SUPREME COURT OF QUEENSLAND

CITATION:	*Rasmussen v Sutton & Anor* [2002] QSC 157
PARTIES:	**JASON PETER RASMUSSEN** (applicant) **v** **J SUTTON** (first respondent) AND **MR BARRETT, MAGISTRATE** (second respondent)
FILE NO:	11196 of 2001
DIVISION:	Trial
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	7 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	24 May 2002
JUDGE:	Chesterman J
ORDER:	**1. That the application is dismissed.** **2. That the applicant pay the first respondent's costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW - NATURAL JUSTICE – where magistrate refused to set aside order disqualifying applicant from holding a driver licence – whether decision was in breach of natural justice ADMINISTRATIVE LAW – JUDICIAL REVIEW - NATURAL JUSTICE – where applicant pleaded guilty to charge of driving while disqualified – whether magistrate made error of fact *Evidence Act* 1977, s 53(1)(a) *Judicial Review Act* 1991, s, 43, s 548 *Justices Act* 1886, s 147A *Penalties & Sentences Act* 1992, s 188 *Transport Operations (Road Use Management) Act* 1995, s 78, s 150 *Transport Operations (Road Use Management – Driver Licensing) Regulation* 1999, s 24

Boyd v Sandercock ex parte Sandercock [1990] 2 Qd R 26, applied
McMasters v Foley [2001] QDC 54, distinguished
Meissner v Queen (1994-1995) 184 CLR 132, applied
R v Broadbent [1964] VR 733 at 735, considered
R v Chiron (1998) 1 NSWLR 218, cited
R v Murphy [1965] VR 187, cited
R v Rimmer [1972] 1 WLR 268, considered
R v Williams ex parte Biggs [1989] 1 Qd R 594, considered
Smith v Corrective Services Commission NSW) (1980) 147 CLR 134, considered
South Australia v Tanner (1988-1989) 166 CLR 161, cited
The Commonwealth v Tasmania (1983) 158 CLR 1, cited

COUNSEL: Mr P. Godsall for the applicant
Mr R. Jones for the first respondent
Mr J.P. Kooremon for the second respondent

SOLICITORS: Anne Murray & Co Solicitors for the applicant
Queensland Police Service Solicitor for the first respondent
Crown Solicitor for the second respondent

[1] **CHESTERMAN J:** The applicant obtained a driver's licence in about July of 1997 when he was 17 years of age. It was cancelled on 17 January 1998 because by then he had accumulated 8 demerit points for twice exceeding speed limits, (once in a built-up area) by more than 30 kilometres per hour. Nine days later he again drove at excessive speed. On this occasion the Magistrate's Court at Bundaberg disqualified him from holding or obtaining a driver's licence because of the fact that he had driven after his first licence had been cancelled. By June of 1999 he had obtained another licence but between then and January 2000 he had accumulated another 13 demerit points. On 21 March 2000 his driver's licence was again cancelled. Despite this, on 17 June 2000 he was apprehended driving a motor vehicle. On 5 July 2000 he pleaded guilty in the Magistrate's Court at Bundaberg to a charge of:

> ". . . Driving a motor vehicle . . . on a road . . . not being at that time the holder of a driver licence authorising him to drive that vehicle on that road and further . . . being a person to whom the provisions of subsection 3 of section 78 of the *Transport Operations (Road Use Management) Act* 1995 applied was disqualified from holding or obtaining a driver licence . . ."

The applicant was fined $600 and disqualified absolutely from holding or obtaining a driver's licence.

[2] Section 78 of the *Transport Operations (Road Use Management) Act* ("*TO Act*") provides that:

> "(1) A person shall not at any time drive a motor vehicle on a road unless . . . (he) is the holder of a driver licence . . .
>
> (2) . . .

(3) A person who is guilty of an offence against subsection (1) and who at the time of the commission of such offence is disqualified –

(a) by this Act;

(b) by an order made under this or any other Act;

from holding or obtaining a driver licence is liable to a penalty not exceeding 34 penalty units or to imprisonment for a term not exceeding 18 months.

(4) . . .

(5) Not withstanding that, at the time of the commission of an offence against subsection (1), the person who committed the offence is disqualified . . . from holding or obtaining a driver licence, the justices before whom the person is convicted . . . in addition to any other punishment they may impose . . . shall order that the person shall, on and from the date of the conviction, be disqualified absolutely from holding or obtaining a Queensland driver licence, and the person shall thereupon be so disqualified under and in accordance with that order."

