

Reported 191 A Crim R 145
Decision :



New South Wales Supreme Court

CITATION :	Director of Public Prosecutions v Kailahi [2008] NSWSC 752
HEARING DATE(S) :	13 March 2008
JUDGMENT DATE :	25 July 2008
JURISDICTION :	Common Law
JUDGMENT OF :	Rothman J
DECISION :	<p>(i) Pursuant to s 59(2)(a) of the Crimes (Appeals and Review) Act 2001, the order of his Honour Mr W Brydon, Magistrate, made at Burwood Local Court on 17 August 2007, dismissing a charge against the defendant of driving while disqualified from holding a licence: s 25A(1)(a) of the Road Transport (Driver Licensing) Act 1998, be set aside.</p> <p>(ii) The matter be remitted to the Local Court to be dealt with in accordance with orders and reasons for judgment of this Court.</p> <p>(iii) No order for costs.</p>

CATCHWORDS :	CRIMINAL LAW - driving offence - driving whilst disqualified - mens rea - honest and reasonable mistake - mistake not result in innocent conduct - no mens rea necessary - no honest and reasonable mistake - issues go to the recording of conviction and/or sentence - appeal allowed.
LEGISLATION CITED :	Crimes (Appeal and Review) Act 2001 Motor Traffic Act 1909 Road Transport (Driver Licensing) Act 1998
CATEGORY :	Principal judgment
CASES CITED :	Bergin v Stack [1953] HCA 53; (1953) 88 CLR 248 He Kaw Teh v R [1985] HCA 43; (1985) 157 CLR 523 R v Vlahos [1975] 2 NSWLR 580
PARTIES :	Director of Public Prosecutions (Plaintiff) Lupe Kailahi (Defendant)
FILE NUMBER(S) :	SC 16189/2007
COUNSEL :	D C Frearson SC (Plaintiff) In person (Defendant)
SOLICITORS :	The Office of the Solicitor for Public Prosecutions (Plaintiff) In person (Defendant)

LOWER COURT JURISDICTION :	Local Court
LOWER COURT JUDICIAL OFFICER :	Brydon LCM
LOWER COURT DATE OF DECISION :	17 August 2007

**IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION**

ROTHMAN J

25 JULY 2008

16189/07 Director of Public Prosecutions v Kailahi

REASONS

1 **HIS HONOUR:** Ms Lupe Kailahi was charged with the offence of driving whilst disqualified from holding a licence. She was driving a motor vehicle at the time that she was stopped by police for the purpose of a random breath test. The test proved negative. At the time of the test, the police officer asked Ms Kailahi if she had her driver's licence with her, to which she replied in the negative. When asked if she actually held a driver's licence, she again answered in the negative.

2 Ms Kailahi was, at that time, subject to an order disqualifying her from driving. The order was apparently made in her absence and while she was overseas. She told the learned Magistrate, who believed her (as do I), that she was unaware of the disqualification. Ms Kailahi was charged with the currently relevant offence.

3 When the charge was heard, his Honour Magistrate Brydon dismissed the charge on the basis that the prosecutor had not proved that Ms Kailahi knew that she had been disqualified from driving. As a consequence of that absence of proof, the learned Magistrate held that the prosecutor had not discharged its onus. The learned Magistrate held that, in the case of a charge of driving whilst disqualified from holding a licence, a necessary element, which the prosecution was required to prove, was that the person charged was aware of the disqualification.

4 From that judgment, the Director of Public Prosecutions appeals pursuant to the terms of s 56 of the *Crimes (Appeal and Review) Act* 2001 and seeks orders quashing and/or setting aside the aforesaid dismissal of the charge.

The Offence

5 Section 25A(1)(a) of the *Road Transport (Driver Licensing) Act* 1998 is in the following terms:

“(1) A person who is disqualified by or under any Act from holding or obtaining a driver licence must not:

(a) drive a motor vehicle on a road or road related area during the period of disqualification, ...

