

29/01; [2001] VSCA 160

SUPREME COURT OF VICTORIA — COURT OF APPEAL

VENEZIA v MARSHALL

Brooking, Charles and Chernov JJ A

17 September 2001 — (2001) 34 MVR 445; (2001) 120 A Crim R 596

MOTOR TRAFFIC – DRINK/DRIVING – APPEAL AGAINST DECISION OF JUDGE UPHOLDING MAGISTRATE'S DECISION – POINT TAKEN ON APPEAL HOPELESS – SUCH POINTS TO BE DEALT WITH FIRMLY BY COURTS – APPEAL DISMISSED.

Lawyers are not to be discouraged from raising points that can, on any fair view, be described as arguable, But they owe a duty to the Court not to raise and argue manifestly hopeless points. The point taken by V. was a hopeless one. In *Venezia v Marshall* [2001] VSC 87; (2001) 33 MVR 269 MC28/01, Gillard J dealt with the matter correctly. Magistrates, masters and judges must deal firmly with hopeless points.

BROOKING JA (delivering the judgment of the Court):

1. Late last week the appellant's solicitor told the Court that this appeal would be discontinued because the appellant had not put him in funds or given security for his costs. In fact, notice of discontinuance has not been given, no doubt because the Court said in response that it would list the appeal for hearing today and possibly make an order under the Rules of Court that the appeal be not taken to be discontinued.

2. We desired the appeal to be listed for hearing for three reasons. In the first place we wished to say something about the impropriety of taking manifestly hopeless points. In the second place we wished to consider whether we should make a special order for costs against the appellant, more severe than the normal consequence of discontinuance. In the third place we wished to say something about the position of legal practitioners where plainly hopeless cases are launched and proceeded with.

3. The appellant's solicitor tells us – and we accept – that he was advised by counsel that the point raised by this appeal was a good arguable one. In these circumstances he cannot be said to have knowingly launched and prosecuted an appeal that should never have been brought. A feature of this case is that the appellant has succeeded in obtaining at least four stays of the order cancelling his licence and disqualifying him from obtaining another. While we entirely acquit the appellant's solicitor himself of any improper conduct, the circumstances in which stays were obtained in this case raise some disquiet, for reasons canvassed in argument.

4. The appeal procedure is not to be used as a means of buying time. Lawyers are not to be discouraged from raising points that can, on any fair view, be described as arguable. But they owe a duty to the Court not to raise and argue manifestly hopeless points.

5. Only a few weeks ago this Court remarked on the taking of technical points by motorists who insist on driving when they have had too much to drink: *Sher v DPP* [2001] VSCA 110; (2001) 34 MVR 153; (2001) 120 A Crim R 585. The appellant, Francesco Venezia of Beaumaris, a manager, is one of those motorists. He was intercepted by police in his four-wheel drive on Friday 17 December 1999 after a sojourn in the Mentone Hotel with a friend. One thing led to another, a preliminary breath test being followed by a further test at Moorabbin Police Station, which was itself followed by a .05 charge, a charge based on the recorded result of his breath analysis and a speeding charge. He was convicted in the Magistrates' Court at Frankston on the second and third charges and the first was therefore withdrawn. The second charge was under s49(1)(f) of the *Road Safety Act* 1986, all too familiar, we are afraid, to need to be set out.

6. The point taken by Mr Venezia – a hopeless one – is simply this: the breath analysing machine records the suspect's date of birth; only two digits can be keyed in for the year; the operator, Senior Constable Poppeliers, keyed in "19" and so the date of birth came out as "20-07-19"; he picked up

his pen and wrote "55" after "19" on the printed out certificate, so as to give Mr Venezia's correct date of birth – he was 44, not 80 – and initialled his handwritten addition. And so, approaching two years after Mr Venezia set off from the Mentone Hotel, we are here today with a further appeal launched against the certificate conviction.

7. A Master made an order under s92 of the *Magistrates' Court Act 1989* – really we do not think he should have done so, for there was no *prima facie* case of error. The appeal so launched was disposed of very satisfactorily by Gillard J on 2 April last, and that ought to have been more than enough. In the meantime, the case has occupied another Master on an application to file an amended notice of appeal and there has been a stay application to Balmford J. Now we have the appeal from the order of Gillard J.

8. The point – none the better for being stated, as it is, in a number of different ways – is that the certificate was not admissible because the addition to it by Senior Constable Poppeliers of "55" and his initials meant that somehow it suddenly stopped being "a document purporting to be a certificate containing the prescribed particulars produced by a breath analysing instrument ... " within the meaning of s58(2) of this Act under which idle points like this continue to be raised. Gillard J has provided the answers to this contention and no more need be said about it. Magistrates, masters and judges must deal firmly with hopeless points of this kind.

9. A calculation will have to be made of the total period of the undeserved stay which Mr Venezia has enjoyed, to ensure that he suffers the full period of his licence disqualification. The four stays of which we are aware are that obtained in the Magistrates' Court, that granted by the Master, that granted by Gillard J and that granted by Balmford J.

10. The appeal is dismissed with costs, including costs reserved, all on an indemnity basis. The appellant has not yet paid and must now pay the hearing fee for today.

APPEARANCES: For the Appellant Venezia. Mr JT Stevens, solicitor. For the Respondent Marshall: Mr A Castle, counsel. Ms Kay Robertson, Solicitor for Public Prosecutions.