

28/94

SUPREME COURT OF VICTORIA

SEMANN v O'CONNELL

McDonald J

2, 3 June 1994 — (1994) 19 MVR 560

SENTENCING – DRIVING WHILST LICENCE SUSPENDED – PREVIOUSLY CONVICTED OF SIMILAR OFFENCE – WHETHER COURT HAS POWER TO IMPOSE A FINE: ROAD SAFETY ACT 1986, S30(1); SENTENCING ACT, S49.

Where a person has been found guilty of a subsequent offence against s30(1) of the *Road Safety Act 1986* ('Act') (driving whilst licence suspended or cancelled) a Court does not have power to impose a fine on the offender whether in addition to or instead of the sentence provided by s30(1) of the Act.

McDONALD J: [1] On 7 May 1993 at the Magistrates' Court at Moonee Ponds the appellant was convicted on one count of driving a motor vehicle on a highway while his licence to do so was suspended. He was convicted and fined the sum of \$500, and his licence to drive a motor vehicle on a highway was suspended for a period of three months from that date. On 5 September 1993 the appellant was charged by the respondent in this case, a constable of police, that he did on 27 July 1993 at Thornbury, drive a motor vehicle on a highway, namely Mansfield Street, Thornbury, while his licence to drive the motor vehicle was suspended.

Part 3 of the *Road Safety Act 1986* makes provision for the licensing of people to drive motor vehicles on highways. Section 18 of that Act makes it an offence for a person to drive a motor vehicle on a highway without holding a driver licence or permit which authorizes the holder to drive the motor vehicle.

Section 19(3) of the Act provides that a licence authorizes a person to drive on a highway any category of motor vehicle indicated in the licence for the term and subject to any conditions specified in the licence. Section 28 of the Act empowers a court, if it convicts a person of or is satisfied that such person is guilty of an offence against that Act or any other offence in connection with the driving of a motor vehicle to, *inter alia*, suspend for such time as the court thinks fit all driver licences or permits held by that person. Section 28A provides that a driver licence suspended by a court is during the period of suspension of no effect, and that a person whose licence is suspended is, during the [2] suspension, disqualified from obtaining a further licence.

Section 30 of that Act, as amended, and relevant to these proceedings provides:

"Section 30 (1) A person must not drive a motor vehicle on a highway while the authorisation granted to him or her to do so under this Part is suspended or after that authorisation has been cancelled or during a period of disqualification from obtaining such an authorisation.

Penalty: For a first offence, 30 penalty units or imprisonment for 4 months;

For a subsequent offence, imprisonment for not less than 1 month and not more than 2 years.

(2) S49 of the *Sentencing Act 1991* does not apply with respect to proceedings for an offence against sub-section (1)".

The conviction recorded and sentence imposed on the appellant on 7 May 1993 was for an offence against sub-section (1) of that section. The charge laid by the respondent against the appellant in respect of his driving a motor vehicle at Thornbury on 27 July 1993 was also laid under s30(1) of that Act.

The matter came on for hearing before the Magistrates' Court at Heidelberg on 30 November 1993. The appellant pleaded guilty to the charge and further admitted his conviction on 7 May 1993. The charge heard by the Magistrate at Heidelberg constituted a "subsequent offence" for

the purpose of s30(1) of the *Road Safety Act* 1986. After hearing counsel for the appellant, Mr Winter, who appeared also before this court on behalf of the appellant, the Magistrate convicted the appellant on the offence with which he was charged. He sentenced the appellant to be [3] imprisoned for a term of three months, but ordered pursuant to s27 of the *Sentencing Act* 1991 that the sentence be wholly suspended for a period of 18 months. The Magistrate further fined the appellant \$1,000 with \$26 statutory costs and further ordered that the appellant's driver licence be cancelled and that he be disqualified from driving in the State of Victoria for six months effective from 30 November 1993. Pursuant to s92 of the *Magistrates' Court Act* 1989 the appellant appealed to this court on a question of law.

On 16 December 1993 a Master of this court stated the question of law as raised by the appeal as follows:

"The question of law shown by the Appellant to be raised by the Appeal is whether or not a Court which sentences an offender, in respect of a subsequent offence of driving whilst authorisation to drive is suspended, to a term of imprisonment, whether or not such term is wholly or partially suspended, is empowered to in addition impose a fine with or without conviction, in respect of the same offence".