Maximum penalty: 30 penalty units or imprisonment for 18 months or both (in the case of a first offence) or 50 penalty units or imprisonment for 2 years or both (in the case of a second or subsequent offence). ”

Mens Rea and Mistake

6 The offence of driving whilst disqualified (or permitting same) was discussed by the Court of Criminal Appeal in *R v Vlahos* [1975] 2 NSWLR 580. His Honour Chief Justice Street discussed the tests for determining whether mens rea must be proved as an ingredient of an offence and concluded that it was unnecessary for the Crown, or prosecuting authority, to prove mens rea to establish the offence in question (then a breach of s 7A of the *Motor Traffic Act* 1909).

7 While the presumption that mens rea is required is not easily displaced (*He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523), nothing in the recent adumbration of principle qualifies the application of the judgment in *Vlahos*. A fortiori, is that the case in circumstances where the provision, in identical terms, has been re-enacted after *Vlahos* and after *He Kaw Teh*.

8 The only other matter that requires attention is the question of whether there exists an honest and reasonable mistake of fact. That, too, is the subject of discussion in *Vlahos* and *He Kaw Teh*. In *He Kaw Teh*, the High Court clarified that, in statutory offences containing no mental element as an ingredient of the offence, except in the case of absolute liability, honest and reasonable mistake survives as a basis of exculpation. It is, notwithstanding common usage, strictly not a defence. Once raised by the accused upon evidence adduced, it is for the prosecuting authority to dispel any doubt that may have been raised by the evidence that the acts

performed were the result of an honest and reasonable mistake.

9 However, that does not mean that the mere fact that, in this case, the driver was unaware of the disqualification, is sufficient to raise reasonable and honest mistake. Mens rea, if it were to exist, for the offence of driving whilst disqualified, would be satisfied by an intention to do an act prohibited by the legislature. In this case, the prohibition is upon driving if, as a matter of fact, the driver be disqualified.

10 However, the defence of honest and reasonable mistake applies only in circumstances where, were the facts believed by the accused to be true, the accused would have been guilty of no offence: *Bergin v Stack* [1953] HCA 53; (1953) 88 CLR 248 (per Fullagar J).

11 In the instant proceedings, even if the Crown were required to negative honest and reasonable mistake as to the existence of a disqualification, such a requirement would only apply in circumstances where, but for the mistake of fact, Ms Kailahi would be entitled to drive. As Ms Kailahi concedes, and as is clear from the conversation with the police officer, Ms Kailahi was aware that she was unlicensed and not permitted to drive. As a consequence, the “mistake of fact”, if it be one, is a mistake as to which offence was being committed.

12 In those circumstances, it is unnecessary for the prosecuting authority to negative or preclude the existence of such a mistake, however reasonable or honest it be.

Comments

13 It should be made clear that the matters raised by the learned Magistrate below, while not providing a basis upon which the charge could be dismissed as not proved, do give rise to matters that the Magistrate is entitled to take into account in assessing whether to record a conviction for that offence, or in determining, if a conviction were recorded, what, if any, sentence should be imposed.

14 I should emphasise that Ms Kailahi, who was, and remains, self-represented, was not called upon before the learned Magistrate below and has not, in these proceedings, sought to put submissions to the contrary of the Director of Public Prosecutions. Further, at all stages, Ms Kailahi has not denied the factual circumstance that she did not have a licence at the time that she was driving the vehicle and that, as a matter of fact, albeit without her knowledge, there was a period of disqualification, which included the period during which this offence occurred. In those circumstances, the parties will bear their own costs of these proceedings.

15 For the foregoing reasons, the Court made orders in the following terms:

- (i) Pursuant to s 59(2)(a) of the *Crimes (Appeals and Review) Act* 2001, the order of his Honour Mr W Brydon, Magistrate, made at Burwood Local Court on 17 August 2007, dismissing a charge against the defendant of driving while disqualified from holding a licence: s

25A(1)(a) of the *Road Transport (Driver Licensing) Act 1998*, be set aside.

(ii) The matter be remitted to the Local Court to be dealt with in accordance with orders and reasons for judgment of this Court.

(iii) No order for costs.

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