32/73

SUPREME COURT OF VICTORIA

EARL v BUTLER

Harris J

15 November 1973 — [1974] VicRp 44; [1974] VR 359

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT CHARGED WITH DRIVING A MOTOR CAR WHILST EXCEEDING .05BAC – DEFENDANT FOUND GUILTY – CONVICTED AND FINED BUT NO ORDER MADE IN RELATION TO HIS OBTAINING A DRIVER LICENCE – DEFENDANT NOT LICENSED AT TIME OF FINDING OF GUILT – WHETHER MAGISTRATE REQUIRED TO MAKE AN ORDER DISQUALIFYING THE DEFENDANT FROM OBTAINING A DRIVER LICENCE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A(1).

HELD: Order nisi absolute. Remitted to the Magistrate for hearing and determination in accordance with this decision.
1. Sub-section (3) of s81A of the *Motor Car Act* 1958 is to be read in this way: "In addition to imposing a fine or term of imprisonment a court convicting a person for an offence against subs(1) shall, notwithstanding anything to the contrary in this Act or in any other Act, 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 where the percentage of alcohol in the blood at the time the offence was committed was .10 per centum or more, but less than .15 per centum—for not less than six months."

2. When those words are read it becomes apparent that what the Act does is to require the court to do two things. These are to cancel the licence and to disqualify the defendant from obtaining a licence. Obviously where the defendant has a licence the court must carry out both of these duties. It does not follow that where the defendant does not have a licence to cancel, the court is relieved from the obligation of imposing a disqualification period upon the defendant. The court is still bound to carry out that duty. The section is not to be read as showing an intention that a disqualification period is only to be imposed if, as it were, the condition precedent of the existence of a licence to cancel is established.

HARRIS J: On 28 February 1973 the Magistrates' Court at Geelong convicted the defendant, Kevin Scott Butler, on an information that he, on 3 February 1973, at North Geelong in the State of Victoria, did drive a motor car whilst the percentage of alcohol in his blood, expressed in grams per 100 millilitres of blood, did exceed .05 per cent. The magistrate fined the defendant $60 in default distress, but did not impose any further or other punishment on the defendant.

The information was laid under s81A(1) of the *Motor Car Act* 1958. That section makes it an offence for a person to drive a motor car while the percentage of alcohol in his blood, expressed in grams per 100 millilitres of blood, is more than .05 per cent. Section 81A(1) provides that

> "Any person who drives a motor car while the percentage of alcohol in his blood contains more than .05 per centum shall be . . . liable in the case of a first offence to a fine of not more than $100 or in the case of any second or any subsequent offence to a fine of not more than $200 or to imprisonment for a term of not more than one month."

The section does not limit the matter of penalty for an offence under subs(1) to what is set out in subs(1). In s81A(3) it is provided that in addition to imposing a fine or term of imprisonment a court convicting a person for an offence against subs(1) "shall notwithstanding anything to the contrary in this Act or in any other Act cancel the licence of such person to drive a motor car and— (a) in the case of a first offence disqualify him from obtaining a licence—(i) . . . (ii) . . . (iii) . . .".

What is set out in (i), (ii) and (iii) are the periods for which the defendant must be disqualified, depending upon the percentage of alcohol in his blood. So far as this case is concerned, the relevant sub-para. is (ii), which provides: "where the percentage of alcohol in the blood at the time the offence was committed was .10 per centum or more but less than .15 per centum— for not less than six months."

On 28 March 1973 the informant, Kenneth Craig Earl, obtained an order nisi to review the order and conviction that the magistrate made. The grounds of the order nisi were as follows:–

> 1. That the stipendiary magistrate was wrong in holding that s81A(3)(a)(ii) of the *Motor Car Act* 1958, did not require him to disqualify the defendant from obtaining a licence to drive a motor car for not less than six months upon his conviction under the said section, where the percentage of alcohol in the blood of the defendant at the time the offence was committed was .10 per cent or more but less than .15 per cent.
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> 2. That the stipendiary magistrate should at least have disqualified the defendant from obtaining a licence to drive a motor car for not less than six months upon his said conviction.
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> 3. That the stipendiary magistrate misdirected himself as to the proper meaning and effect of s81A of the *Motor Car Act* 1958 upon the hearing of the said information.

When the order to review was called on for hearing before me, Mr Rowlands of counsel announced his appearance for the informant. The defendant was called but there was no appearance for the defendant.

The first matter that must be dealt with is to consider whether it is open to the informant to challenge the failure of the Magistrates' Court to disqualify the defendant from obtaining a licence under the wording of the order nisi to review. Mr Rowlands properly drew my attention to the decision of the Full Court in *Clifford v Wade*, decided on 17 April 1973 but unreported. That case dealt with the problem that confronted an informant who sought to review the refusal of a Magistrates' Court to exercise its discretionary power to cancel a licence pursuant to s26 of the *Motor Car Act*. The difficulty that the informant encountered in that case was that he had obtained an order nisi to review which challenged the validity of the conviction and punishment actually imposed by the magistrate. The order to review did not itself refer to the refusal expressed orally by the magistrate to cancel the licence of the defendant under s26.

