

42A/76

## SUPREME COURT OF VICTORIA

**VELDMAN v WEINROWSKI; SEWELL v WEINROWSKI**

Gillard J

16, 18 March 1976 — [1976] VicRp 44; [1976] VR 448

**MOTOR TRAFFIC – DRIVING WHILST DISQUALIFIED – PERSON AGED 17 YEARS – SUBMISSION THAT HE WAS INELIGIBLE TO OBTAIN A DRIVER LICENCE – ORDER OF DISQUALIFICATION WOULD BE OF NO EFFECT – FINDING BY MAGISTRATE THAT DISQUALIFICATION ORDER HAD NO EFFECT – THAT ACT ONLY APPLIES TO A PERSON WHO IS ELIGIBLE TO OBTAIN A LICENCE – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S26(1).**

Defendant was convicted on 26 June 1975 of unlicensed driving and disqualified from obtaining a licence for 3 months. At the time he was 17 years of age. He was subsequently convicted of driving whilst disqualified. Argued that, as he was ineligible to obtain a licence at that age, this non-existent right could not be cancelled – hence any order of disqualification would be of no effect as s26(1)(b) could only apply to a person eligible to obtain a licence. Upon Order nisi to Review—

**HELD:** Order absolute. Orders of dismissal set aside. Remitted to the Magistrates' Court to be dealt with in accordance with the law.

1. When the defendant appeared at the Court on 26 June it was proved that in fact he did not hold a licence. The Court being satisfied that the offence was committed under the *Motor Car Act* accordingly was quite entitled to make an order for disqualification as it did. The nature of the disqualification was a disqualification from obtaining a licence, irrespective of any other fact. If the defendant was then in fact under age to obtain a licence, there was imposed upon him a further prohibition which prevented his obtaining a licence, assuming that he reached an age that he could obtain a licence. The Court was not bound to enquire as to his age. The Court was quite entitled to exercise its power once it found that the conditions for the exercise of the power existed. For the period of three months thereafter, irrespective of age, the defendant was disqualified by a court order from obtaining a licence and from obtaining a licence. It was quite immaterial whether for some other cause he could not obtain a licence. He was now under a curial prohibition for a period of three months from obtaining a licence.

2. The period of disqualification was specified, the fact of a declaration of disqualification was clearly made out, and, accordingly, the defendant should have observed the provisions of the *Motor Car Act* and he should not have driven a motor car during that period.

**GILLARD J:** This is the return of orders nisi to review two decisions of the Magistrates' Court at Ringwood given on 14 July 1975, when the Court dismissed two informations laid against Michael Karl Heinz Weinrowski, who for convenience will be referred to as "the defendant".

The defendant was charged first with that on 9 July 1975, he did drive a motor cycle on a highway during a period of disqualification from obtaining licence to drive a motor cycle by a Magistrates' Court, and secondly, with a similar offence allegedly committed on 10 July 1975.

It appeared from the evidence that at the time of the alleged offences on 9 and 10 July 1975, the defendant was riding a motor cycle on a highway without a licence or permit. It further appeared from the evidence that on 26 June 1975, he had at the Ringwood Magistrates' Court been charged with, convicted of and fined \$100 for the offence of driving a motor cycle without holding a permit or licence to drive a motor cycle. Pursuant to s26(1) *Motor Car Act* 1958, besides being punished by a fine of \$100, the defendant was declared by the Court to be disqualified from obtaining a licence for a period of three months. Notice of that disqualification was found in the possession of the defendant when he was apprehended by the police on 10 July 1975. *Prima facie*, therefore, it would appear that the charges had been clearly proved.

But the point was taken that when the defendant was interviewed by the police at the time of the two alleged offences in July he stated to the police that he was seventeen years of age. Without

any further proof of age, Mr McIvor, who appeared for him, submitted to the Court that the two charges should be dismissed on the ground that the defendant was aged seventeen and that he could not obtain a licence until he was eighteen years of age, and the order of the Magistrates' Court at Ringwood on 26 June 1975, disqualifying the defendant from obtaining a licence for three months could not apply in the circumstances.

The magistrate in substance upheld this submission, and according to the affidavit filed on behalf of the informant, it was stated: -

"In coming to the above conclusion the said magistrate stated 'a right that does not exist cannot be cancelled; defence submission upheld, my view is that the Order disqualifying the defendant from obtaining any licence for a period of three months has no effect because the period fixed on 26 June 1975 covers a period when the defendant was still not eligible to obtain a licence, my view is that s28 of the *Motor Car Act* 1958 applies to a person who is eligible to obtain a licence."

An order nisi was obtained to review that finding and the dismissal of the two informations on four grounds:

"1. The learned stipendiary magistrate was wrong in holding that the Order of the Magistrates' Court at Ringwood made on 26 June 1975 disqualifying the respondent from obtaining a licence to drive under the *Motor Car Act* 1958 was of no effect, because the respondent was on that date not eligible to obtain such a licence.

"2. The learned stipendiary magistrate was wrong in holding that the powers given by s26(1)(b) of the *Motor Car Act* 1958 to disqualify a person from obtaining a licence to drive a motor car under the said Act were able to be used only when such person was then eligible to obtain such a licence.

"3. The learned stipendiary magistrate was wrong in holding that the respondent's driving had not occurred during a period of disqualification from obtaining a licence to drive a motor car under the *Motor Car Act*, within the meaning of the provisions of s28(1) of the said Act.

