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HIGH COURT OF AUSTRALIA

JOHANSON v DIXON and OTHERS

Barwick CJ, Stephen, Mason, Murphy and Aickin JJ

5-9 October 1978 — [1979] HCA 23; (1979) 143 CLR 376; 53 ALJR 494

CRIMINAL LAW – VAGRANCY – HABITUALLY CONSORTING WITH REPUTED THIEVES – OFFENCE COMMITTED UNLESS GOOD ACCOUNT GIVEN OF CONSORTING – WHETHER ESTABLISHING THAT CONSORTING WAS FOR AN INNOCENT PURPOSE A "GOOD ACCOUNT": *VAGRANCY ACT* 1966 (VICT.), S6(1).

Held by The Court (Murphy J dissenting) that the application for special leave to appeal (from the Supreme Court (Full Court) should be refused.

1. The legislative history of this provision provides no basis for construing s6(1)(c) of the *Vagrancy Act* otherwise than in accordance with the ordinary meaning of the words used.

2. The ordinary meaning of the words "to consort" is to "accompany; to escort or attend, to be a consort to (someone) or to associate oneself with (someone)", and thus to associate with or to keep company with a particular person is to "consort" with such person. It denotes some seeking or acceptance of the association with other specified persons on the part of a defendant.

3. The offence therefore lies in habitually associating with persons as described in the section, i.e. reputed thieves, known prostitutes or persons who have been convicted of having no visible lawful means of support. The words prescribing the offence require only associating with such persons and do not require that the association should be for any specified purpose. However, the provision does require that the association should be "habitual" but otherwise mere association is sufficient.

4. A "good account" of a defendant's consorting is not provided by saying that he was doing no more than consorting with such persons without there being any unlawful purpose connected with such consorting. The offence is habitual consorting and not habitual consorting for any specified purpose.

BARWICK CJ: I have had the advantage of reading the reasons for judgment [and I agree] entirely with those reasons and with the conclusion that the application for special leave be refused. I find no need to add anything on my own behalf.

STEPHEN J: I have read and am in agreement with all that is said in the reasons for judgment of Mason J and of Aickin J concerning this application for special leave.

2. I would refuse special leave accordingly.

MASON J: The applicant was convicted at the Fitzroy Magistrates' Court on 21st April 1976 on two counts of habitually consorting with reputed thieves contrary to s6(1)(c) of the *Vagrancy Act* 1966 (Vict.) and sentenced to twelve months' imprisonment on each count, the sentences to be served concurrently. Section 6(1)(b) and (c) provide:

> Any person who— . . .
> (b) is found in a house or place in company with reputed thieves or persons having no visible lawful means of support who, on being thereto required by the court, does not give to the satisfaction of the court a good account of his lawful means of support and also of his being in such house or place upon some lawful occasion;
> (c) habitually consorts with reputed thieves or known prostitutes or persons who have been convicted of having no visible lawful means of support unless such person, on being thereto required by the court, gives to the satisfaction of the court a good account of his lawful means of support and also of his so consorting; . . .
> shall be guilty of an offence.
> Penalty: For a first offence — imprisonment for one year;

> For a second or subsequent offence against this section (whether under the same paragraph or not) — imprisonment for two years."

Paragraphs (b) and (c) of s6(1) were subsequently amended by s3 of Act No. 9047 of 1977, the relevant effect of which was to delete from par (c) the reference to persons who have been convicted of having no visible lawful means of support and that part of the proviso that related to a good account of the defendant's lawful means of support. But it was the section in the form in which it stood before this amendment that governed the present case.

2. An appeal by the applicant against the convictions was dismissed by Judge Hewitt in the County Court of Victoria on 17th June 1976. His Honour refused the applicant's request to state a case for the determination of the Supreme Court under s85 of the *Magistrates' Courts Act* 1971 (Vict.). At the instance of the applicant the Supreme Court (McGarvie J) made an order that the County Court state a case *Johanson v Dixon (No 1)* [1977] VicRp 64; (1977) VR 574. The first case stated by Judge Hewitt was referred by Kaye J to the Full Court on the ground that the question of construction raised by the case was important. However, the Full Court, holding the case to be defective, ordered that it be restated. The second version of the case stated by the learned judge also proved to be defective and was required to be restated. After hearing argument on the case in its third and final form the Full Court dismissed the appeals and confirmed the sentences *Johanson v Dixon (No 3)* [1978] VicRp 40; (1978) VR 377.

