

26/82

SUPREME COURT OF VICTORIA

PAYNE v CANGIR

Kaye J

4 June 1981

MOTOR TRAFFIC – DRIVING A MOTOR CAR WHILST DISQUALIFIED FROM DRIVING - DEFENDANT FOUND DRIVING A MOTOR CAR – DRIVER HOLDER OF A LEARNER'S PERMIT – CONDITIONS FOR USE OF PERMIT NOT COMPLIED WITH – NO LICENSED DRIVER IN MOTOR CAR – DRIVER NOT *BONA FIDE* LEARNING TO DRIVE – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT 1958*, SS23(1), 23AA, 28(1).

The defendant was detected driving a motor car during a period of disqualification. He had a learner's permit. He had passengers in his car but none was licensed and the relationship of pupil and teacher did not exist. The magistrate dismissed the charge of driving whilst disqualified.

HELD: The excluding provisions of s23(1) of the *Motor Car Act 1958* namely, that the defendant was *bona fide* learning to drive and did not have a licensed driver sitting beside him had no application to the defendant and accordingly he was driving whilst disqualified.

KAYE J: This is the return of an order nisi made by Master Brett on the 22nd day of September, 1980, calling upon the respondent to show cause why an order, made by Mr EO Bourke SM on 19 May 1980, sitting in the Magistrates' Court at Williamstown dismissed an information, should not be reviewed. On the return of the order nisi, the respondent has failed to appear. The matter came before the Magistrate on the return of three informations, dated 17th July 1980. Those informations included two other matters which are not relevant to these proceedings, namely, that the respondent was driving a motor vehicle whilst his blood alcohol exceeded .05 and that he failed to comply with s23AA(5)(a) of the *Motor Car Act*. It is in respect of the third information, that these proceedings have been taken.

The respondent was charged that on 6th July 1980, at Newport, he drove a motor car during a period of disqualification from obtaining a licence by order of a Magistrates' Court. At the material time the respondent was disqualified pursuant to a conviction and order made in the Cheltenham Magistrates' Court on 2nd July 1980, whereby he was convicted of motor car offences and disqualified from obtaining any licence under the *Motor Car Act* for a period of three months from the date of the conviction.

The evidence before the Magistrate was adduced from Gregory Mark Payne, a Constable of Police. In substance, he swore that shortly before 1.00 a.m. on Sunday, 6th July 1980, while on duty in a mobile patrol car in the Newport area, he observed the respondent seated in the driving seat of a motor car which was parked on the eastern kerb of the Melbourne Road. As the police car pulled in behind the car in which the respondent was seated, the respondent began to drive off. When signalled to stop, the respondent did so. A conversation took place between the police officer and the respondent, during which the latter, when asked to produce his licence to drive a motor vehicle, said that he did not have one. He did, however, state that he had a learner's permit. By that, he was referring to a permit issued by the Chief Commissioner pursuant to powers conferred on him by s23AA of the *Motor Car Act 1958*.

The only evidence in the summary proceedings was given by Constable Payne. At the conclusion of his evidence, a submission was made by counsel who appeared for the respondent, which was, in substance, that the charge could not be sustained because the respondent was the holder of a learner's permit which conferred on him the right to drive, and that at the time of the alleged offence, the permit had not been cancelled by the Chief Commissioner of Police. The prosecuting Sergeant replied to the submission made by counsel, and counsel for the respondent made a further submission that because the learner's permit had not been cancelled, it was still

valid and therefore it would be improper for the Magistrate to give more weight to s28(1) than to s23AA of the *Motor Car Act*. The Magistrate upheld the submission made by counsel and dismissed the charge, stating as his reason for doing so that he was not prepared to give more weight to the provisions of s28(1) than to those of s23AA of the *Motor Car Act*.

The section under which the information was laid against the respondent, s28(1) of the *Motor Car Act*, reads:

"Any person who drives a motor car during the period of any suspension of his licence to drive the 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 and liable in the case of a first offence to a penalty of not more than \$1,000 or imprisonment for not more than six months and in the case of a second or any subsequent offence imprisonment for not less than one month and not more than two years."

The facts constituting the commission of the offence on the part of the respondent are clear from the evidence which was before the Magistrate. Those facts were that at the relevant time the respondent was driving a motor car, and at that time the respondent was subject to an order of disqualification from obtaining a licence which had been made by the Magistrates' Court at Cheltenham.

The confusion which has, in my view, intruded into the reasoning of the Magistrate is by the omission to give proper effect to the provisions of s23(1) of the *Motor Car Act*. Before doing so, however, I refer to the provisions of s23AA. As already indicated, under subsection (1) of that section it is provided that a person over the age of 17, who is not the holder of a licence to drive a motor car, may be the holder of a learner-driver's permit issued by the Chief Commissioner. By subsection (5), the conditions for the use of such a permit are provided. Those include that during the period of the permit he shall have a licensed driver sitting beside him.

Section 23(1) provides, insofar as applicable to the present proceedings, as follows:-
"Nothing in this Part shall prevent an unlicensed person who is over the age of 17 years and *bona fide* learning to drive a motor car from driving such a motor car upon any highway, if such unlicensed person is the holder of a learner-driver's permit and has a licensed driver sitting beside him."

Those are the provisions which take out the situation of a person holding a permit from other provisions of Part III of the Act. But it is clear that in order to come within those provisions, excluding an unlicensed person from the operation of s28(1) he must be an unlicensed person who is over the age of 17 years and *bona fide* learning to drive a motor car, and he must have a licensed driver sitting beside him. The evidence before the Magistrate established clearly that although the respondent was the holder of a permit, he was not at the material time *bona fide* learning to drive a motor car and he did not have a licensed driver sitting beside him. The position was, in fact, that he had other persons in the vehicle. He told the police officer that as far as he knew they were not licensed to drive a motor vehicle, and that the relationship of pupil and teacher in connection with the driving of a motor car did not exist between him and them: see *Hudd v Wilson* [1929] VicLawRp 26; (1929) VLR at 132; 35 ALR 138.

It follows that what might be described as the excluding provisions of s23(1) had no application to the respondent and he therefore was at the material time driving during a period of disqualification from obtaining a licence. It follows therefore that the Magistrate was in error, and that, on the evidence then before him, the respondent ought to have been convicted. I therefore remit the information to the Magistrate for re-hearing, and in the absence of any further evidence for the imposition of a penalty according to law.

The order nisi is made absolute.