

05/11; [2011] VSC 142

SUPREME COURT OF VICTORIA

SHERMAN v ROADS CORPORATION & ANOR

Whelan J

11, 12 April 2011

ADMINISTRATIVE LAW – ROAD SAFETY ACT DEMERIT POINTS – THIRTEEN DEMERIT POINTS ACCRUED BY DRIVER – SECTION 26AA APPEAL TO MAGISTRATES’ COURT – APPEAL NOT A CRIMINAL PROCEEDING – POWER TO ORDER REHEARING AFTER NON-APPEARANCE – WHETHER ROADS CORPORATION A PARTY TO THE APPEAL HEARING – WHETHER ANY GROUNDS EXISTED TO ALLOW THE APPEAL AGAINST SUSPENSION: MAGISTRATES’ COURT ACT 1989, S100(2); 110; ROAD SAFETY ACT 1986, SS25(1), 26AA.

S. incurred 13 demerit points in a three-year period and the Roads Corporation served a specified notice on S. giving him the option of extending the demerit point period or if that option was not exercised, the Corporation would suspend his driver licence for a specified period. Thirteen days after S. was served with the notice, he applied for a rehearing of the offence which resulted in S. incurring two demerit points. The rehearing application was refused and S. then appealed unsuccessfully to the County Court. S. appealed the driver licence suspension to the Magistrates’ Court which was allowed. The Roads Corporation was not served with a copy of the appeal and subsequently applied for a rehearing of the appeal which was granted. Upon an application seeking judicial review, S. submitted that the Roads Corporation was not a party to the appeal and that the decision to suspend his licence was erroneous.

HELD: Application by originating motion dismissed.

1. In relation to the submission that there was no jurisdiction to make this order and that it was an error of law on the face of the record S. submitted that the appeal under s26AA of the *Road Safety Act 1986* was not a proceeding within either the civil or criminal jurisdiction of the Magistrates’ Court but rather was a proceeding standing apart from the provisions of the *Magistrates’ Court Act* dealing with such proceedings.

2. S110 of the *Magistrates’ Court Act 1989* ('Act') applied to this proceeding. It is clear that the appeal was not a criminal proceeding and could be appropriately described as a civil proceeding in the context. Section 100 of the Act is not determinative of the issue even if it does operate as S. suggested. It would be extraordinary if there were no power to rehear a matter determined in the absence of a party.

3. In relation to the submission that the Roads Corporation was not a party to an appeal under s26AA of the *Road Safety Act* and that the Corporation had no power to seek a rehearing, that submission was rejected. The Roads Corporation is obviously a necessary and proper party to an appeal under s26AA. The Roads Corporation (called “Vic Roads”) was named by S. as a respondent to his appeal.

4. Accepting that an appeal to the County Court did not operate as a stay upon the conviction for the 15 February 2009 offence it was also clear on 14 September 2010 when the appeal under s26AA was dismissed, that S. did incur 13 demerit points during the relevant period. Accordingly, there is no basis in law for requiring the Roads Corporation to now alter their records in that respect. [See [2011] VSCA; MC18/2011, for result of appeal to the Court of Appeal]

WHELAN J:**Introduction**

1. By an originating motion dated 22 September 2010 the plaintiff, who appears in person, seeks “judicial review ... pursuant to the provisions of Order 56” of three orders made by the Magistrates’ Court of Victoria, being orders made on 15 March, 23 August and 14 September 2010, and of “the decisions, omissions and determinations made by the Roads Corporation”. Apart from orders concerning stays and extensions of time, the originating motion seeks orders “quashing all determinations and orders of the second defendant [the Magistrates’ Court] made 15/03/10, 23/08/10 and 14/09/10”, and orders “mandating both defendants [the Magistrates’ Court and the Roads Corporation] to correct their record, with respect to the plaintiff, according to law”.

2. The orders of the Magistrates' Court and the decisions of the Roads Corporation in relation to which relief is sought all concern demerit points in relation to the plaintiff under the *Road Safety Act* 1986. The orders of the Magistrates' Court which are complained of were purportedly made in relation to an appeal by the plaintiff concerning his demerit points under s26AA of that Act.

