30/75

SUPREME COURT OF VICTORIA

FRANCIS v CARMICHAEL

Dunn J

17, 18, 21 April 1975 — [1976] VicRp 20; [1976] VR 259

MOTOR TRAFFIC – NOTICE OF SUSPENSION GIVEN TO HOLDER OF DRIVER LICENCE – APPEAL BY DRIVER AGAINST SUSPENSION – NOTICE OF APPEAL TO BE GIVEN WITHIN 14 DAYS OF NOTICE OF SUSPENSION – NOTICE NOT GIVEN WITHIN TIME – EFFECT – MAGISTRATE NOT INFORMED THAT DRIVER LICENCE CANCELLED INTERSTATE AT THE TIME OF THE APPEAL – APPEAL GRANTED BY MAGISTRATE – WHETHER APPEAL SHOULD BE ALLOWED: *MOTOR CAR ACT* 1958, S25(2).

HELD: Order absolute. Order made set aside and appeal dismissed.
1. The exercise of the power to admit additional evidence has, by judicial decision, been kept within narrow limits. Without purporting to give a reference to all the relevant authorities, the court will admit additional evidence to cure a mere slip, to cure the effect of surprise, and where the additional evidence would be fatal to the order made.

2. The additional evidence was admitted on the grounds of curing the effects of surprise and of providing evidence fatal to the order made. It was proper to admit this evidence on the ground that it was all within the knowledge of the appellant and went directly to the jurisdiction of the court to deal with or to allow the appeal and on the view of the material submitted in the appellant's affidavit it was withheld from the court.

3. According to the appellant's affidavit he neither disclosed the grounds of the Deputy Commissioner's suspension of his licence nor the fact of an alleged conviction. If this were a case of mistaken identity it was inconceivable that the appeal would not have been conducted on that basis.

4. Accordingly, the appellant fell within the proviso and the court had no jurisdiction to quash the suspension. When the case fell within the proviso, jurisdiction of the Magistrates' Court was removed and removed completely so that the court could not vary or interfere with the suspension. If the facts were disclosed as deposed to by the Police Prosecutor then clearly the Magistrate overlooked the proviso and the order he made was wrong.

5. In relation to the question of service of the Notice of appeal, it was clear from authorities that the expression, "at least fourteen days' notice" in s25(2) of the *Motor Car Act* 1958 means fourteen clear days. On such material before the Magistrate the notice had not been given at least fourteen clear days before the hearing. The giving of the notice at least fourteen days before the hearing was a necessary prerequisite of appeal. It was a notice that had to be given not only to the Chief Commissioner but also to the Clerk of the Magistrates' Court. Moreover, the right of appeal only came into being, "on giving at least fourteen days' notice in writing of his intention" to appeal.

6. The dividing line between a requirement that goes to jurisdiction and one that does not is not easy to draw, but the language of this proviso fell into the category in respect of which strict compliance was necessary.

7. Accordingly, the order nisi was made absolute, the Magistrate's order set aside and the appeal dismissed.

DUNN J: This is a return of an order nisi to review the decision of the Magistrates' Court at Preston given on 5 August 1974. The decision was on appeal by Stephen Walter Francis pursuant to s25(2) of the *Motor Car Act* 1958. For convenience I shall refer to him in this judgment as the appellant and the Deputy Commissioner of Police as the respondent.

In this case the licence of Francis had been suspended by the Deputy Commissioner of Police and the appeal was against that suspension. The learned stipendiary magistrate who constituted the court allowed the appeal and ordered that the appellant be allowed to hold a licence to drive a motor car in Victoria as from 5 August 1974.

The grounds of the order nisi are as follows: -

(1) That by virtue of the proviso to s25(3) of the *Motor Car Act* 1958 as amended the said Magistrates' Court had in the circumstances no jurisdiction to entertain the said appeal or to order that the said Stephen Walter Francis be allowed to hold a licence to drive a motor car in Victoria as from 5 August 1974.

(2) That notice of intention to appeal not having been given at least fourteen days before 5 August 1974 (as required by s25(2) of the said Act) the said Magistrates" Court had no jurisdiction to entertain the said appeal.

(3) Alternatively that notice of intention to appeal not having been given at least fourteen days before 5 August 1974 (as required by s25(2) of the said Act) the said Magistrates' Court erred in law in hearing and determining the said appeal on 5 August 1974, instead of adjourning the hearing of the said appeal.

In order to appreciate the grounds of appeal it was necessary to refer to the relevant provisions of s25 of the *Motor Car Act* 1958 and I will refer to only those words that are relevant to the determination of this matter. Section 25(1) provides, and I quote the relevant words,

"The Chief Commissioner may suspend any licence to drive a motor car issued under this Part for such time as the Chief Commissioner thinks fit—

(c) if the holder... of the licence is by reason of any judgment order or decision given or made pursuant to any law of any other State or Territory of the Commonwealth disqualified from driving any motor vehicle."

