27/71

SUPREME COURT OF VICTORIA

STONEHAM v WALLACE

Smith J

9 December 1971

MOTOR TRAFFIC – DEFENDANT CHARGED WITH NOT HAVING A LOG BOOK DULY COMPLETED IN HIS POSSESSION – CHARGE PROVED – DEFENDANT HAD A PRIOR CONVICTION – CERTIFICATE FROM THE MOTOR REGISTRATION BRANCH PRODUCED TO THE MAGISTRATE – MAGISTRATE REFUSED TO ACCEPT EVIDENCE OF THE PRIOR CONVICTION – PENALTY LESS THAN THE MINIMUM IMPOSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S37H(1), 92(1)(a).

HELD: Order nisi absolute.
1. Notwithstanding the fact that it would seem that the defendant was not licensed under the Victorian *Motor Car Act* particulars of his prior convictions in Victoria would have been sent to the Chief Commissioner; and having regard to the form of the motor car legislation in this State the Motor Registration Branch would appear to have been the most likely repository for documents forwarding such information and for records of such information.

2. In addition there was the consideration that *Barnfield v Calandro* [1964] VicRp 98; [1964] VR 762 supported the view that the production of this certificate, which purported to be signed as required by s92(1)(a) and was in the prescribed form, was evidence not only of the facts certified but also that the matters so certified appeared in the records kept in the Motor Registration Branch.

3. For those reasons it appeared that there was here a case made out that the requirement in s92(1)(a) that the matter must appear in records kept in the Motor Registration Branch was satisfied; and it followed that the Magistrate here had tendered to him evidence of a prior conviction which was admissible to establish the fact that his conviction of the defendant was a second conviction. That was so notwithstanding the fact that the defendant was not shown to have been a Victorian licensed driver.

4. Accordingly the Magistrate should have admitted the certificate in evidence and treated it as providing evidence of the existence of a prior conviction.

SMITH J: This is an order nisi to review a decision of the Magistrates' Court at Coburg on the hearing of an information for an offence under the *Motor Car Act* 1958. The information charged that the defendant did, contrary to s37H(1) of the *Motor Car Act* 1958 drive a motor car registered number NSW ITN-678 without having in the motor car in his possession an authorised log book issued to him and duly completed in accordance with the requirements of s37C of the Act.

The Magistrate held the offence to have been proved and asked whether anything was known. The Prosecutor replied, "Yes sir, relying on s92 of the *Motor Car Act* I produce a certificate signed by Deputy Officer in charge of the Motor Registration Branch relating to prior convictions." The purpose of the production of that certificate was to bring the case within the provisions of the Act which prescribe a minimum penalty for a second offence against the Division of the Act which had been contravened in this case. The minimum penalty fixed by the Act is a $40 fine.

Having produced the certificate the Prosecutor went into the witness box and gave evidence that at the time of interception the defendant had produced for inspection a New South Wales driver's licence No. 7602HU. The Magistrate asked, "Did you say a New South Wales licence?" That point was confirmed and the Magistrate then asked, "How do you properly produce an extract with a New South Wales licence production?" The Prosecutor replied, "This is a matter which appears in and can be calculated from the records kept at the Motor Registration Branch." The Magistrate then said, "I don't propose to hear any more at this time. The defendant is fined $30 with $2 costs." The Prosecutor then invited the Magistrate to hear a further submission and mentioned the reported decision of *Barnfield v Calandro* [1964] VicRp 98; [1964] VR 762. The

Magistrate said, "Does this refer to the production of interstate drivers' licences?" The Prosecutor said, "No sir, but that case held that prior convections are matters which appear and can be calculated from the records at the Motor Registration Branch." The Magistrate said, "I don't agree for the reason that those records are records kept not rightly by the Motor Registration Branch. I have canvassed my views widely to other members of the Transport Regulation Board and I do not propose to hear any more."

The order nisi contains three grounds, but it is sufficient for present purposes to refer to ground 2 which, as amended, reads;

> "That the Magistrate was wrong in law in that he refused to admit in evidence or to act upon the certificate produced to him which is Exhibit "B" to the affidavit herein of Laurence Phillip Chappell sworn 17 June 1971."

The tender of the certificate was based on the provisions of s92(1)(a) of the *Motor Car Act* 1958 which, omitting words not immediately relevant is in these terms:—

> "In any proceedings for offences against this Act ... (a) where it is necessary to prove that any motor car ... was or was not registered ... or any other matter which appears in or can be calculated from the records kept in the Motor Registration Branch, a certificate purporting to be signed by the officer in charge of the Motor Registration Branch or his deputy setting out that such motor car ... was or was not registered ... or such other matter, shall be *prima facie* evidence of the facts stated therein."

The decision in *Barnfield's case* is authority for the view that in circumstances such as the present it is "necessary" within the meaning of s92(1)(a) to prove the prior conviction. As to whether the prior conviction is something which "appears in the records kept in the Motor Registration Branch" within the meaning of s92(1)(a) the provisions of s26 are relevant. That section in its present form provides, *inter alia*, that

> "Any Magistrates' Court before which a person is convicted of an offence under this Act or of any offence in connection with the driving of a motor car,... (c) shall cause particulars of the conviction and of any order of the court made under this section to be sent forthwith to the Chief Commissioner."

At the time when the *Barnfield's case* was decided the corresponding obligation under the Act as it then stood to send particulars of convictions to the Chief Commissioner operated only in the case of the convictions of persons licensed under this legislation. That limitation, however, has now been removed from the legislation by amendment.

Accordingly, notwithstanding the fact that here it would seem that the defendant was not licensed under the Victorian *Motor Car Act* particulars of his prior convictions in Victoria would have been sent to the Chief Commissioner; and having regard to the form of the motor car legislation in this State the Motor Registration Branch would appear to be the most likely repository for documents forwarding such information and for records of such information. In addition there is the consideration that the *Barnfield case* supports the view that the production of this certificate, which purported to be signed as required by s92(1)(a) and was in the prescribed form, was evidence not only of the facts certified but also that the matters so certified appeared in the records kept in the Motor Registration Branch.

For those reasons it appears to me that there was here a case made out that the requirement in s92(1)(a) that the matter must appear in records kept in the Motor Registration Branch was satisfied; and it follows, in my view, that the Magistrate here had tendered to him evidence of a prior conviction which was admissible to establish the fact that his conviction of the defendant was a second conviction. In my view that was so notwithstanding the fact that the defendant was not shown to have been a Victorian licensed driver. Accordingly the Magistrate should have admitted the certificate in evidence and treated it as providing evidence of the point, existence of a prior conviction.

He has imposed a fine which is less than the minimum fine which the law required him to impose if he were satisfied that the conviction was a second conviction, and the matter will therefore have to go back to the Magistrate for reconsideration of the penalty.

The order made is that the order nisi be made absolute: that so much of the order below as fixed the penalty as a fine of $30 be set aside; that the case be remitted to the Magistrates' Court for reconsideration of the question of penalty and for the imposition of a penalty consistently with the views of the law that have been stated.

APPEARANCES: For the applicant Stoneham: Mr D Wraith, counsel. John Downey, State Crown Solicitor. No appearance of or by the defendant Wallace.