3. The applicant now seeks special leave to appeal from the Full Court's order on the ground that the interpretation of the sub-section raises a point of special importance. The submission made by Mr Evans on behalf of the applicant as to the meaning and effect of s6(1)(c), as will be seen, raises an important question. He argues that the words "a good account . . . of his so consorting" are satisfied if the defendant establishes that his consorting was for an innocent purpose, an argument which was accepted by McGarvie J but was rejected unanimously by the Full Court in the judgment from which special leave to appeal is now sought.

4. The application is complicated by the circumstance that Judge Hewitt failed to make the findings of fact which the applicant sought. His Honour found that the applicant consorted at identified places, mainly hotels, on thirty-three occasions between 4th March 1975 and 27th February 1976 with certain persons all of whom were at the time in question, and to the knowledge of the applicant, reputed thieves. It was found that the consorting was habitual, that on each occasion the applicant had been questioned and warned by police officers that he should not consort and that none the less he had continued to do so. It was also found that the account given by the applicant of the lawful means of support was a good account. With respect to the applicant's account of his consorting the case recited —

> "4. ... (i) The account given by the applicant of his consorting was not a good account.
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> 5. I dismissed both appeals and confirmed the convictions below, finding that the respondents had proved the elements of the charges, beyond reasonable doubt, and that the applicant had not, on the balance of probabilities, given to the satisfaction of the court a good account of his consorting, although he had given a good account of his lawful means of support. . . .
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> 8. Pursuant to the Order of the Honourable Mr. Justice Kaye made the 28th June 1977, I say —
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> (1) The applicant stated in evidence that in the main, the people he was accused of consorting with he had known for a long period of time; one was his brother, and some others were friends. He did not differentiate between the various occasions of consorting as set out in paragraph 4 hereof. Save as aforesaid, I have no recollection of the applicant's evidence and no transcript was taken of the proceedings.
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> (2) I did not accept as true his account of his consorting with reputed thieves given by the applicant. I disbelieved his evidence save as to his means of support and save that on an occasion on which the applicant was drinking with his brother (the 6th November 1975 at the Renown Hotel), he also was consorting with another man, and I was not satisfied of his account of his consorting with the other man. I did not come to any conclusion with respect to his brother, as I deemed it unnecessary."

5. The applicant seeks to overcome the finding in par 8(2) of the case by submitting that par 8(1) is an incomplete summary of the applicant's evidence in that it says nothing about the

purpose for which the applicant was consorting on the occasions in question. It is then argued that in par 8(2) the judge says no more than that he disbelieved that part of the applicant's evidence which is summarized in the preceding paragraph. I do not read the stated case in this way. By the opening sentence of par 8(2) I understand his Honour to be saying that he did not accept the totality of the applicant's account as to his consorting with reputed thieves. This is made plain by the next sentence in which the judge states unequivocally, "I disbelieved his evidence", and then makes two exceptions to that statement. One exception relates to his testimony concerning lawful means of support, a matter not mentioned in par 8(1); the other relates to his consorting with his brother and another man on 6th November 1975, as to which his Honour states that he was not satisfied with the applicant's account of his consorting with the other man, a statement which must be taken to refer to the purpose of that consorting. The interpretation proposed by the applicant of par 8 has little to commend it. It is inherently improbable that the judge was saying, as the applicant contends, "I do not accept his account of his consorting with reputed thieves, but I say nothing about the acceptability of his evidence relating to his purpose in consorting with those reputed thieves."

6. Reliance is placed on affidavits deposing to the evidence which had been given by the applicant in the County Court. According to these affidavits the evidence given demonstrated that on the occasions in question the applicant was drinking with persons who were his friends and in one instance his brother, the purpose of the meetings being purely social with the consequence that the consorting was innocent, not having any criminal or illegal flavour to it. The point is made that the deponents were not cross-examined and no contrary evidence was led by the Crown. However, there is no ground on which this Court can amend the stated case by substituting or adding a finding which is contrary to a finding already made by the judge and, on the view which I take, expressed in the stated case. Nor is there any basis for requiring the judge to re-hear the evidence and re-state the case once again. I might have taken a different view had it appeared that the judge had omitted to deal with a relevant matter and had the parties been in agreement as to the matter to be included in the case but here the judge has made a finding which covers the point at issue, albeit unfavourably to the applicant, and the Crown vigorously contests the substitution of a contrary finding. What happened in essence was that the judge declined to accept the applicant's evidence on a point on which the applicant bore the onus of satisfying the Court. It is simply not open to an appellant court on a case stated to review a refusal to find a fact when that refusal is based on the rejection of the testimony of a witness (*Hofstetter v Thomas* (1968) VR 199). Indeed, a case stated should not annex or set aside the evidence given in the court below unless it asks, in conformity with the statute authorizing the stating of the case, the question whether there is evidence to justify a finding made by the court below or questions relating to the admissibility of that evidence. This is not a case of that kind.