3. There is no appeal under s109 of the *Magistrates' Court Act* 1989. Indeed, one of the submissions made by the plaintiff is that the proceeding in the Magistrates' Court was not a civil proceeding. No submission was made that the application under Order 56 ought not to be entertained for the reasons given in *Kuek v Victoria Legal Aid & Anor*.^[1]

4. Against the Magistrates' Court, the relief sought is in the nature of *certiorari*. Such relief will only be granted for jurisdictional error, want of procedural fairness, fraud, or error of law on the face of the record.^[2] The precise grounds upon which that relief is sought are not entirely clear, but, as I apprehended it, it is said that there was jurisdictional error and error of law on the face of the record.

5. It seems to me that the relief sought against the Roads Corporation is in the nature of mandamus compelling the Roads Corporation to correct their records. The correction that would need to be made would be the removal of certain points from the record in relation to a particular period. The ground upon which that relief is sought, as I understand it, is that the correction is required by the provisions of the *Road Safety Act* and the Regulations made thereunder.

6. The above is the best articulation I can give of the plaintiff's claim. The documents filed are not clear, and, in relation to the Roads Corporation, are expressed in very broad terms, but that articulation reflects the way the matter was argued before me.

7. Thus, the issues to be determined are whether the plaintiff can demonstrate jurisdictional error or error of law on the face of the record in relation to the Magistrates' Court orders of 15 March, 23 August and 14 September 2010, and whether he can demonstrate that the provisions of the *Road Safety Act* and the Regulations are such as to mandate correction by the Roads Corporation of its records.

The sequence of events and the relevant legislation

8. Under the *Road Safety Act* the Roads Corporation must keep a demerits register (s25(1)). The Corporation is required to record demerit points in that register in the manner prescribed (s25(2)). If the holder of a full driver's licence incurs 12 or more demerit points in any three year period then the Corporation is required to serve a specified notice (s25(3)(a)). The notice gives the person receiving it the option to extend the demerit point period, but if that option is not exercised the Corporation must suspend the person's driver's licence for a specified period (s25(3D)).

9. There is a limited right of appeal from such a suspension. Under s26AA of the *Road Safety Act*, the holder of the driver's licence may appeal the suspension to the Magistrates' Court. Such an appeal can only be on one or both of two specified grounds, which are that the Corporation recorded demerit points other than as required by the Regulations, or that an error had been made in the addition of the number of the demerit points incurred in a relevant period (s26AA(2)). A notice of appeal stays the suspension until the appeal is determined (s26AA(3)).

10. On 17 November 2009 the Roads Corporation gave Mr Sherman a notice containing the prescribed particulars. As at that date Mr Sherman was properly recorded as having incurred 13 demerit points. Two of those points were in relation to an offence on 15 February 2009 of making an improper turn at an intersection.

11. On 30 November 2009 Mr Sherman applied for a rehearing in the Magistrates' Court in relation to the 15 February 2009 offence. There is no evidence as to when, or whether, that application was notified to the Roads Corporation. Mr Sherman told me he did not notify the Roads Corporation of it. He submitted that it was the Court's duty to notify the Roads Corporation.

12. On 29 December 2009 the Roads Corporation suspended Mr Sherman's licence pursuant to s25(3D) of the *Road Safety Act*.

13. On 5 January 2010 Mr Sherman appealed under s26AA of the *Road Safety Act*. His notice of appeal named as a respondent “Vic Roads”. The ground of appeal was: “That an error has been made in the addition of the number of demerit points incurred by the appellant in a relevant period”.

14. At some point prior to 11 January 2010 the Roads Corporation became aware of the application to rehear the 15 February 2009 offence. In submissions I was told by counsel for the Roads Corporation that it took the view that, as s93 of the *Magistrates’ Court Act* was still operative then, it was arguably required to remove the two demerit points referable to the 15 February 2009 offence from the records, and it did so.

