18/11; [2011] VSCA 149

SUPREME COURT OF VICTORIA — COURT OF APPEAL

SHERMAN v ROADS CORPORATION & ANOR

Mandie JA and Almond AJA

13, 26 May 2011

PRACTICE AND PROCEDURE – APPLICATION BY APPELLANT FOR STAY ON SUSPENSION OF DRIVER LICENCE PENDING DETERMINATION OF APPEAL – APPLICATION BY FIRST RESPONDENT FOR SUMMARY DISMISSAL OF APPEAL ON BASIS THAT APPEAL HAD NO PROSPECT OF SUCCESS – MAGISTRATES' COURT HAD REHEARD AND DISMISSED APPELLANT'S APPEAL UNDER S26AA OF THE *ROAD SAFETY ACT* 1986 (VIC) AGAINST HIS DRIVER LICENCE SUSPENSION – APPELLANT'S APPLICATION TO SUPREME COURT FOR JUDICIAL REVIEW DISMISSED – APPELLANT APPEALED TO COURT OF APPEAL – WHETHER ROADS CORPORATION A PROPER PARTY TO AN APPEAL UNDER S26AA OF THE *ROAD SAFETY ACT* – WHETHER MAGISTRATES' COURT HAD POWER TO REHEAR AN APPEAL UNDER S26AA OF THE *ROAD SAFETY ACT* EITHER PURSUANT TO S110 OF THE *MAGISTRATES' COURT ACT* 1989 OR BY VIRTUE OF INHERENT POWER TO SET ASIDE ORDERS MADE IN THE ABSENCE OF A PARTY: *MAGISTRATES' COURT ACT* 1989, SS100(1)(d), 110; *ROAD SAFETY ACT* 1986, S26AA.

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. The key issue considered by the Court was whether the Magistrates' Court had power in the circumstances to hear the appeal under s26AA of the *Road Safety Act* 1986 ('Act'). The Judge (Whelan J) decided that the Magistrates' Court did have such power and the application for an originating motion was dismissed: see MC 05/2011; [2001] VSC 142). Upon appeal—

HELD: Appeal dismissed.

1. In relation to a preliminary point raised by S., namely, that the Corporation was not a necessary or proper party to a s26AA appeal and had no standing to seek a rehearing (or indeed to appear) in this proceeding or appeal, this contention was rejected. It was obvious that the Corporation was entitled to appear and to dispute the grounds of appeal (albeit somewhat limited) set out in s26AA of the Act. This was confirmed by the provision requiring service on the Corporation not less than 14 days before the hearing date. The argument that the Corporation was not a proper party to such an appeal was without foundation.

2. In relation to the question whether the Magistrates' Court had power to rehear S.'s appeal pursuant to s26AA of the Act, it was open to characterise a s26AA appeal as a 'cause of action' under statute within the meaning of s100(1)(d) of the *Magistrates' Court Act* 1989. However, the contrary was arguable whereby it could not be said that S. had no prospect of succeeding in his submission.

3. It was submitted that even if the Magistrates' Court had no power to rehear the s26AA appeal under s110 of the *Magistrates' Court Act* 1989, the Magistrates' Court had an inherent discretionary power to set aside an order made in the absence of a party and to rehear the matter the subject of that order.

***Taylor v Taylor* [1979] HCA 38; (1979) 143 CLR 1; (1979) 25 ALR 418; [1979] FLC 90-674; (1979) 53 ALJR 629; 5 Fam LR 289; and**

***Cameron v Cole* [1944] HCA 5; (1944) 68 CLR 571; [1944] ALR 130; 13 ABC 141; (1944) 17 ALJR, referred to**

4. It was inconceivable that the Magistrates' Court did not have a discretion to rehear a s26AA appeal decided in the absence of the Corporation pursuant to an inherent jurisdiction or power to do so. Accordingly, S.'s principal argument had no prospect of success.