The Master referred the appeal for hearing and determination to this court. The question of law for this court's determination was whether the Magistrate in the circumstances of this case had power to impose a fine on the appellant.

The primary submission made on behalf of the appellant was that the Magistrate was in error in imposing a fine on the appellant in the circumstances as existing here where the appellant pleaded guilty to and was convicted of an offence under s30(1) of the *Road Safety Act*, which offence constituted a "subsequent offence" under that section. It was submitted that by reason of the operation and the effect of sub-section (2) of that section, the legislature had removed the power from a court to impose a [4] fine on a person found guilty of a second or "subsequent offence" under s30(1) of the *Road Safety Act*, and accordingly, in imposing the aforesaid fine on the appellant, the Magistrate had acted without power.

The offence in respect of which the appellant pleaded guilty, and was convicted and sentenced by the Magistrates' Court at Heidelberg on 30 November 1993 constituted a "subsequent offence" within the meaning of s30(1) of the *Road Safety Act* having regard to the appellant's previous conviction on 7 May 1993. Mr Devlin who appeared on behalf of the respondent on the hearing of the appeal, also submitted to the court that the Magistrate did not have power in the circumstances of this case to impose a fine on the appellant, in the exercise of his sentencing discretion. He submitted also that this was so by reason of the operation of s30(2) of that Act.

Section 49 of the *Sentencing Act* 1991, which is to not apply with respect to proceedings for an offence against s30(1) of the *Road Safety Act* by reason of the provisions of sub-section (2) of that latter section, provides:

"S.49 (1) If a person is found guilty of an offence the court may, subject to any specific provision relating to the offence, fine the offender in addition to or instead of any other sentence to which the offender may be liable.

(2) The maximum fine that a court may impose under sub-section (1) is the appropriate maximum specified in the specific provision or, if no maximum is specified there, then that specified in section 52".

That section enables a court to impose a penalty on a person found guilty of an offence rather than a term of imprisonment, where the legislation provides that the [5] penalty for the offence is a term of imprisonment. The effect and the operation of s49 is made "subject to any specific provision relating to the offence". As referred to s30(2) of the *Road Safety Act* specifically provides that s49 of the *Sentencing Act* does not apply to proceedings for an offence against s30(1) of the former Act. For a first offence against s30(1) of the *Road Safety Act*, the penalty provided is "30 penalty units or imprisonment for 4 months".

Section 110 of the *Sentencing Act* 1991 provides the meaning of penalty units as follows:

"If in an Act, subordinate instrument or local law there is a statement of a number (whether whole or fractional) of what are called 'penalty units', that statement must, unless the context otherwise requires, be construed as stating a number of dollars equal to the product obtained by multiplying \$100 by that number of penalty units."

For a first offence against s30(1) of the *Road Safety Act* the court may in the exercise of its sentencing discretion impose a penalty on a person found guilty of an offence under that section. However, by providing that s49 of the *Sentencing Act* shall not apply with respect to proceedings for an offence against s30(1) of the *Road Safety Act*, the legislature has clearly stated its intention that for a "subsequent offence" against that section a court does not have the power to fine that offender whether in addition to or instead of the sentence provided by s30(1) of the Act.

It was not directly the subject of this appeal as to what sentencing options may otherwise be available to a court dealing with a subsequent offender under s30(1) of [6] the *Road Safety Act*, by reason of the provisions of s7 of the *Sentencing Act*.

Sub-section (f) of that latter section impowers a court in the exercise of its sentencing discretion to order an offender to pay a fine with or without recording a conviction. However, that section in its operation is specifically made "subject to any specific provision relating to the offence and subject to" Part 3 of the Act. Section 49 of the Act is contained in Part 3.

By the legislature providing by s30(2) of the *Road Safety Act* that s49 of the *Sentencing Act* was not to apply to an offence against sub-section (1) of the former section and by having regard to the penalty provisions contained within that sub-section, it specifically removed the power of a court to impose a fine on a "subsequent" offender against s30(1) of the *Road Safety Act*, whether it be in addition to or instead of a sentence of imprisonment. Accordingly, by imposing a fine on the appellant as part of his sentence the Magistrate acted beyond power. The appeal must therefore be upheld.

APPEARANCES: For the appellant Semann: Mr S Winter, counsel. Legal Aid Commission of Victoria. For the respondent O'Connell: Mr S Devlin, counsel. Director of Public Prosecutions.