[3] Section 24 of the *Transport Operations (Road Use Management – Driver Licensing) Regulation* 1999 ("the Regulation") provided the means by which the applicant was disqualified from holding or obtaining a driver licence. It provides:

24.(1) This section applies if—

(a) 4 or more demerit points are recorded on a person's traffic history; and

(b) the demerit points were allocated in a continuous 1 year period while the person held a learner or P type licence, but did not hold an open licence of another class; and

(c) the person holds a learner, P type or open licence.

(2) The person's licence is cancelled from the cancellation date.

(3) Also, the person is disqualified from holding or obtaining a Queensland driver licence for a period ending—

(a) if the licence is a learner, provisional, probationary or open licence —3 months after the return date; or

(b) if the licence is a restricted licence—

(i) 3 months after the return date; or

(ii) if the disqualification period imposed under section 86(5) of the Act expires more than 3 months after the return date—when the disqualification period imposed under the Act ends.

(4) However, if the licence was the first licence granted after another licence was cancelled under this section, the person is disqualified from holding or obtaining a Queensland driver licence for a period ending 6 months after the return date.

(5) The chief executive must, by written notice (a **"return notice"**)—

(a) inform the person that the person's licence is to be cancelled; and

(b) require the person—

(i) to return the person's licence to the chief executive in a specified way, and within a specified time of at least 14 days; or

(ii) if the person can not comply with subparagraph (i)—to give the chief executive, within the specified time, a statutory declaration stating why the person can not comply; and

(c) inform the person about section 29.

(6) The person must comply with the return notice, unless the person has a reasonable excuse.

Maximum penalty—20 penalty units.

That regulation was in force between December 2000 and December 2001. It has been replaced by Reprint No 2.

[4] When apprehended by police on 17 June 2000 the applicant admitted that:

> ". . . he had surrendered it to the Department of Transport office in Bundaberg and understood he was disqualified from holding or obtaining a driver's licence at that time. He had lost his licence due to demerit points."

It is apparent therefore that the applicant received the notice referred to in s 24(5) and returned his licence as required. The "return date" referred to in s 24(3) and (4) is presumably the day on which the person affected returns his licence in response to the notice.

[5] When he appeared before the magistrate on 5 July 2000 the applicant satisfied the conditions found in s 78(1), (3) and (5) of the *TO Act* as a result of the operation of s

24 of the Regulation which disqualified him from holding or obtaining a driver's licence for at least 3 months from 21 March 2000.

[6] On 6 April 2001 Judge Robertson gave judgment in an appeal, *McMasters v Foley* [2001] QDC 54 which cast doubt upon the validity of s 24 of the Regulation. On 15 October 2001 the applicant was advised of the decision by his solicitors whom he consulted on an unrelated matter. On 29 October 2001 the applicant sought, pursuant to s 147A of the *Justices Act* 1886 to reopen the proceedings against him which had been heard on 5 July 2000. The Magistrate's Court constituted by the second respondent extended time, entertained the application to reopen proceedings but refused to alter the order made on 5 July 2000.

[7] The applicant has applied for judicial review of the second respondent's refusal to set aside the order disqualifying him absolutely from holding or obtaining a driver licence.

Section 147A provides that:

> **147A.(1)** This section does not apply to an error in a sentence, or to an error consisting of a failure to impose a sentence, for which a court may reopen a proceeding under the *Penalties and Sentences Act* 1992, section 188.
>
> **(2)** Where justices record a conviction or make an order that is based on or contains an error of fact, those justices or any other justices may, on the application of a party to the proceedings or a clerk of the court reopen the proceedings and after giving the parties an opportunity of being heard, set aside the conviction or vacate or vary the order in either case to conform with the facts.
>
> **(3)** The powers conferred by subsection (2) include power to set aside a conviction or vacate or vary an order where the justices are satisfied that—
>
> (a) the conviction or order has been recorded or made against the wrong person;
>
> (b) the summons issued upon the complaint originating the proceedings that resulted in the conviction or order did not come to the knowledge of the defendant;
>
> (c) the defendant in the proceedings that resulted in the conviction or order has been previously convicted of the offence the subject of the complaint originating those proceedings; or
>
> (d) the conviction or order recorded or made against the person was incorrectly ordered or made because of someone's deceit.
>
> **(4)** The justices may, upon the hearing of an application pursuant to this section, take evidence orally or by affidavit.

> **(5)** An application pursuant to subsection (2) shall be made within 28 days after the date of the conviction or order or such further time as the justices allow upon application made at any time in that behalf.

[8] To understand the grounds advanced for judicial review it is necessary to set out the second respondent's reasons.

