18/01; [2001] VSCA 110

SUPREME COURT OF VICTORIA — COURT OF APPEAL

SHER v DPP

Brooking, Batt and Buchanan JJ A

2 August 2001 — (2001) 34 MVR 153; (2001) 120 A Crim R 585

MOTOR TRAFFIC – DRINK/DRIVING – DISMISSAL OF CHARGE BY MAGISTRATE ON TECHNICAL POINT – DISMISSAL SET ASIDE ON APPEAL – REMITTED TO MAGISTRATES' COURT FOR REHEARING – APPEAL FROM SUCH ORDER – WHETHER THE ORDER FOR REHEARING INTERLOCUTORY – WHETHER APPEAL INCOMPETENT – OBSERVATIONS ON ACTIVITY OF LAWYERS TAKING TECHNICAL POINTS IN DRINK/DRIVING CASES – WHETHER SUCH ACTIVITY IN THE PUBLIC INTEREST – WHETHER COURTS SHOULD DO THEIR BEST TO KEEP DRUNK DRIVERS OFF THE STREETS.

Where a judge of the Supreme Court quashed a magistrate's dismissal of a drink/driving charge and another and remitted the charges for rehearing in the Magistrates' Court, such an order was interlocutory in nature and accordingly, an appeal against it was incompetent.

***Obiter*: Some lawyers seem to find full-time employment in keeping the streets safe for those who drive when they have had too much to drink. The results of this activity are not in the public interest. Parliament does its best to keep drunk drivers off the streets. But the hydra of technicality is a many-headed beast and as one unattractive point is cut off another rears up in its place. The Courts must do their best too.**

BROOKING JA: (Delivering the judgment of the Court):

1. This is the latest product to come before the Court of the thriving minor industry, in which some lawyers seem to find full-time employment, of keeping the streets safe for those who drive when they have had too much to drink. Much time and ingenuity are devoted to this.

2. We are not at all persuaded that the results of all this activity are in the public interest. Parliament does its best to keep drunk drivers off the streets. But the hydra of technicality is a many-headed beast, and as one unattractive point is cut off another rears up in its place. The Courts must do their best too.

3. Arguments about proof of the effects of drink on an individual's ability to drive properly lead to the creation of blood alcohol concentration offences. This is followed by the creation of offences which depend upon the result shown by an instrument. A new jurisprudence develops about the use of measuring devices and certificates. Then drivers refuse to have breath tests and this is met by the creation of the offence of refusing to take a breath test. Next the lawyers say that the necessary incantations have not been used, so that there has been no unlawful refusal.

4. Mr Jack Sher, a solicitor, is the latest combatant. He was originally charged with four offences, including driving under the influence, but the informant proceeded only on two charges: refusing a preliminary breath test and using a car with a bald tyre. The date of the alleged offences was as long ago as 7 November 1998. Remarkably, the charges were heard for four days. This was in November 1999. On the fourth day they were dismissed because the informant, who had himself issued the summons, had filed a carbon copy of it, not the first strike. Although the informant had signed the carbon copy, it was held that the words "original summons" in the Act of Parliament somehow prohibited the use of carbon paper. The magistrate awarded $7,700 costs against the police.

5. This kind of point must bring the law into disrepute. Of course the taking of such points is allied with reliance on the statutory time limit of 12 months for prosecutions for summary offences, so that the use of carbon paper is said to enable Mr Sher to escape prosecution.

6. Gillard J in yet another decision given with his Honour's customary promptitude, has corrected the magistrate's error and remitted the charges to the Magistrates' Court. Now we have an appeal against that decision.

7. In an age when form was allowed to prevail over substance more than it is now, Hodges J said that it was pleasing to be able to meet one technical objection by another: *R v Walsh & O'Brien*; *ex parte Dilnot* [1892] VicLawRp 60; (1892) 18 VLR 327 at 330. We are pleased to be able to say that this appeal is incompetent. The order for a rehearing is interlocutory: *Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423 at 443; [1966] ALR 705; (1966) 40 ALJR 102 per Windeyer J; *Hornsby v Kaschke* [1999] VSCA 153; [1999] 3 VR 27; (1999) 31 MVR 23. These are but examples, and indeed it is conceded by counsel that this order under appeal is interlocutory.

8. Mr Sher asks for leave to appeal. But he should not have it. No substantial injustice would be done by allowing this decision to stand. More important, it is not attended by sufficient doubt to warrant the grant of leave to appeal. On the contrary, it is manifestly correct, both as regards the carbon copy point and as regards the other point taken by Mr Sher – that the fact that he was charged with having a bald tyre as well as with refusing a breath test meant that there had to be two appeals, not one, to set the magistrate right. Indeed, the decision of Gillard J is manifestly correct on all points.

9. The appeal is dismissed as incompetent. The application for leave to appeal is refused. And we ask counsel for the appellant why the order for costs should not be as between solicitor and client in the circumstances? Yes, Mr Nash?

MR NASH: I have nothing to say, Your Honour.

BROOKING JA:
10. Very well. The appeal is dismissed as incompetent, with costs as between solicitor and client, and the application for leave to appeal is refused.

APPEARANCES: For the appellant Sher: Mr G Nash QC and Mr GA Hardy, counsel. Agricola, Wunderlich & Associates, solicitors. For the respondent: Mr JD McArdle QC, counsel. Ms Kay Robertson, Solicitor for Public Prosecutions.