7. Accordingly, it is my opinion that the applicant must fail on the findings of fact which have been made, even if he were successful in maintaining his interpretation of the statute. For this reason I would dismiss the application for special leave.

8. Nevertheless, as the question of construction has been fully debated before the Court, it should be dealt with. The offence of consorting is an Australasian contribution to the criminal law. It first saw the light of day in s4 of the *Police Offences Amendment Act*, 1901 (NZ). Provisions making habitual consorting an offence are to be found in the statute law of the other Australian States, but, with the exception of Tasmania to which I shall refer shortly, in no State is there a provision of the kind that appears in s6(1)(c) making it a defence for the defendant to give to the satisfaction of the court a good account of the two matters referred to in the paragraph. Section 6 of the *Police Offences Act* 1935 (Tas.) makes it a defence for the defendant to prove to the satisfaction of the court lawful means of support and "good and sufficient reasons" for consorting.

9. The history of the legislative provisions does not, I think, furnish any particular reason for construing s6(1)(c) of the *Vagrancy Act* otherwise than according to its terms. In its context "consorts" means "associates" or "keeps company" and it denotes some seeking or acceptance of the association on the part of the defendant (*Brown v Bryan* (1963) Tas SR 1, at p2). Consequently the offence is made out if it appears that the defendant habitually associates with persons falling within the three designated classes, "reputed thieves", "known prostitutes" or "persons who have been convicted of having no visible lawful means of support". It is not for the Crown to prove that

the defendant has consorted for an unlawful or criminal purpose. The words creating the offence make no mention of purpose: cf. s6(1)(b) where the proviso refers to "upon some lawful occasion". Nor does the word "consorts" necessarily imply that the association is one which has or needs to have a particular purpose. What is proscribed is habitual association with persons of the three classes, they being undesirable or discreditable persons. Mere association with those persons, which is not habitual, for a criminal or unlawful purpose is not proscribed. The presence of the word "habitually" tells strongly against the applicant's argument. Why did the legislature insist on habitual consorting as an element in the offence if consorting for a criminal or illegal purpose is an essential element in the offence? Indeed, the contrast between pars (b) and (c) of s6(1) is adverse to the applicant's interpretation. Section 6(1)(b) makes it an offence for a person to be found in a house or place on a single occasion with reputed thieves or persons having no visible lawful means of support unless he gives to the satisfaction of the court a good account of his lawful means of support and of his being in the place or house "upon some lawful occasion". Thus under par (b), where the offence consists in keeping company on a single occasion, it is enough to show, *inter alia*, that the occasion was a lawful occasion. But in the more serious case of habitual association something else is required: the defendant must give good account of that habitual association. It is apparent, therefore, that the gist of the offence under par (c) is habitual association with persons who fall into the designated classes, whether the association is for unlawful purposes or not.

10. The expression "a good account . . . of his so consorting" which appears in the proviso is far from precise and for an obvious reason. It is not possible to foresee all the circumstances which may conceivably justify habitual consorting. Yet the applicant seeks to use the imprecise language of the proviso as a reason for altering the precise literal meaning of that part of the sub-section which creates the offence, thereby importing into the offence words which could readily have been expressed by the legislature if it had the applicant's interpretation in mind.

11. An alternative version of the argument was that s6(1)(c) was so designed that the Crown could prove the offence by establishing habitual consorting and that evidence of habitual consorting would be sufficient to sustain a conviction unless the defendant gave a good account of that consorting by showing that it was for an innocent purpose. This argument encounters similar objections.

12. It would have been a simple matter to have expressed "good account" in terms of lawful purpose. In the absence of any such provision "good account" must be taken to signify some justification, acceptable to the court, for the habitual consorting which constitutes the gist of the offence. And if the offence consists in habitual consorting it is not an acceptable justification to say that there was habitual consorting but nothing more. To be acceptable the justification must at least assign a reason for the consorting which goes beyond the desire of the defendant to associate with persons of the designated classes. Thus it may be a good account for the defendant to say that he associated with the person in question because they were his close relatives, for filial or family reasons, or because his occupation required him so to do and the association was not for any unlawful purpose. But to say no more than that the association was innocent or not unlawful is not to give a good account.

