33/04; [2004] VSC 401

SUPREME COURT OF VICTORIA

DPP v FERNANDEZ

Smith J

30 September, 15 October 2004 — (2004) 149 A Crim R 390; (2004) 42 MVR 59

MOTOR TRAFFIC – DRINK/DRIVING – SENTENCING – PERSON WITH RELEVANT PRIOR CONVICTION – READING OF .061% BAC – WHETHER COURT HAS DISCRETION NOT TO CANCEL PERSON'S DRIVER LICENCE: *ROAD SAFETY ACT* 1986, S50(1AB).

Under s50(1AB) of the *Road Safety Act* 1986 ('Act') there are only two limited categories of offender who can invoke the right to seek the exercise of the court's discretion whether to cancel that person's driver licence. The first category applies to those who are required to have a zero blood alcohol concentration and return a reading of less than .05%BAC. The second category applies to those on full licences and then only if the offence was a first offence and the reading was less than .07%BAC. Accordingly, where a person with a relevant prior conviction returned a reading of .061%BAC, a magistrate was in error in declining to cancel that person's driver licence.

SMITH J:

Background to appeal

1. On 31 March 2004 at Dandenong, the respondent Mr Fernandez pleaded guilty to breach of s49(1)(f) *Road Safety Act* 1986. The learned Magistrate adjourned the proceeding for 12 months without recording a conviction and released Mr Fernandez on him giving an undertaking under s75 of the *Sentencing Act* 1991. Her Worship also ordered that Mr Fernandez pay the sum of $1,000 into the Court Fund. No order was made in relation to the defendant's driving licence. The DPP appeals from this decision.

Questions of law raised in the appeal:

2. Master Wheeler identified the following questions of law as raised by the appeal:

> "(a) Was the Magistrate in error, in the circumstances of this case including the respondent's prior conviction for exceeding a prescribed concentration of alcohol in his blood, in deciding pursuant to s50(1AB) of the *Road Safety Act* 1986 or otherwise, that she had a discretion not to cancel the respondent's licence and disqualify him from driving following a finding that he was guilty of a subsequent offence under s49(1) (f) of the *Road Safety Act* 1986?
>
> (b) Was Her Worship in error in interpreting s50(1AB) (b) of the *Road Safety Act* 1986 as requiring cancellation of a driver's licence and disqualification only when the subsequent offence involved a concentration of alcohol in the blood of the offender of not less than 0.07gm per 100 millilitres of blood?
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> (c) Was Her Worship in error in interpreting s50(1AB) (b) of the *Road Safety Act* 1986 as applying to a person who had previously been found guilty of an offence against one of the paragraphs of s49(1) of the *Road Safety Act* 1986.

The hearing

3. The facts placed before Her Worship were that on 25 July 2002 at 11.17 pm, Mr Fernandez was intercepted at a preliminary breath testing station at Endeavour Hills. Following a positive indication on that preliminary breath test, he accompanied police to a booze bus and furnished a sample. The reading obtained was .061 grams. Mr Fernandez had previously been convicted on 25 July 1994 on a drink driving offence where his reading was .11 grams. It was common ground that this had the effect that for the purpose of the application of the relevant statutory provisions the charge to which he had pleaded guilty was a second offence, it having occurred within 10 years of the first offence.[1] Counsel for Mr Fernandez had put written submissions to Her Worship supporting the argument that s 50(1AB) of the *Road Safety Act* 1986 conferred upon her, in the circumstances of the case, a discretion not to cancel the driving licence of Mr Fernandez. Her Worship indicated that she accepted those submissions and decided to exercise that discretion in favour of Mr Fernandez.

The legislative provisions

The following are the relevant provisions of the *Road Safety Act* 1986. *[His Honour then set out the provisions and continued] ...*

General submissions

4. I was referred by counsel to the usual authorities on statutory construction, the legislative history of the provisions in question and the relevant *Hansard* statements. Both counsel argued that a purposive construction should be applied. Counsel for Mr Fernandez submitted that an ambiguity existed in the construction of s50(1AB) and the provision being penal in nature such ambiguity should be resolved in favour of Mr Fernandez. A matter on which there was common ground was that in the event that there was ambiguity in the construction of the relevant provisions the ambiguity should be resolved in favour of the offender.[2]

Submissions of the appellant

5. Counsel for the appellant submitted that s50(1) gives a court a discretion to cancel the licence of a person to whom s52 applies where it is the first offence and the person's reading is less than .05 grams. The prescribed reading for persons to whom s52 applies is .00 grams. [3] Where the Court decides to interfere with the person's licence under s50(1) the maximum disqualification period permitted is six months disqualification. The result of these provisions is, for example, that where a person is a first offender to whom s52 applies, and that person has a concentration of alcohol between .00 grams and .05 grams, his or her licence could be cancelled and a disqualification of one month imposed.