Having referred to the lateness of the application and the reasons for delay, and having granted an extension of time, his Worship said:

> "But I do not . . . enter into the merits either way of *McMasters v Foley*. . . I can say without referring particularly to the opinion . . . the chief magistrate has taken the matter of applications of this type to the Crown solicitor for opinion, and the opinion of the Crown solicitor is that decisions made by magistrates prior to . . . *McMasters v Foley* are determined according to the law before it is interpreted in a different manner and that was not grounds for reopening.
>
> While it is not conveying the same to the magistracy as a whole the chief magistrate is in possession of certain authorities by . . . the Crown solicitor.
>
> Perhaps they are the ones they refer to, perhaps they are additional matters but . . . the cases I refer to are in respect of the opening (of) proceedings under s 147A . . . The scope to do so is very limited and must be based on an error of fact and not on issues going to the merits of a case."

The magistrate then cited *R v Williams ex parte Biggs* [1989] 1 Qd R 594 and quoted from the judgment of Andrews CJ (with whom Connolly and Ryan JJ agreed) (599):

> "I cannot think that it was the intention of the legislature to permit a Clerk of the Court to be applying to have proceedings reopened on issues going to the merits of a matter."

Earlier the Chief Justice had said in relation to s 147A(2) that a reference to an error of fact was "a reference to the facts already before the court in the proceedings . . ."

[9] The second respondent also referred to *Boyd v Sandercock ex parte Sandercock* [1990] 2 Qd R 26 which held that a penalty was not contrary to law merely because the prosecution failed to prove a fact which would have led to a higher sentence being imposed. The appellant had been convicted of driving with a blood alcohol level in excess of the permissible limit. He was sentenced on the basis that he had no prior convictions but in fact he had one. Had it been disclosed to the court the appellant would have been liable to, and would probably have suffered, a harsher penalty. The mistake of fact was held not to justify a reopening of proceedings pursuant to s 147A. Thomas J who gave the judgment of the court said (29-30):

> ". . . The reference . . . is to facts already before the court in the proceedings on the complaint. . . . The section was not to be interpreted as authorising a rehearing of proceedings on their merits,

and that the limited scope of the examples set out in s 147A(3) pointed to the scope of errors intended to be covered in subsection (2) as being 'very limited'."

[10] The grounds for judicial review are:

"(a) There was a breach of natural justice in that the magistrate relied upon an opinion given by the Crown solicitor to the chief magistrate without disclosing its content to the parties or allowing them to make submissions about it.

(b) The decision not to reopen proceedings was an improper exercise of power because the magistrate

(i) took into account an irrelevant consideration i.e., 'cases dealing with the discovery of further information after a hearing which had no reference to the case before him where all facts were known'

(ii) failed to take a relevant consideration into account namely that the applicant had been sentenced to a penalty more severe than was permissible through a mistake 'in interpretation of law'

(iii) failed to take a relevant consideration into account in that a fellow magistrate had exercised his discretion favourably in the same circumstances

(iv) failed to take into account a relevant consideration namely 'the decision in *McMasters v Foley*'.

(c) There was an improper exercise of power in making a decision in reliance upon the opinion given to the chief magistrate without regard to the merits of the case.

(d) The decision not to reopen the proceedings was so unreasonable that no reasonable person would exercise power in that way.

[11] The four complaints set out at particulars of ground (b) can, I think, be ignored. Though couched in the language of judicial review they amount to an attack upon the correctness of the second respondent's reasons for refusing to reopen the proceedings. As such they are an attempt to appeal against that decision where there is no right of appeal to this court. Ground (b) is no more than an assertion that the second respondent misunderstood the import of the authorities to which he referred and failed to accord sufficient deference to *McMasters*. These matters go to the merits of the decision and not to the process by which it was made, which is the only legitimate scope of judicial review.

[12] The remaining grounds are two in number; that it was a breach of natural justice not to decide the application on the basis of an opinion not disclosed to the parties and that the decision was so unreasonable that no reasonable decision maker could have made it.

As I understood the argument, the basis of the second ground is that no reasonable magistrate determining an application pursuant to s 147A in the circumstances applicable to the applicant would not have followed and applied *McMasters* so as to

conclude that the applicant was not disqualified from holding a driver's licence on 17 June 2000 so that the order disqualifying him absolutely had no basis and was wrongly made.

I do not accept this submission for reasons which will become apparent later.