13. The argument relies rather heavily on what is claimed to be the harsh or severe application of the provision if the interpretation favoured by the Full Court is to be accepted. It would operate to ostracize a person in the designated classes, cutting him off from any form of friendship, so the argument runs. However, it seems reasonably clear that to constitute the offence, habitually consorting with more than one person, with a plurality of persons, is required. Association with a reputed thief would not be enough. The legislative policy which underlies the provision negatives the statutory rule of construction requiring that the reference in the plural should be read in the singular. It is a policy which was designed to inhibit a person from habitually associating with persons of the three designated classes, because the association might expose that individual to temptation or lead to his involvement in criminal activity. It is not to the point that the section is a provision of long standing and that it reflects a policy which came into existence many years ago. The fact, if it be a fact, that the policy is now a matter of some controversy, is no justification for our construing the provision otherwise than in accordance with its terms. If a change in the statute is thought to be desirable on account of changed conditions or changed attitudes, it is for Parliament to decide whether that change should be made.

14. The case does not call for a detailed examination of the decisions on the various statutory provisions to which I have already referred. Suffice it to say that, with the exception of McGarvie J's decision, the cases all proceed on the view that consorting means associating or keeping company with, and no more than that – see *Gabriel v Lenthall* (1930) SASR 318, at p327; *Auld v Purdy* (1933) 50 WN (NSW) 218, at p219; *Clarke v Nelson; Ex parte Nelson* (1936) QWN No 17; *Dias v O'Sullivan* (1949) SASR 195, at pp199-202; [1949] ALR 586; *Reardon v O'Sullivan* (1950) SASR 77, at pp79, 81-83, 85-87; *Beer v Toms; Ex parte Beer* (1952) St R Qd 116, at p126; 46 QJPR 102; *Davis v Samson* (1953) NZLR 909, at p911; *Byrne v Shearer* [1959] VicRp 80; (1959) VR 606; *Bryan v White* (1962) Tas SR 113; *Young v Bryan* (1962) Tas SR 323; *Brown v Bryan* (1963) Tas SR 1, at p2.
I agree with the Full Court that *Byrne v Shearer* provides no support for the applicant. Although O'Bryan, Dean and Smith JJ (1959) VR at pp608, 611, 612-613 spoke of the court being satisfied that the consorting was innocent, it does not appear that the question which presently arises was debated in that case or that their Honours' observations were directed to this question.

15. The difference between "good account" and "good and sufficient reasons" for consorting, the latter being the expression found in s6 of the *Police Offences Act* 1935 (Tas.), is not so great as to warrant the drawing of a distinction between the two provisions. It was submitted for the applicant that the Tasmanian decisions to which I have referred were either distinguishable or, alternatively, that they were wrong and should be overruled. In my view the decisions are correct and, as I have said, no distinction is to be drawn for present purposes between the Tasmanian provision and s6(1)(c) of the Victorian Act.

16. I would dismiss the application for special leave.

AICKIN J: This is an application for special leave to appeal from the Full Court of the Supreme Court of Victoria. As the judgment of that Court shows the case has had a long and unfortunate history because of the protracted endeavours to have a case stated by the County Court in a form proper for consideration by the Full Court. Its somewhat chequered history is set out in the judgment of the Full Court in *Johanson v Dixon (No 2)* [1978] VicRp 23; (1978) VR 243. Those initial procedural problems are no longer material.

2. The applicant was convicted on 21st April 1976 at the Fitzroy Magistrates' Court on two informations under s6(1)(c) of the *Vagrancy Act* 1966 and sentenced to twelve months' imprisonment on each information, such sentences to be served concurrently. Section 6(1)(b) and (c) is as follows:

> "6. (1) Any person who— . . .
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> (b) is found in a house or place in company with reputed thieves or persons having no visible lawful means of support who, on being thereto required by the court, does not give to the satisfaction of the court a good account of his lawful means of support and also of his being in such house or place upon some lawful occasion;
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> (c) habitually consorts with reputed thieves or known prostitutes or persons who have been convicted of having no visible lawful means of support unless such person, on being thereto required by the court, gives to the satisfaction of the court a good account of his lawful means of support and also of his so consorting; . . .
> shall be guilty of an offence."

3. From that conviction he appealed to the County Court which affirmed the conviction. Ultimately a case stated came before the Full Court.

4. The stated case showed that the County Court judge had found as facts that the applicant had consorted with persons who were, to the knowledge of the applicant, reputed thieves, on sixteen or more separate occasions in relation to each information. The County Court judge found that the applicant had given a good account of his lawful means of support but said that his income was such as to expose him to strong temptation to engage in criminal activity. He also found that the applicant had not given a good account of his consorting. The case stated sets out that the applicant had stated in evidence that the people with whom he was accused of consorting were in the main friends whom he had known for a long time and that one was his brother. The stated case further stated that the judge had no other recollection of the applicant's

evidence and that he did not accept as true the applicant's account of his consorting with reputed thieves.