The Full Court pointed out that such a refusal by the magistrate itself constituted an order which was capable of being reviewed under the provisions of s155 of the *Justices Act* 1958 and held that as this oral order was not referred to in the order nisi, the order nisi had to be discharged.

In my opinion, there is a difference between that case and the case which is now before me. In my opinion, the provisions of s81A should be read as creating an offence and providing a penalty for that offence which penalty contains more than one element. Part of the penalty is a fine or (in the case of a second or subsequent offence) a term of imprisonment but in addition to a fine or imprisonment there is a third element of the penalty which is prescribed for the offence. That third element is contained in subs(3) where the Act requires the court to cancel the licence of the defendant and (in the case of a first offence) to disqualify him from obtaining a licence for the periods set out in para (a) (i) to (iii). I should perhaps add that the sub-section does go on to deal with the position in relation to second and subsequent offences. It looks as if by some oversight the words "disqualifying him from obtaining a licence" have been omitted from the prefatory words in para (b). However, that is not the problem we have to deal with in this case.

The view I take is that because there are these various penalties imposed under s81A, a conviction or order which fails to impose all the elements of the penalty which the statute requires does show an error in the conviction or order. That is to say, the view I have formed is that the section mandatorily requires the Magistrates' Court (a) to impose a fine or imprisonment and (b) to cancel the licence and disqualify the defendant from obtaining a licence. Consequently if one of these elements is not present in the conviction or order there is an error in the conviction or order. The result of that reasoning is that I hold that it is open to the informant to raise and have decided in this Court the question whether there is an error in the magistrate's decision in not disqualifying the defendant from obtaining a licence to drive a motor car for not less than six months.

I turn now to that point. The evidence shows that the defendant in this case did not have a licence to drive a motor car at the time when he was charged with the offence, or, as far as it appears, at the time when he was convicted. The defendant was represented and it was submitted on behalf of the defendant that it was not mandatory to disqualify the defendant from obtaining a

licence because he did not hold a licence. It was submitted that the section envisaged cancellation of a licence prior to disqualification. The magistrate accepted this view and stated that in his opinion s81A(3) did not mean that the disqualification period was mandatory where the defendant was unlicensed at the time and he did not feel that the circumstances of the offence warranted the exercise of his discretion to disqualify under s26(1)(b). There is, of course no challenge to the refusal to exercise the discretion under s26(1)(b), but what is put by Mr Rowlands is that there was a mandatory obligation under the section to disqualify the defendant from obtaining a licence for a period of not less than six months.

The point arises because of the way in which the section is set out in the Act. If one regards the setting-out of the Act as not being the important thing, but regards the important thing as being the words used in the Act, then so far as is relevant, subs(3) is to be read in this way: "In addition to imposing a fine or term of imprisonment a court convicting a person for an offence against subs(1) shall, notwithstanding anything to the contrary in this Act or in any other Act, 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 where the percentage of alcohol in the blood at the time the offence was committed was .10 per centum or more, but less than .15 per centum—for not less than six months." When those words are read it becomes apparent that what the Act does is to require the court to do two things. These are to cancel the licence and to disqualify the defendant from obtaining a licence. Obviously where the defendant has a licence the court must carry out both of these duties. It does not follow that where the defendant does not have a licence to cancel, the court is relieved from the obligation of imposing a disqualification period upon the defendant. The court is still bound to carry out that duty. I do not read the section as showing an intention that a disqualification period is only to be imposed if, as it were, the condition precedent of the existence of a licence to cancel is established.

The result of what I have said is that I hold that the magistrate was in error in acceding to the submission that was put to him on behalf of the defendant. I hold that although the defendant did not have a licence to cancel and that therefore the magistrate could not cancel any licence, nevertheless the magistrate constituting the court was under a duty to disqualify the defendant from obtaining a licence, and that on the evidence in this case the relevant period was for a period of not less than six months.

It follows from what I have said that the conviction below ought not to be allowed to stand in its present form. What is required is that there should be added to the order an order for the disqualification of the defendant from obtaining a licence for a period of not less than six months. To carry out this duty involves the exercise of some discretion as to what the period should be and I will now ask Mr Rowlands to address me as to what course he submits I should follow. [His Honour then heard further argument as to the appropriate form of order and continued:–]

Having now discussed with counsel the course which I should adopt, the conclusion I have come to is: I should remit this matter to the Magistrates' Court for hearing and determination in accordance with the ruling that I have given.

The order will be: Order nisi made absolute on grounds 1 and 2. Matter is remitted to the Magistrates' Court for further hearing in accordance with the decision of this Court. Order that the defendant pay the informant's costs of and incidental to the order to review, and that such costs be fixed at the sum of $200. Order absolute.

Solicitor for the informant: John Downey, Crown Solicitor.