Subs(2) provides,

"In any case where the Chief Commissioner...suspends a licence pursuant to the last preceding subsection... the person whose...licence is... so suspended on giving to the Chief Commissioner and to the clerk of the magistrates court at least fourteen days' notice in writing of his intention so to do may appeal against such suspension to any magistrates' court."

Subs(3) provides:

"Upon any appeal pursuant to the provisions of the last preceding subsection the court shall redetermine the matter of the suspension, shall hear any relevant evidence tendered whether by the applicant or the Chief Commissioner and, without limiting the generality of its discretion, shall take into consideration all the matters which the Chief Commissioner ought to have taken into consideration in determining the matter of such suspension.
Provided that in the case of a suspension pursuant to paragraph (c) of subs(1) of this section the court shall not quash the suspension if the court is satisfied that the holder of the licence is in fact disqualified in some other State or Territory of the Commonwealth as provided in that paragraph."

As will appear, if the affidavits filed by and on behalf of the appellant are to be accepted, the learned stipendiary magistrate was gravely misled by or on behalf of the appellant — conduct which deserves severe censure.

So far as is material, the appellant's notice of intention to appeal was as follows:

"Take notice that I Stephen Walter Francis of 11 Terry Street, West Heidelberg in the State of Victoria do hereby give notice that I intend appealing against the determination of the Victorian Deputy Commissioner of Police pursuant to s25 of the *Motor Car Act* 1958 number 6325 whereby the said Deputy Commissioner suspended my motor driver's licence number 2186277 until 11th December, 1975."

This notice gave no indication of the ground for suspension nor the grounds of appeal.

Since s25(3) requires the court to redetermine the matter and take into consideration all the matters the Chief Commissioner ought to have taken into account, it is obvious that the ground on which the Chief Commissioner relied should be disclosed to the court together with the material relevant to it.

On 5 August 1974, Sergeant de Leeuw was the prosecuting sergeant at Preston. He had not been informed by the Chief Commissioner or the Deputy Commissioner about this appeal and had no information concerning it. He so informed the learned stipendiary magistrate but apparently did not apply for an adjournment and the learned stipendiary magistrate proceeded to hear the appeal. Sergeant de Leeuw apparently appeared on the appeal and cross-examined the appellant and made certain submissions to the court. Those submissions did not deal with the critical matter in issue because he was in fact uninformed of it prior to the appeal proceeding.

In the affidavits which have been filed in respect of this order nisi there is a grave conflict between the affidavit of Sergeant de Leeuw and those of the appellant and counsel who appeared for him. I will deal with some of the areas of conflict later but there is no dispute that no evidence of service of the notice of intention to appeal was given and the notice of suspension of the licence was not tendered in evidence, nor was the ground on which the Deputy Commissioner acted clearly stated to the court.

Counsel for the appellant represented to the court that the requirements of service had been complied with and he tendered two copy letters from his instructing solicitor, one to the Deputy Commissioner and one to the Clerk of Courts at Preston, each enclosing a copy of the notice of intention to appeal. The copy letters were dated 22 July 1974.

Affidavits have been filed on behalf of the respondent dealing with a number of matters relevant and material to this appeal but not the subject of evidence before the learned stipendiary magistrate. One of such matters deals with service on the Deputy Commissioner of the notice of intention to appeal. I turn to consider whether such affidavits should be admitted in this case. They were objected to by Mr Fricke, who appeared before me for the appellant, but did not appear for him in the court below.

The *Justices Act* 1958 s160 provides: "On the return of the order to review the court or judge may on a consideration of the evidence and materials adduced and brought before the said magistrates' court of the justice or clerk and if the court or judge thinks fit of any further evidence either oral or by affidavit..." deal with the order to review.

The exercise of the power to admit additional evidence has, by judicial decision, been kept within narrow limits. Without purporting to give a reference to all the relevant authorities, the court will admit additional evidence to cure a mere slip – see *Sutherland v Cooley* [1899] VicLawRp 64; (1898) 24 VLR 410; 4 ALR 245; *Kennett v Holt* [1974] VicRp 79; [1974] VR 644: to cure the effect of surprise – *Larkin v Penfold* [1906] VicLawRp 90; [1906] VLR 535, at p541; 12 ALR 337; 28 ALT 42 and where the additional evidence would be fatal to the order made – *Mohr v Daly* [1914] VicLawRp 61; [1914] VLR 439, at p442; [1914] ALR 299; 36 ALT 25. In this case I think the additional evidence should be admitted on the grounds of curing the effects of surprise and of providing evidence fatal to the order made. I would, in any event, think it proper to admit this evidence on the ground that it was all within the knowledge of the appellant and went directly to the jurisdiction of the court to deal with or to allow the appeal and on the view of the material submitted in the appellant's affidavit it was withheld from the court. If it be a matter of discretion I would also admit counsel's affidavit on behalf of the appellant although, I think, probably no such direction from me is necessary for that affidavit.