6. Counsel for the appellant then submitted that s50(1A) applies to persons "in circumstances in which sub-s (1) does not apply". Counsel argued, therefore, that the persons to whom s50(1A) applies are:

- persons to whom s52 does not apply
- persons to whom s52 does apply but whose offence is a second offence or whose blood alcohol concentration exceeded .05%.

Subject to sub-s(1AB), the provision on which Mr Fernandez ultimately relies, the Court must, under sub-s50(1A) cancel the driver's licence or permit and disqualify the offender from obtaining a licence or permit for a period not less than the disqualification periods mentioned in para (a) in the case of the first offence and para (b) in the case of a subsequent offence.

7. Counsel for the appellant properly conceded that s50(1AB) qualified s50(1A). As to the operation of s50(1AB), the directly critical provision in this appeal, counsel for the appellant submitted that it distinguishes between offenders who have been previously found guilty[4] of an offence under s49(1) (or any previous enactment corresponding to those provisions or any corresponding law) and other persons.[5] Thus, in the case of Mr Fernandez, counsel for the appellant submitted that para (a) did not apply because he had previously been found guilty of an offence under s49(1) and his reading exceeded .05 grams. Counsel submitted further that para (b) did not apply because Mr Fernandez did not satisfy the requirements embodied in the phrase "in any other case" because he had been previously found guilty of an offence against s49(1). In practical terms, counsel submitted that a person previously found guilty of an offence against s49(1) cannot avoid mandatory licence cancellation unless the reading is less than .05 grams per 100 millilitres of blood (para (a)). A person who has not previously been found guilty of an offence against s49(1) can only avoid mandatory licence cancellation where the reading in question is less than .07 grams (para (b)).

Submissions of counsel for the respondent

8. Counsel submitted that the purpose of s50(1AB) was to give a discretion back to the sentencing court. It is an ameliorating provision. He submitted that if the circumstances specified in paras (a) or (b) of s51(1AB) exist then there is no mandatory obligation to cancel and disqualify a person's licence for at least the minimum period referred to in s51(1A). Further, counsel submitted that on its face s50(1AB) (a) could not have been intended to include full licence holders to whom s52 did not apply; for s50(1AB) (a) applies only where the reading is less than 0.5 grams and full licence holders could not breach the law if their blood alcohol reading was less than .05 grams. Counsel submitted, therefore, that the expression "in any other case" in s50(1AB) (b) referred to persons other than those to whom s52 applied and did not refer to first offenders. Counsel

submitted that the construction sought by the DPP involved the proposition that Parliament had intended to give a discretion which could have no operation.

Analysis

9. The provisions are very difficult to comprehend. I am not persuaded, however, that there is any ambiguity in the provisions of s50(1AB). They proceed on the assumption that the sentencing court has a discretion whether to record a conviction or simply find a person guilty and, in the latter case, allow some discretionary amelioration of the prima facie rule that licences or permits be cancelled and a minimum disqualification period be imposed in respect of people to whom s50(1A) applies.

10. Section 50(1AB) operates as a qualification to s50(1A) and so applies to those to whom s50(1) does not apply — that is

> • persons to whom s 52 does not apply
> • persons to whom s 52 does apply but who have already offended with a blood alcohol level of less than .05 grams per 100 millilitres of blood.

11. Turning to sub-paras (a) and (b), they attempt to identify two cases, the second being cases other than the first identified. The first that is identified (para (a)) is identified clearly to the following terms:

> "In the case of a person previously found guilty of an offence against any one of the paragraphs of s49(1) or any previous enactment corresponding to any of those paragraphs or any corresponding law . . ."

In other words para (a) and para (b) are distinguishing between people with prior convictions who are caught by (a) and people without prior convictions who are caught by para (b). Counsel for Mr Fernandez seeks to include in the description of "the case" the reference to alcohol levels. In my view, it is clear, that the reference to alcohol levels does not define the categories of people to whom para (a) or para (b) will apply. The concentration of alcohol in the blood specified in para (a) and para (b) is stated to set limits on the circumstances in which the discretion extended to the persons identified in para (a) or para (b) can be invoked, a discretion not to cancel the licence or permit or disqualify the offender. It seems to me that that construction is clear and not subject to any ambiguity. It might also be said that if counsel for Mr Fernandez is correct, Parliament's intention would have been easily and clearly addressed by inserting in para (a) after the words "in the case of a person" the words "to whom s52 applies" and deleting the word "previously".