5. At the time of the s26AA appeal that took place in the absence of the Corporation on 1 February 2010, the suspension of S.'s driver licence was in existence, albeit stayed pending the result of that

appeal. The consequence of the appeal being allowed was that the suspension was set aside. However the necessary consequence of the grant of a rehearing of that appeal was that the 'allowing of the appeal' by the Magistrates' Court was itself set aside by virtue of the order for a rehearing. This had the additional consequence of reviving the suspension, although it remained stayed pending the result of the rehearing of the appeal. S.'s argument that there was no valid suspension because of the missing two points was no more valid in relation to the rehearing of the appeal than it was in relation to the initial hearing of the appeal. The argument that the addition of the points was incorrect remained to be determined once a rehearing of the appeal was granted. By the time that determination came to be made, S.'s conviction had had the effect that the said two points were taken to have been properly incurred and there was no longer any basis for challenging the suspension.

MANDIE JA:

Introduction

1. The appellant's driver licence was suspended by the first respondent, the Roads Corporation ('the Corporation'), pursuant to the Corporation's statutory obligations and powers under the *Road Safety Act* 1986 (Vic) on the basis of the number of demerit points that the appellant had accumulated within a three year period. The appellant appealed against the suspension pursuant to s26AA of the *Road Safety Act*. The Corporation did not appear on the appeal and the appellant succeeded on the appeal in the Corporation's absence with the result that the suspension was no longer in force. However, the Corporation sought and obtained a rehearing of the appeal and this time it was dismissed by the magistrate, the result being that the suspension became effective again.

2. The appellant brought proceedings by way of judicial review under O56 of the *Supreme Court Rules* seeking *inter alia* to quash the dismissal of his appeal in the Magistrates' Court. A judge in the Trial Division dismissed the appellant's proceeding. The key issue considered by the judge was whether the Magistrates' Court had power in the circumstances to rehear the appellant's appeal under s26AA of the *Road Safety Act* and the judge decided that the Magistrates' Court did have such power.

3. The appellant has appealed to the Court of Appeal from the judgment in the Trial Division. The appellant applies before us for a stay of a number of orders pending the hearing of this appeal but the principal order which he now seeks is an order staying the operation of the suspension of his driver licence. The Corporation has applied for an order summarily dismissing the appellant's appeal, alternatively, for an order for security for costs of that appeal. I note that an interim order staying the operation of the suspension of the driver licence had expired but on the hearing of these applications the Court granted a further stay pending a determination of the applications (judgment being reserved). In fact, for various reasons, a good deal of this driver licence suspension has already been served but the appellant seeks a stay affecting the balance of the suspension period pending the hearing of his appeal.

Application by the Corporation for summary dismissal of appeal

4. The Court has power and a discretion, whether under r 23 or in its inherent jurisdiction, to summarily dismiss an appeal if the appeal is an abuse of process (which includes an appeal that has no prospect of success).[1]

5. The Corporation submitted that the appellant's appeal was an abuse of process and had no prospect of success.

6. The Corporation submitted that the notice of appeal did not disclose any arguable ground of appeal and did not state 'specifically and concisely the grounds of complaint'.[2] It is clear that the appellant's notice of appeal does not comply with this rule but the appellant appears on his own behalf and it is reasonably apparent what his essential grounds of appeal are both from what was argued below and from what was argued before this Court.

7. The appellant raised what he described as a preliminary point, namely, that the Corporation was not a necessary or proper party to a s26AA appeal and had no standing to seek a rehearing (or indeed to appear) in this proceeding or appeal. I would reject that contention. It is obvious that the Corporation must be entitled to appear and to dispute the grounds of appeal (albeit somewhat limited) set out in s26AA of the *Road Safety Act*. That this is so can be explained as follows.