Turning now to the first ground of the order nisi the original affidavits are in conflict as to whether or not the court was told that the appellant had a conviction in New South Wales for driving while under the influence of intoxicating liquor and that the Deputy Commissioner purported to suspend the licence pursuant to s25(1)(c) of the *Motor Car Act* 1958. Sergeant de Leeuw says the court was so informed and the appellant gave evidence of his conviction on 11 December 1972, and that the disqualification was for three years. This is all denied by the appellant and his counsel. To the additional affidavit filed on behalf of the respondent is exhibited the notice of suspension which specifically states the suspension was pursuant to s25(1)(c) and sets out the details of the conviction relied upon, namely one at North Sydney Petty Sessions on 11 December 1972, for driving under the influence of liquor and the penalty imposed of $300 and automatic suspension of licence for three years. Also exhibited are the appropriate admissible records of that conviction.

Acting on the rule that affidavits in reply should normally be accepted, it then appears

that material that could prove fatal to the jurisdiction of the court was withheld from the learned stipendiary magistrate, seemingly deliberately withheld. On this basis the learned stipendiary magistrate never had his mind directed to the terms of the proviso of s25(3) and the question is whether the matter should be sent back to the court to determine. If this were the only matter I would probably have taken this course, although very reluctantly, because according to the appellant's affidavit he neither disclosed the grounds of the Deputy Commissioner's suspension of his licence nor the fact of an alleged conviction. If this were a case of mistaken identity it is inconceivable that the appeal would not have been conducted on that basis.

I think the conclusion is inevitable that the appellant falls within the proviso and the court had no jurisdiction to quash the suspension. When the case falls within the proviso, jurisdiction of the magistrates' court is removed: see *R v Justices of the Peace at Yarram; Ex parte Arnold* [1964] VicRp 3; [1964] VR 21, and removed completely so that the court cannot vary or interfere with the suspension, *R v Court of Petty Sessions at Heidelberg; Ex parte Arnold* [1964] VicRp 79; [1964] VR 632. If the facts were disclosed as deposed to by Sergeant de Leeuw then clearly the learned stipendiary magistrate overlooked the proviso and the order he made was wrong.

However, as the same result is reached, whatever view is taken, I find it unnecessary to finally resolve the question as to whether this is one of the rare cases which justify preferring the affidavits on behalf of the party moving for the discharge of the order nisi. Accordingly, I am prepared to uphold the first ground, that in the circumstances the court had no power to quash the suspension.

In my opinion, the second ground is also good. It is clear from authorities to which Mr Batt who appeared for the respondent, referred me that the expression, "at least fourteen days' notice" in s25(2) of the *Motor Car Act* 1958 means fourteen clear days: see *Associated Dominions Assurance Society Pty Ltd v Balmford* [1950] HCA 30; (1950) 81 CLR 161, at p183; [1950] ALR 672 and *Forster v Jododex Australia Pty Ltd* [1972] HCA 61; (1972) 127 CLR 421; [1972-73] ALR 1303; 46 ALJR 701. The rule is so stated in *Halsbury's Laws of England*, 3rd. ed., vol. 37, para. 167, p95.

Even on such material as was before the learned stipendiary magistrate the notice had not been given at least fourteen clear days before the hearing. The additional material adduced on behalf of the respondent puts the matter beyond doubt. In my opinion the giving of the notice at least fourteen days before the hearing is a necessary prerequisite of appeal. It is a notice that has to be given not only to the Chief Commissioner but also to the clerk of the magistrates' court. Moreover, the right of appeal only comes into being, "on giving at least fourteen days' notice in writing of his intention" to appeal.

The dividing line between a requirement that goes to jurisdiction and one that does not is not easy to draw, as the authorities collected by McInerney J, in *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VicRp 81; [1970] VR 625, demonstrate. I think the language of this proviso falls into the category of which *Ex parte McCance; Re Hobbs* (1926) 27 SR (NSW) 35; 44 WN (NSW) 43, is an example, in respect of which strict compliance is necessary. Even if this opinion be in error, there was in this case no waiver of the requirement for proper service, as was urged upon me by Mr Fricke.

It is quite clear from the undisputed evidence that Sergeant de Leeuw had no prior knowledge of this matter. He had no instructions from the Chief Commissioner or the Deputy Commissioner and consequently had no knowledge of the facts as to when service was effected and without such knowledge he would be unable, if he had the authority, to waive the requirement. Having reached the conclusion that I have in respect of the first two grounds, it is unnecessary for me to deal with the third ground.

Accordingly, the order nisi will be made absolute. The order below will be set aside and the appeal will be dismissed. The appellant, as I have called him, Stephen Robert Francis, is ordered to pay $200 costs. Order absolute.

Solicitor for the respondent: John Downey, Crown Solicitor.
Solicitors for the appellant: Godfrey Stewart and Co.