

08/70

SUPREME COURT OF VICTORIA

MOYLE v ROBINSON

Gillard J

14 April 1970

MOTOR TRAFFIC – DRINK/DRIVING – CHARGE FOUND PROVED – COURT REQUIRED TO CANCEL DEFENDANT'S DRIVER LICENCE – MAGISTRATE DECIDED TO ORDER THAT THE DEFENDANT'S DRIVER LICENCE BE DEFERRED FOR THREE MONTHS – WHETHER MAGISTRATE REQUIRED TO CANCEL THE DRIVER LICENCE FORTHWITH – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S81A(3).

HELD: Magistrate's order in error. Cancellation order to take effect.

1. The point raised by the Order Nisi turned upon the proper interpretation of s81A(3). That provision with respect to cancellation contained in the subsection was clearly mandatory, and it meant what it said, that the licence was to be cancelled from the time that the order was made. There was no power to say that despite a person's conviction he was entitled to continue driving till some period in the future. On the contrary, the statutory policy appeared to be clear that the licence should have been cancelled forthwith.

2. This interpretation of the section was a matter of first impression and there was no agreement with the magistrate that there was nothing to prevent his cancelling the licence from a future date. On the contrary, as a matter of first impression, that at the time of imposing the fine or other punishment, in addition to such punishment the Court was required to cancel the licence.

GILLARD J: This is the return of an Order Nisi to review an order of the Court of Petty Sessions at Ferntree Gully made on 8 December 1969. The defendant in those proceedings, Alan Edward Robinson, had been charged with several offences under the *Motor Car Act*, and in particular was charged with an offence that he drove a motor car whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was more than .05 per cent. He was found guilty of this offence and the magistrate proceeded to impose the punishment set out in s81(A) *Motor Car Act* 1958. By sub-section 3 of that sections it is provided:

"In addition to imposing a fine or term of imprisonment a Court convicting a person for an offence against subsection 1 shall notwithstanding the provisions of subsection 4 of s26 cancel the licence of such person to drive a motor car and in the case of a first offence disqualify him from obtaining a licence for not less than three months and in the case of a second or subsequent offence disqualify him from obtaining a licence for not less than twelve months".

The magistrate faced with an application for an adjournment of the informations without conviction refused such application on behalf of the defendant, but obviously came to the conclusion that certain hardship would be imposed on the defendant if the cancellation of his licence operated forthwith. Faced with this problem, the magistrate announced that the defendant was fined \$20 on the information and that his licence was cancelled as from 31 March 1970 and was disqualified from obtaining a licence for a period of three months from that date. The stipendiary magistrate in making this order commented that he did not know whether he could order a cancellation to take effect from some future date, but he could not see anything in the Act to prevent him from so doing. He further commented that it would take a Supreme Court judge to say he was wrong in so doing. In consequence of his comments, undoubtedly the informant was provoked into taking out an Order Nisi to review the magistrate's decision, and on 24 February 1970 Master Bergere granted an Order Nisi to review the magistrate's decision upon the following grounds:

- That upon convicting the defendant of an offence pursuant to s81(A) of the *Motor Car Act* the magistrate ought to have cancelled his licence to drive a motor car forthwith, and

- That the magistrate was wrong in law in directing the cancellation of the defendant's licence to drive a motor car be postponed to the 31 March 1970.

The point raised by the Order Nisi is a very narrow one, and it turns upon the proper interpretation of s81A(3). In my view, that provision with respect to cancellation contained in the subsection is clearly mandatory, and it means what it says, that the licence shall be cancelled from the time that the order is made. There is no power to say that despite a person's conviction he is entitled to continue driving till some period in the future. On the contrary, the statutory policy appears clear to be that the licence should be cancelled forthwith. The interpretation of the section is a matter of first impression. I do not agree with the magistrate that there is nothing to prevent his cancelling the licence from a future date. On the contrary, as a matter of first impression, it seems to me that at the time of imposing the fine or other punishment, in addition to such punishment the Court shall cancel the licence.

Having regard to the interpretation I put upon the section, the magistrate's decision was in error in law. What should now be done?

It appears that under the terms of the magistrate's order the defendant's driving licence would have been cancelled as from 31 March this year. I am therefore faced with what power I should exercise under s160 *Justices Act 1958* to correct the magistrate's decision. If I quash his order and remit it to him, it means that the defendant's licence to drive has already been cancelled for some fourteen days and that having regard to the minimum fixed under the provisions of the *Motor Car Act*, he would when a proper order was made, have his licence cancelled for a period of three months and fourteen days. This to me is an unjust result. Furthermore, I have been invited to make an order cancelling the licence from this date. The same result would flow.

It seems to me, therefore, that I should look to my powers under s160 and I see that amongst many powers given to the Court on review, there is a specific power that the Court may make "any other order as to such Court or judge seems just."

Having regard to the fact that the period of cancellation has already commenced, the just result would be to allow the magistrate's order to continue in force, and accordingly to allow that to be done, I must discharge the Order Nisi. This, of course, would be an acceptance that I regard the magistrate's decision as right. As I have already held, in my view he was in error in the way he interpreted the section and made an erroneous order. However, I think justice can be done if I discharge the Order Nisi and direct that the informant forward to the magistrate as copy of my reasons setting out that I specifically hold he was in error, but having regard to the peculiar fact that the period has already commenced to run, I am exercising the powers conferred upon me by s160.

Accordingly, the formal order of the Court is that the Order Nisi is discharged and I direct that copies of my reasons be forwarded to the magistrate and to the defendant at his last known address. There will be no order as to costs.

APPEARANCES: For the informant Moyle: Mr MJ Dowling, counsel. State Crown Solicitor. No appearance of or for the defendant Robinson.