8. Section 25(1) of the *Road Safety Act* requires the Corporation to keep a Demerits Register and to record against a person any demerit points that are incurred by that person. Section 25(2) provides that the circumstances in which demerit points are incurred, the number of points incurred, and related matters, are 'as prescribed'. The relevant regulations are the *Road Safety (Drivers) Regulations* 2009 ('the Regulations'). Schedule 3 to the Regulations sets out the prescribed traffic offences and the number of demerit points relating to each of them. Relevantly to the present application item 38 in Schedule 3 allocates two demerit points to the offence of 'turning improperly'. Section 25(3)(a) of the *Road Safety Act* requires the Corporation to serve a demerit point option notice on the holder of a full driver licence if he incurs 12 or more demerit points within any three year period. It is unnecessary to refer to the option given by such a notice but it is sufficient to note, for present purposes, that, if the option is not exercised (as was the case here), s25(3D) in conjunction with s25(3E) requires the Corporation, *inter alia* where 12 or more demerit points are incurred within a three year period, to suspend the person's driver licence for at least three months.

9. With that statutory and regulatory background, s26AA(1) of the *Road Safety Act* provides that, if the Corporation so suspends a driver licence, the holder may, in accordance with the Regulations, appeal against that suspension to the Magistrates' Court. The grounds of such an appeal are limited to two grounds by s26AA(2), namely, that the Corporation recorded demerit points other than as required by the Regulations and/or that an error had been made in the addition of the demerit points in a relevant period.

10. Paragraph 86(1)(b) of the Regulations requires a person appealing under s26AA to serve on the Corporation an endorsed copy of his notice of appeal 'not less than 14 days before the hearing date'. It is obvious that the Corporation must be entitled to be heard having regard to the grounds of appeal and that this is so is confirmed by the provision requiring service on the Corporation not less than 14 days before the hearing date. The argument that the Corporation is not a proper party to such an appeal is without foundation.

11. The Corporation acknowledged and the appellant agreed that the appellant's principal ground of appeal was that the Magistrates' Court had no power to rehear the appellant's appeal pursuant to s26AA of the *Road Safety Act*. The appellant had submitted to the judge that the Magistrates' Court did not have such power because an appeal under s26AA of the *Road Safety Act* was not a civil proceeding within the meaning of s100 of the *Magistrates' Court Act* 1989 (Vic). The appellant reiterated that submission before this Court, adding that the power of rehearing granted to the Magistrates' Court under s26AA of the *Road Safety Act* was in the nature of 'an original supervisory jurisdiction' and was neither a criminal nor a civil proceeding under the *Magistrates' Court Act*. It followed, so the appellant submitted, that the first order made by the Magistrates' Court allowing his appeal under s26AA was not 'a final order ... in a civil proceeding' within the meaning of s110(1) of the *Magistrates' Court Act* and therefore the Magistrates' Court had no jurisdiction or power to rehear the s26AA appeal. It seems to me that this question, in turn, depends upon whether an appeal under s26AA of the *Road Safety Act* is a 'cause of action' in respect of which the Magistrates' Court is 'given jurisdiction ... under any Act' within the meaning of s100(1)(d) of the *Magistrates' Court Act*. If that question be answered in the affirmative then the s26AA appeal is a civil proceeding but if that question be answered in the negative then it is at least strongly arguable that the Magistrates' Court had no power under s110 to order and conduct a rehearing.

12. The appellant relied on the case of *Lednar v Magistrates' Court.*[3] In that case Gillard J stated, although it was probably not part of the ratio of his decision, that an application to the Magistrates' Court for an order for the taking of a forensic sample under s464ZF(3) of the *Crimes Act* 1958 (Vic) was neither a criminal nor a civil proceeding within the meaning of the Magistrates' Court Act. The appellant submitted that a s26AA appeal was likewise neither a criminal nor a civil proceeding. Although I tend to the view that a s26AA appeal is properly to be characterised as a 'cause of action' under statute within the meaning of s100(1)(d) of the *Magistrates' Court Act*, I would accept that the contrary is arguable and that it cannot be said that the appellant has no prospect of succeeding in his submission that s110 of the *Magistrates' Court Act* was not a valid source of power for the rehearing of the s26AA appeal conducted by the Magistrates' Court.