15. On 1 February 2010 an order was made by the Magistrates’ Court at Moorabbin allowing Mr Sherman’s appeal. There was no appearance on behalf of the Roads Corporation. A reason for the non-appearance was given in the submissions but there was no evidence about that.

16. On 15 March 2010 the Roads Corporation sought and was granted a rehearing of the appeal. This is the first order of which Mr Sherman complains.

17. The rehearing of the appeal was adjourned on two occasions; first on 3 May 2010, and again on 23 August 2010. The 23 August adjournment is the second order of which Mr Sherman complains.

18. The appeal was eventually reheard on 14 September 2010. By then, Mr Sherman’s rehearing of the 15 February 2009 offence had been held. On 7 June 2010 he had been convicted of that offence on that rehearing. He appealed that conviction to the County Court on 15 June 2010. As at 14 September 2010 that County Court appeal had not been dealt with. The County Court appeal was subsequently dismissed.

19. The record of what occurred on 14 September 2010 relevantly reads as follows:

“Dismissed. Merits of the case.

Special conditions: Taking into account S264 of the *Criminal Procedure Act* and Regulation 73 of the *Road (Drivers) Safety Regulations* and the obligations placed on the Corporation to record the points the appeal is dismissed.”

This is the final order of which Mr Sherman complains.

20. Costs orders were made against Mr Sherman on the adjournment on 23 August 2010 and on the dismissal on 14 September 2010.

The orders made 15 March 2010 and 23 August 2010

21. Most of the attention in the course of submissions concerned the order for a rehearing of the s26AA appeal made on 15 March 2010. In his written submissions the plaintiff described this order as the “hinge” of his complaints.

22. Mr Sherman submits that there was no jurisdiction to make this order and that the making of the order was an error of law on the face of the record. He submitted that the appeal under s26AA was not a proceeding within either the civil or criminal jurisdiction of the Magistrates’ Court but rather was a proceeding standing apart from the provisions of the *Magistrates’ Court Act* dealing with such proceedings. Thus, he submitted that the power to order a rehearing in s110 of the *Magistrates’ Court Act* did not apply. In support of that submission he made reference to the provisions of s100 of the *Magistrates’ Court Act* and in particular to s100(2). His submission was that s100(2) was a limitation only upon the civil jurisdiction of the Magistrates’ Court and that, given that limitation, appeals under s26AA of the *Road Safety Act* could not be governed by Part 5 of the *Magistrates’ Court Act*, where s110 appears.

23. On behalf of the Roads Corporation it was submitted that proceedings in the Magistrates’ Court must be either criminal or civil and, it being clear that this was not a criminal proceeding, Part 5 did apply. It was submitted that the appeal under s26AA fell within s110 of the *Magistrates’ Court Act*. It was submitted that s100(2) was a provision designed to make it clear that the

Magistrates' Court did not have the sort of jurisdiction which this Court exercises under Order 56 and similar such jurisdiction and that it was of no relevance to s110.

24. My conclusion is that s110 did apply to this proceeding. It is clear that the appeal is not a criminal proceeding. It can be appropriately described as a civil proceeding in the context. Section 100 is not determinative of the issue even if it does operate as Mr Sherman suggests, which I do not accept. It would be extraordinary if there were no power to rehear a matter determined in the absence of a party.

25. Once it is accepted that there was jurisdiction to order a rehearing there is no further basis for complaint in relation to the order that was made. There is no further error on the face of the record. Further, there is then no basis for complaint in relation to the order of 23 August 2010 pursuant to which the ordered rehearing was adjourned.

Order made 14 September 2010

26. In relation to the order made 14 September 2010 the material before me does not establish any jurisdictional error or any error on the face of the record.

27. The record of the order made 14 September 2010 addresses in terms only one issue, which is the operation of s264 of the *Criminal Procedure Act* 2009 and Regulation 73 of the *Road Safety (Drivers) Regulations* 2009. This concerns the issue of whether the appeal to the County Court in relation to the 15 February 2009 offence operated as a stay on the conviction. Before me Mr Sherman maintained that he did not contend, and had never contended, that it did have that operation and that that was not an issue which he had raised or which he seeks to raise now. Once that matter is put to one side, the record merely records that the appeal was dismissed. Mr Sherman has not demonstrated any error on the face of that record.