5. The ground of the present application for special leave to appeal is that the interpretation of s6(1)(c) raises a point of special importance and general interest. It was argued that on the proper construction of the section it was a sufficient answer for an accused person to establish that his consorting was for an "innocent purpose".

6. It was also argued that this Court should receive further material on affidavit as to the evidence before the County Court judge and should modify the findings in the stated case. In his reasons for judgment my brother Mason deals with these arguments. There is no basis on which this Court can amend the stated case by making findings of its own, and I agree with my brother Mason's reasons for taking the view that this is not a case in which this Court should require the County Court judge to re-hear the evidence and re-state the case yet again. I also agree that it is not open to an appellate court on a proceeding by way of case stated to review a finding of fact, or a refusal to find a particular fact. Nor can it reverse a finding that particular evidence should be disbelieved.

7. The legislative history of this provision in New Zealand and in Tasmania and other States is discussed in the reasons of my brother Mason and I agree with his account of that history, and his conclusion that it provides no basis for construing s6(1)(c) of the *Vagrancy Act* otherwise than in accordance with the ordinary meaning of the words used.

8. The ordinary meaning of the words "to consort" is to "accompany; to escort or attend, to be a consort to (someone) or to associate oneself with (someone)", and thus to associate with or to keep company with a particular person is to "consort" with such person. In this respect I agree with the views expressed in *Brown v Bryan* (1963) Tas SR, at p2 that it denotes some seeking or acceptance of the association with other specified persons on the part of a defendant.

9. The offence therefore lies in habitually associating with persons as described in the section, i.e. reputed thieves, known prostitutes or persons who have been convicted of having no visible lawful means of support. The words prescribing the offence require only associating with such persons and do not require that the association should be for any specified purpose. However, the provision does require that the association should be "habitual" but otherwise mere association is sufficient.

10. There is a marked contrast between the provisions of pars. (b) and (c) in that the offence described in par (c) is simply that the defendant "habitually consorts with reputed thieves etc." without being able to give to the court a "good account of his lawful means of support and also of his so consorting", whereas par (b) deals with a person who is "found in a house or place in company with reputed thieves or persons having no visible lawful means of support who, on being thereto required by the court, does not give to the satisfaction of the court a good account of his lawful means of support and also of his being in such house or place upon some lawful occasion."

11. Paragraph (b) deals, so far as presently material, with an offence constituted by a single incident, i.e. being "found in a house or place" in the company specified and failing to "give to the satisfaction of the court a good account of his being in such house or place upon some lawful occasion". It is thus clear that some lawful reason for being in the particular house or place constitutes in this respect a good answer to that charge. In marked contrast, however, par (c) so far as presently material, deals, not with a single occasion, but with habitual conduct, i.e. habitually consorting with reputed thieves unless he gives to the satisfaction of the court a good account "of his so consorting". The force of this contrast is not diminished by the fact that the two paragraphs were not introduced at the same time.

12. It is, in my opinion, quite clear on the words of these provisions that a "good account" of his so consorting is not provided by saying that he was doing no more than consorting with such persons without there being any unlawful purpose connected with such consorting. The offence is habitual consorting and not habitual consorting for any specified purpose.

13. To say merely that there was no unlawful purpose associated with the habitual consorting with reputed thieves provides no account, much less any good account of such consorting. It does no more than describe the offence itself as set out in the statute. I find it impossible to read par (c) as applicable only to cases where it is shown that some particular unlawful purpose was associated with (presumably) all the instances of consorting which make up the habitual consorting the subject of a charge.

14. There has been a substantial number of decisions in the courts in various States and in New Zealand dealing with substantially the same legislation. The cases are cited in the reasons for judgment of my brother Mason and I do not need to discuss them further, beyond saying that, with one exception, they establish a uniform view that "consorting" means merely associating with or keeping company with other persons and involves no additional ingredient. The exception to that proposition is the decision of McGarvie J in an earlier stage of the present litigation, reported as *Johanson v Dixon (No 1)* [1977] VicRp 64; (1977) VR 574, in which he expressed the view that a person charged with this offence gives a "good account of his consorting" if he establishes to the reasonable satisfaction of the Court that the consorting was "innocent". I respectfully agree with the reasons given in the judgment of the Full Court (Young CJ, Menhennitt and Murray JJ (1978) VR 377) that the reasons and conclusions of McGarvie J as to the meaning and effect of s6(1)(c) of the *Vagrancy Act* cannot be supported. In my opinion that decision, so far as it deals with the present point, should be overruled.

15. For those reasons I am of opinion that special leave should be refused.

ORDER
Application for special leave to appeal refused.