12. The issue raised by counsel for Mr Fernandez is whether Parliament would have intended, despite the width and clarity of the language in s50(1AB) (a), that that provision would not apply to any driver to whom s52 did not apply. It appears to me, however, that what the drafter was attempting to do was to emphasise that there were to be only two limited categories of offender who could invoke the discretion and was spelling out the blood alcohol levels under which each category had to come if it was to have the right to seek the exercise of the discretion. It so happens that the practical result is that para 50(1AB)(a) will apply only to s52 offenders. That does not mean it must be construed as confined to those offenders. It may have been drafted that way out of an abundance of caution. I think the more likely explanation is that advanced for the DPP, namely that the drafter was simply following a dichotomy that had been used for many years in the corresponding enactments to distinguish two situations – the person with the prior conviction and the person without. Further there is good reason why Parliament would not have wanted to extend a discretion not to cancel or disqualify a second offender who was outside s52 while wanting to do so for those caught by s52. Section 52 offenders who are required to have a zero blood alcohol concentration include people whose livelihood it is to drive. Further a .00 grams level can be easily breached without causing any danger to the community – eg a reading of .01 grams. Thus, the Parliament was probably prepared to extend a discretion to such persons so long as their blood alcohol level on the second or subsequent occasion was less than .05 grams per 100 millilitres, a level below which it is generally accepted driving performance is not likely to be materially impaired. On the other hand a person to whom the .05 grams limit applies who has previously breached that limit is someone to whom one could well understand Parliament wanting a mandatory cancellation to apply when they offend again. At the same time one could well understand Parliament enacting s50(1AB) (b) to cover persons with full licences to whom

the .05 limit applied but who had only just breached it in their first offence and to extend that leniency to persons to whom s52 applied who on their first breach of the law had a reading of less than .07 grams.

The practical result would be that in the case of someone to whom s52 applied who committed a first offence with a reading between .05 grams and .07 grams, s50(1) would not apply but s50(1A) and s50(1AB) (b) would apply so that a discretion would be available under those provisions. Where a person to whom s52 applied committed a second offence, s50(1) would not apply but a discretion would be available if the reading on the second offence was less than .05% (s50(1AB) (a)). For those on full licences, only s 0(1AB)(b) would provide a discretion and then only if the offence was a first offence and the reading was less than .07%.

13. The legislation would appear to create at least two arguable anomalies. One is that s51(AB) (a) purports to apply to persons who cannot use it (non s52 drivers) and under s50(1AB) (b) extends a discretion to persons excluded from the s 50(1) discretion because their reading is between .05% and .07%. That is difficult to understand. It is true that those anomalies would be removed if Mr Fernandez's construction were adopted. The language, however, is clear.

14. The relevant *Hansard* statements[6] do not directly assist. They refer to the need for amendments to deal with what was seen as a device used by magistrates of not recording a conviction and so avoiding the mandatory cancellation requirements. The Bill dealt with the issue by adding the words "or finding a person guilty". I can, however, find no explanation for s50(1AB) in the second reading speeches. It is reasonable to infer that it was included to provide a limited discretion in place of the broad discretionary device that had been removed by the amendments. Consistently with that scenario, one would not expect the sort of dichotomy put forward by counsel for Mr Fernandez.

15. Judges have commented before on the extreme difficulty of interpreting the provisions of the Act. I suggest that one of the reasons for that difficulty is that the original provisions were very technical and detailed. This in turn has led to technical arguments[7] and periodic amendments designed to address arguments of construction that have been successful but are viewed as unsatisfactory. Thus, as here, qualification has been placed on qualification. The legislation is now so complicated that to simplify it would be a very difficult task.

16. I have found the task of understanding the above provisions to be the most difficult yet. Thus it is in fact with considerable hesitation that I have come to the above conclusions about the construction of s50(1AB). In my view, Her Worship erred in her construction of s50(1AB) in concluding that the provision of para (b) could apply to a second offender such as Mr Fernandez. I am persuaded that there was no discretion and accordingly the appeal should be allowed.

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[1] See s50AA *Road Safety Act* 1986.
[2] *Beckwith v R* [1976] HCA 55; (1976) 135 CLR 569 at 576; (1976) 12 ALR 333; 51 ALJR 247; 28 ALT 39; *DPP v Greelish* [2002] VSCA 49, para 18; (2002) 4 VR 220; (2002) 128 A Crim R 144; (2002) 35 MVR 466.
[3] S52(2) above.
[4] Para (a).
[5] Para (b).
[6] *Road Safety (Licence Cancellation) Bill*, Legislation Council, 19 May 1992, *Hansard* 791; Legislative Assembly 9 June 1992, 2053.
[7] *Day v County Court of Victoria & Hanson* [2002] VSC 426; (2002) 37 MVR 319.

APPEARANCES: For the appellant DPP: Mr WJ Walsh-Buckley, counsel. Solicitor for Public Prosecutions. For the respondent Fernandez: Mr DA Trapnell, counsel. Guthrie & Associates, Solicitors.