13. However the Corporation submitted that, even if the Magistrates' Court had no power to

rehear the s26AA appeal under s110 of the *Magistrates' Court Act*, the Magistrates' Court had an inherent discretionary power to set aside an order made in the absence of a party and to rehear the matter the subject of that order. In *Taylor v Taylor*,[4] the High Court considered the jurisdiction of the Family Court to set aside an order in various circumstances including one made in the absence of a party. The High Court was unanimously of the view (although Murphy J dissented as to the result of the appeal) that the Family Court had an inherent jurisdiction or power to set aside an order made in the absence of a party if, in the circumstances, justice so required, provided that the Act did not negative the existence of any such power. Reference was made to an earlier High Court decision in *Cameron v Cole*[5] which was concerned with the Federal Court of Bankruptcy and in which it was considered that a statutory court of limited jurisdiction nevertheless had an inherent jurisdiction to set aside its orders (unless displaced by statute) in certain circumstances including those in which an order was made in the absence of a party. Indeed, in *Taylor v Taylor*, Murphy J expressly stated that there was a longstanding principle that an order made against an absent party might be set aside even where the absence was the absent party's fault.[6]

14. In my opinion, as the judge below also thought, it is inconceivable that the Magistrates' Court does not have a discretion to rehear a s26AA appeal decided in the absence of the Corporation pursuant to an inherent jurisdiction or power to do so (on the assumption that s110 is inapplicable). It follows, in my view, that the appellant's principal argument has no prospect of success.

15. The appellant raised a further argument which he relied upon to establish that he had a prospect of success on his appeal. The argument was that, when the Magistrates' Court granted a rehearing on 15 March 2010, the demerit points were insufficient to support a suspension of his driver licence because the last two demerit points that he had incurred (for the offence of turning improperly) had been cancelled, or at least removed from the Register, by the Corporation as a result of his election to have the relevant infringement offence heard and determined in the Magistrates' Court.[7]

16. The relevant chronology is as follows. On 15 February 2009 the appellant was recorded as having committed an infringement offence of making an improper turn at an intersection and two demerit points were recorded making a total of 13 demerit points incurred within a three year period. On 17 November 2009 the Corporation sent the appellant a demerit point option notice based on the said total of 13 demerit points. On 29 December 2009, the Corporation suspended the appellant's driver licence for a period of three months commencing on that date. On 30 November 2009, the appellant elected to have the infringement offence that had been recorded on 15 February 2009 heard and determined in the Magistrates' Court.

17. On 5 January 2010, the appellant filed an appeal under s26AA of the *Road Safety Act* on the ground that an error had been made in the addition of the number of demerit points. The commencement of this appeal had the effect of staying the suspension of the appellant's driver licence until the date on which the appeal was determined.[8] On 11 January 2010, having become aware of the appellant's said election for a hearing of the infringement offence, the Corporation removed the two points relating to that offence from the appellant's record on the Register. On 1 February 2010, the Magistrates' Court (Keil M), in the absence of the Corporation, allowed the appellant's appeal under s26AA of the *Road Safety Act*.

18. A certified extract from the Register of the Magistrates' Court[9] shows that the s26AA appeal was allowed and that no other order was made. The s26AA appeal can only have been allowed on the single ground relied on, namely that there was an error in the addition of demerit points and the basis of that can only have been that the suspension was correct if there were 13 demerit points but that two of those points had subsequently been removed thereby showing that the basis for the suspension was in fact incorrect. As a s26AA appeal is 'against' a suspension, the effect of allowing an appeal must be to set aside the suspension even if that order is not specifically made.