[13] The other ground appears more substantial. It would, I think, be a denial of natural justice had the second respondent refused the application on the basis of an opinion not disclosed to the parties so that the applicant had no chance to argue against it or to advance reasons why his application should succeed. Such conduct would also have amounted to an abdication of his responsibility to decide the application on its merits. On reading the second respondent's judgment as a whole it does not seem that, in fact, he did act upon the opinion. The second respondent made it clear that he had not been supplied with a copy of the opinion, nor the names of the authorities it referred to, but had been told that the Crown solicitor had advised *McMasters* did not have the effect the applicant contended for. He then wondered whether the Crown solicitor had come to that opinion by a consideration of *Williams* and *Biggs* which he thought determined the principles applicable to the application to reopen proceedings. The second respondent was, in effect, saying:

> "Contrary to the submissions by the applicant there is an opinion that *McMasters* does not affect complaints based upon s 24 of the regulations determined prior to April 2001. I have not seen the opinion and do not know the basis for it, but it may be the cases, *Williams* and *Biggs*, which establish the principles governing an application to reopen proceedings."

[14] So construed the second respondent did not determine the application adversely to the applicant on the basis of materials concealed from him. I am not satisfied there has been a denial of natural justice, nor a failure to make his own decision. He determined the application by reference to the principles he thought applicable which he discerned from the relevant authorities.

[15] It cannot be said that the second respondent's decision was unreasonable in the relevant sense, or indeed in any sense. I do not think he can be criticised for not regarding *McMasters* as correct and as binding on him.

[16] The facts in *McMasters* were that the driver concerned was the holder of a learner's permit who had accumulated more than four demerit points in her traffic history. She had not, however, received the notice referred to in s 24(5) of the Regulation and had not returned her licence to the chief executive. It was therefore held that s 24(3) had no application because there being no "return date" there could be no identification of the period during which the driver was disqualified from holding or obtaining another licence. The period would have no commencement date. The magistrate, and on appeal, Judge Robertson, held that the regulation should not be construed liberally in favour of imposing disqualification where the conditions specified had not been exactly satisfied. Judge Robertson declined to hold that the driver was "deemed to be disqualified" because she had not complied with a notice she had not received. His Honour referred to *Smith v Corrective Services Commission (NSW)* (1980) 147 CLR 134:

> "Section 78(3) (of the *TO Act*) is a penal provision . . . therefore any ambiguity in construction is to be resolved in favour of the person accused."

The real point, perhaps, may have been whether s 24(3) of the Regulation was a penal provision. It is that provision which establishes the means by which a person may be disqualified from holding or obtaining a driver licence. It may, I think, be doubted whether a regulation designed to remove from the roads irresponsible drivers for a time in the interests of public safety, is properly to be regarded as a penal statute. Whatever the answer to that question the fact is that the doubts which attended the applicability of s 24(3) in *McMasters* do not exist in the applicant's case. There is no question that he received the notice and returned his licence so that the regulation could operate according to its plain terms. There is also no doubt that he drove while in the specified period of disqualification.

[17] Judge Robertson advanced the further opinion that the regulation was invalid. That opinion was an *obiter dictum* and not binding upon the second respondent who should not be regarded as having acted unreasonably in declining to act in accordance with it. With respect, his Honour's reason for believing the regulation is invalid is unconvincing. Section 150 of the *TO Act* is the relevant regulation making power. It provides:

> "A regulation may prescribe rules about the management of drivers including for example –
>
> (a) . . .
> (b) . . .
> (c) rules about licences, including, in particular, the circumstances in which, and the reasons for which, they can be cancelled or suspended or conditions imposed on them;
> (d) . . ."

It is important to the reasoning that the section did not refer to the topic of "disqualification" so that:

> "To the extent that s 24(3) sets out to impose a disqualification of a type referred to in s 78.3 of the Act . . . is not a valid exercise of the regulation making power . . ."

[18] I would myself doubt the validity of the reasoning and understand why the second respondent might do likewise. "Disqualification" is not a separate topic from the "cancellation" or "suspension" of driver licences. When a licence is cancelled the former holder is not permitted to drive a motor vehicle on a public road. The length of time which must expire before the person may again become the holder of a licence is part of the topic of "the management of drivers" and indeed of cancellation of licences. To say the person is disqualified from holding or obtaining a licence is to say no more than his licence has been cancelled and he may not, for the period of the disqualification, obtain another one. Without such a provision the cancelling of licences would be ineffective as a means of managing drivers. One whose licence was cancelled could immediately reapply for another.