Decisions of the Roads Corporation

28. In relation to the decisions of the Roads Corporation Mr Sherman's position, as articulated before me, was that two decisions of the Roads Corporation were made which were erroneous in law. The first was the decision to apply for a rehearing, and the second was the decision, or decisions, in late 2009 concerning his licence suspension.

29. In relation to the first matter it was submitted that the Roads Corporation is not a party to an appeal under s26AA of the *Road Safety Act* and that the Corporation had no power to seek a rehearing. I reject this submission. The Roads Corporation is obviously a necessary and proper party to an appeal under s26AA. The Roads Corporation (called "Vic Roads") was named by Mr Sherman as a respondent to his appeal.

30. In relation to the decisions made concerning his licence, the originating motion was expressed in very wide terms which did not address any specific decision. Mr Sherman's affidavit and his written submissions suggested that the relevant decision was one made on 17 November 2009. This is the date of the notice. In the course of oral argument, it seemed to me that (at one point at least) Mr Sherman conceded that the notice itself was properly given based on the record as it stood at that time. In any event, whether that matter was conceded or not, my conclusion is that there could be no warrant for directing any correction of the record as at 17 November 2009.

31. The Roads Corporation was required by s25(3D)(b) of the *Road Safety Act* to suspend Mr Sherman's licence because a valid notice of 17 November 2009 had been given to him and he had not taken the option of extending the demerit period. Once he appealed, however, s26AA(3) operated to stay that suspension.

32. Because of the view the Roads Corporation took of s93 of the *Magistrates Court Act*, the Roads Corporation in fact removed two of Mr Sherman's points on 11 January 2010. Mr Sherman submitted that that was the proper course for it to follow. His submission was that, that having been done, the record could never again record those two points, or at least could never record them in relation to the period which was the subject of the notice on 17 November 2009. That period was 28 February 2008 to 5 March 2009. He made these submissions by reference to what he submitted was a "cycle" of steps which had to be taken under the relevant provisions of the Act and the Regulations.

33. It is now clear, and, accepting that an appeal to the County Court did not operate as a stay upon the conviction for the 15 February 2009 offence it was also clear on 14 September 2010 when the appeal under s26AA was dismissed, that Mr Sherman did incur 13 demerit points during the period 28 February 2008 to 9 March 2009. I cannot see any basis in law for requiring the Roads Corporation to now alter their records in that respect. Indeed, if the order sought by Mr Sherman were made the Roads Corporation would be required to inaccurately record the points incurred by Mr Sherman during that period.

Other issues

34. Mr Sherman's application insofar as it concerns the order made 15 March 2010 and the Roads Corporation decisions in late 2009 is out of time (Rule 56.02(1)). Time can only be extended in special circumstances (Rule 56.02(3)). Counsel for the Roads Corporation accepted that an assessment of the merits could be taken into account, notwithstanding some conflict in the authorities on that issue. The matter was fully argued. Mr Sherman was within time in relation to what might be seen as the culminating order dismissing his s26AA appeal on 14 September 2010. Given that he is within time in relation to that order, I consider that time should be extended to enable all his related complaints to be dealt with.

35. Mr Sherman relied in his submissions on the Charter of Human Rights and Responsibilities Act 2006. My conclusion is that the Charter does not in any relevant respect advance his position.

Conclusion

36. Mr Sherman has failed to establish that he is entitled to the relief claimed. I order that time is extended to 22 September 2010 insofar as it is necessary to do, and that his application by originating motion is otherwise dismissed.

[1] [2001] VSCA 80; (2001) 3 VR 289.

[2] *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 174-5; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.

APPEARANCES: For the plaintiff Sherman: In person. For the defendant Roads Corporation: PG Priest QC and MGK Madder, counsel. DLA Phillips Fox, solicitors.
