt the interpretation applied by their Worships. Further, it is important for compliance that there be community acceptance and confidence in the systems. For that to exist it is important that there be mechanisms for dealing with unjust results. Thus, in my view, it will strengthen the system and so serve its purposes to construe s26(2)(a) in the way adopted by their Worships.

Holloway's case

39. In the Holloway matter, the learned Magistrate found that Mr Holloway was not the driver on one of the occasions giving rise to demerit points. He then did not proceed expressly to decide the appeal on that ground, but to decide the appeal on the ground that there had been a "miscalculation". I accept that the normal meaning of the term "miscalculation" is to "calculate wrongly", or "wrong or faulty calculation".^[1] In those circumstances, it seems to me that his Worship did not interpret the term "miscalculation" correctly in s26(2)(b). On the other hand, the decision was, in my view, correct because of the construction he had placed on s26(2)(a), a construction which entitled Holloway to succeed on his appeal under s26 of the Act.

Conclusion

40. For the foregoing reasons, the plaintiff has failed to demonstrate any error in the construction of s 26 of the Act by the Magistrates' Court in determining the Parsons matter save for the ruling that the points be allocated to Ms Renowden. I will invite submissions from counsel as to the appropriate orders to be made. In relation to the Holloway matter, an error of law has been demonstrated but as a matter of discretion, the orders sought should not be made. It is a case of a correct decision having been reached partially for the wrong legal reason and partially on the correct legal reason, the latter independently providing a proper basis for the decision and requiring the same result.

[1] It should be noted that this is not an issue requiring resolution in these proceedings.

[2] These Regulations provide for internal review.

[3] The underlining is that of his Worship.

[4] See also Schedule 7 *Magistrates' Court Act 1989* (the "PERIN Provision").

[5] There is a third stage – the suspension stage.

[6] Correction through the informant.

[7] Prevents suspension by a Court dealing with a s66 offence unless the defendant was the driver.

[8] Counsel for the plaintiff also submitted that the plaintiff's interpretation of s 26(2)(a) was supported by s 6(5)(b) which has the effect that the Court must confirm the decision of Vic Roads if it is satisfied that the suspension "was required by the Regulations or s25". In my view the two provisions must be given similar constructions but they do not aid the construction of each other. The question to be resolved remains.

[9] The issue in these proceedings concerns the Magistrates' Court appeal, not the internal review by the

Corporation. As to the latter it can proceed on the basis that any previous court order is *prima facie* correct. Spenser-Bower, Turner & Handley, *Res Judicata*, 270; *General Medical Council v Spackman* [1943] AC 627; [1943] 2 All ER 337; *Ong Bak Hin v GMC* [1956] 1 WLR 515.

[10] *Rogers v R* 1994] HCA 42; (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 46; *Hunter v Chief Constable of the West Midlands Police* [1981] UKHL 13; [1982] AC 529; [1981] 3 All ER 727; [1981] 3 WLR 906; Spenser Bower, Turner and Handley, above, 447-451.

[11] *Macquarie Dictionary* 3rd Ed and the *Oxford English Dictionary* 2nd Ed respectively.

APPEARANCES: For the plaintiff Roads Corporation: Mr AL Cavanough QC and Ms C Hubble, counsel. Phillips Fox, solicitors. For the defendant Holloway: Mr J Marquis, counsel. Harwood Andrews Lawyers. For the defendant Parsons: Mr R Cook, counsel. Poulton Elliott & Grey, solicitors.