[19] Whether a regulation is within the scope of the power to make regulations conferred by an Act depends upon whether it is reasonably proportionate to the pursuit of the enabling purpose. per Deane J in *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 260 approved in *South Australia v Tanner* (1988-1989) 166 CLR 161 at 165. It is not enough that the court thinks the regulation is expedient or misguided. It must be so lacking in reasonable proportionality as not to be a real exercise of the power: *Tanner* at 168. Fixing a period for which the cancellation of a licence is to be

effective is reasonably proportionate for the purpose of managing drivers whose conduct is a danger to the public.

[20] Section 48 of the *Judicial Review Act* 1991 provides that the court may, on its own motion, stay or dismiss an application under s 43 if the court considers that it would be inappropriate for proceedings to continue. The application is brought pursuant to s 43. It is inappropriate that the application for judicial review should continue because the attack upon the second respondent's decision is doomed to fail. The conviction of 5 July 2000 and the orders made pursuant to it cannot be said to be based on or to contain any error of fact, because the applicant pleaded guilty to the charge. His contention that the circumstance of aggravation, that he drove whilst disqualified from holding or obtaining a licence, was wrong in that it could not be proved against him is answered by his formal acceptance, by his plea of guilty, of all the ingredients of the complaint formally served upon him which brought him to the court. According to the Full Court of the Supreme Court of Victoria, *R v Broadbent* [1964] VR 733 at 735:

> "A plea of guilty at a trial upon an arraignment has a two-fold significance. First, it is a formal and conclusive admission by the accused of the offence charged in the indictment to which he pleads guilty. Its second significance is that a plea of guilty dispenses with the necessity for the Crown proving the facts essential to establish his guilt of the charge to which he has so pleaded."

I do not understand the principle to be limited to a plea of guilty to an indictment. In *R v Rimmer* [1972] 1 WLR 268 the Court of Appeal, dealing with a plea of guilty before magistrates, said (271):

> ". . . a plea of guilty has two effects: First of all it is a confession of fact; secondly it is such a confession that without further evidence the court is entitled to and indeed in all proper circumstances will so act upon it that it results in a conviction."

[21] In *Meissner v Queen* (1994-1995) 184 CLR 132 the High Court determined an appeal against a conviction for attempting to pervert the course of justice by improperly endeavouring to influence an alleged perjurer to plead guilty before a magistrate's court. Brennan, Toohey and McHugh JJ said in a joint judgment (141):

> "A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. . . . A court will act on a plea of guilty when it is entered in open court by a person who is a full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even the person entering it is not in truth guilty of the offence."

[22] To the same effect Dawson J said (157):

> ". . . a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence . . . the entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the

> basis of such a plea would not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."

[23] Once a plea of guilty is accepted it becomes a judgment, a matter of record, and is conclusive proof of the accused's guilt of the offence of which he was convicted. He may not afterwards in other proceedings deny the conviction. This is the view of the authors of *Cross on Evidence* Australian edition para 5135. It seems also to be the effect of s 53(1)(a) of the *Evidence Act* 1977. It seems correct as a matter of principle. It must follow that the applicant cannot dispute he committed the acts which constitute the essential elements of the charge to which he pleaded guilty. Relevantly he cannot dispute that he drove a motor vehicle while not holding a relevant driver licence and during a period when he was disqualified from holding or obtaining a driver licence. There is no doubt the offence is one known to the law. The applicant contests only the means by which he became disqualified. He admitted, however, that he was disqualified. He could not, on the application to reopen proceedings, contest these facts implicit in his plea, or ask the court to punish him anew on the basis that he was not disqualified. It does not matter, as *Meissner* shows that he may not, in truth, have been guilty.

[24] The applicant has never applied to withdraw his plea of guilty. Nor has he sought to have his conviction set aside notwithstanding his guilty plea. Such a course will only be allowed in the circumstances described in *Meissner*. See also *R v Chiron* (198) 1 NSWLR 218 especially the (dissenting) judgment of Lee J and *R v Murphy* [1965] VR 187.

[25] In my opinion it was impossible for the applicant to demonstrate that he was dealt with on the basis of some error of fact when he is precluded from disputing the basic facts essential to his conviction.

[26] It should also be mentioned that the applicant complained that the second respondent had not considered the effect of s 188 of the *Penalties and Sentences Act* 1992 in rejecting his application to reopen proceedings. The short answer is that the second respondent was not asked to consider an application under that section. The transcript of proceedings make it clear that the second respondent was asked only to exercise power under the *Justices Act*.

[27] In summary the applicant has not made out his grounds for judicial review and, in any event, his application to the second respondent to reopen proceedings was doomed to fail by reason of his plea and conviction of the offence, including the circumstance of aggravation. The application should be dismissed with costs to be assessed on the standard basis.