"4. The learned stipendiary magistrate was wrong in holding that the respondent was ineligible to obtain a licence to drive a motor car under the *Motor Car Act* 1958 on 26 June 1975."

S26(1) of the *Motor Car Act* 1958 confers on a Magistrates' Court the following powers:

"Any magistrates' court before which a person is convicted of an offence under this Act or of any offence in connexion with the driving of a motor car—

(a) may if the person convicted holds any licence to drive a motor car under this Act suspend that licence for such time as the court thinks fit, or may cancel the licence and if the court thinks fit also declare the person convicted disqualified from obtaining a licence for such time as the court thinks fit; and

(b) may if the person convicted does not hold any licence to drive a motor car under this Act declare him disqualified from obtaining a licence for such time as the court thinks fit; and ..."

It is to be noted that the statutory provisions dealt with two different situations. First, where a person holds a licence, the Court in such a circumstance might bring that licence to an end by cancellation, and as an additional punishment may declare that the person convicted shall be disqualified from obtaining a licence for a specified period. On the other hand, if the person convicted does not have a licence, then the Court may declare him disqualified from obtaining a licence for such time as the Court thinks appropriate.

In this case, when the defendant appeared at the Court on 26 June it was proved that in fact he did not hold a licence. The Court being satisfied that the offence was committed under the *Motor Car Act* accordingly was quite entitled to make an order for disqualification as it did. The nature of the disqualification was of some importance. It was a disqualification from obtaining a licence, irrespective of any other fact. If the defendant was then in fact under age to obtain a licence, there was imposed upon him a further prohibition which prevented his obtaining a licence, assuming that he reached an age that he could obtain a licence. The Court was not bound to enquire as to his age. The Court was quite entitled to exercise its power once it found that the conditions for the exercise of the power existed. For the period of three months thereafter, irrespective of age, the defendant was disqualified by a court order from obtaining a licence, and I repeat, from obtaining a licence. It is quite immaterial whether for some other cause he could not obtain a licence. He was now under a curial prohibition for a period of three months from obtaining a licence.

By the provisions of the *Motor Car Act* 1958, a licence is granted to a person on his application to the Commissioner of Police. The applicant should be a person of prescribed age set out in s22 of the Act, but it is conceivable that an applicant may be in mistake as to his age, or even misrepresent it, and apply for a licence. Under the provisions of s22(4) the Chief Commissioner must deal with the application and if he is satisfied that the applicant for a licence is qualified to hold that licence, then he shall issue a licence.

From other provisions of the Act it is clear that the qualification might depend on various factors besides the age of the applicant. A test might be required. Furthermore, the applicant might be disqualified because of some order of the Court from obtaining a licence. Patently, the Commissioner is required to act upon the evidence before him. If on the evidence before him he is satisfied as to the applicant's qualification, then he should issue a licence. Of course, he can be misled and provision is made for this in one respect in s26(7), which reads:

"Every person who under the provisions of this Act is disqualified from obtaining a licence and who applies for or obtains a licence while he is so disqualified shall be guilty of an offence against this Act and any licence so obtained shall be of no effect."

It can be seen that the licence is a privilege granted only after the Chief Commissioner on the evidence before him is satisfied as to the qualification of an applicant. If a person is disqualified by a court from obtaining a licence that order in itself does not prevent his applying for a licence, for the prohibition is against his obtaining a licence. It may be that by the evidence he puts forward the Chief Commissioner is misled and in virtue of the statutory provisions it would appear that a licence document obtained on such false evidence would be of little or no value, and particularly so if the applicant were declared to be a person disqualified from obtaining a licence. He immediately becomes liable for punishment for an offence against the Act.

It seems to me, therefore, that since licences are granted on the basis of such facts as are presented to the Chief Commissioner, age is but one factor. The information provided to him might not necessarily be accurate. It is trite law that a change of name is always permissible. The record of an applicant, therefore, might not be traced by reason of a legal change of name.

It is therefore of prime importance in the administration of the grant of licences that declarations of the character made in cases as here are valid and effective, so as to operate on the possible grant of a licence, if otherwise wrongly obtained. If such a declaration from obtaining a licence is made, then the person is under a disqualification from obtaining a licence for the period fixed by the Magistrates' Court. If, therefore, he foolishly drives a motor car during that period, clearly he is driving it during a period of disqualification.

Accordingly, in my view, despite what the learned magistrate said, I believe the defendant falls fairly within the description of the provisions of s28(1) namely:

"Any person who drives a motor car during the period of any suspension of his licence to drive a motor car or after his licence has been cancelled or during any period of disqualification from obtaining a licence shall be guilty of an offence..."

In my view, the period was specified, the fact of a declaration of disqualification was clearly made out, and, accordingly, the defendant here should have observed the provisions of the *Motor Car Act* and he should not have driven a motor car during that period.

Accordingly, in my view, the orders of dismissal made by the magistrate must be set aside. The orders nisi will be made absolute with costs, and the orders of dismissal set aside and the informations returned to the Magistrates' Court at Ringwood to be dealt with in accordance with the reasons given by me.

The defendant is not in Court. He did not appear. But I think in justice I should in his favour declare that he is entitled to a certificate under the *Appeal Costs Fund Act*. Orders absolute.

Solicitor for the informants: John Downey, Crown Solicitor.