19. On 15 March 2010, the Corporation was granted a rehearing of the appellant's appeal under s26AA but the rehearing was adjourned pending the hearing in relation to the infringement offence – that was determined on 6 June 2010 when the appellant was convicted of the offence the subject of the infringement notice and the two points again recorded. On 15 June 2010 the appellant appealed to the County Court in respect of that conviction – that appeal was subsequently

dismissed but nothing appears to turn on the existence of the appeal or the result in it. The rehearing of the appellant's s26AA appeal finally took place on 14 September 2010 and the Court (Barrett M) dismissed the appeal.

20. It was common ground that, at the time of the s26AA appeal that took place in the absence of the Corporation on 1 February 2010, the suspension of the appellant's driver licence was in existence, albeit stayed pending the result of that appeal. As I have said, the consequence of the appeal being allowed was that the suspension was set aside. However the necessary consequence of the grant of a rehearing of that appeal was that the 'allowing of the appeal' by the Magistrates' Court was itself set aside by virtue of the order for a rehearing. This had the additional consequence of reviving the suspension, although it remained stayed pending the result of the rehearing of the appeal. The appellant's argument that there was no valid suspension because of the missing two points is no more valid in relation to the rehearing of the appeal than it was in relation to the initial hearing of the appeal. The argument that the addition of the points was incorrect remained to be determined once a rehearing of the appeal was granted. By the time that determination came to be made, the appellant's conviction had had the effect that the said two points were taken to have been properly incurred and there was no longer any basis for challenging the suspension.

21. Although the chronology is somewhat lengthy and the analysis somewhat technical, in my opinion the appellant's argument has no prospect of success.

22. Recognising that a summary dismissal should not be ordered unless the position is clear, I would for the foregoing reasons summarily dismiss the appeal.

Application for stay

23. Given my conclusion that the appeal should be dismissed, there is strictly no need to determine whether any stay should be granted. However, I will briefly consider the question whether in the absence of such dismissal a stay ought be granted. A stay on the judgment below will only be granted on appeal in special or exceptional circumstances. It is clear that the appellant would not have been entitled to a stay in relation to the orders as to costs and the only real question that would have arisen would have been whether a stay ought be granted on the suspension of his driver licence.

24. It is clear that the appeal, as regards the suspension of his driver licence, would have been rendered nugatory if he were not granted a stay and that would have normally been a strong ground for granting such a stay. However, if the appellant had no real prospect of success on the appeal, I would not have thought that a stay should be granted in any event.

25. In my opinion, even if the appeal had not been summarily dismissed, the appellant's prospects of success on the appeal were so slight as not to justify the grant of a stay.

Conclusion

26. It is unnecessary to consider the Corporation's application for security for costs. For the reasons already stated, I would dismiss the appeal.

ALMOND AJA:

27. I agree with Mandie JA.

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[1] See *Shire of Yarra Ranges v Russell* (2009) 25 VR 560 and *Black v Rafa Pastoral Pty Ltd* [2009] VSCA 295, [17] (Maxwell P and Redlich JA).
[2] See r 64.05 *RSC*.
[3] [2000] VSC 549; (2000) 117 A Crim R 396.
[4] [1979] HCA 38; (1979) 143 CLR 1; (1979) 25 ALR 418; [1979] FLC 90-674; (1979) 53 ALJR 629; 5 Fam LR 289.
[5] [1944] HCA 5; (1944) 68 CLR 571; [1944] ALR 130; 13 ABC 141; (1944) 17 ALJR 397.
[6] [1979] HCA 38; (1979) 143 CLR 1, 20; (1979) 25 ALR 418; [1979] FLC 90-674; (1979) 53 ALJR 629; 5 Fam LR 289.
[7] See s39 *Infringements Act* 2006 (Vic).
[8] See s26AA(3)(a) *Road Safety Act*.
[9] Exhibit 'PS-1' to an affidavit of the appellant sworn on 20 September 2010.

APPEARANCES: The appellant Sherman appeared in person. For the Roads Corporation: Mr CGK Madder, counsel. DLA Piper, solicitors.