23/01; [2001] VSC 472

SUPREME COURT OF VICTORIA

DPP v FIELD

Ashley J

29 November 2001 — (2001) 126 A Crim R 317

CRIMINAL LAW – PERSON PREVIOUSLY FOUND GUILTY OF SEXUAL OFFENCE FOUND ALLEGEDLY LOITERING NEAR CHILD CARE CENTRE – PERSON IN MOTOR VEHICLE PARKED OPPOSITE CHILD CARE CENTRE ABOUT 25 METRES AWAY – WHETHER "NEAR" CHILD CARE CENTRE – CHARGE DISMISSED – FINDING BY MAGISTRATE THAT PROSECUTION MUST PROVE AN INTENTION TO COMMIT A SEXUAL OFFENCE AGAINST A CHILD – WHETHER PROSECUTION REQUIRED TO PROVE SUCH INTENTION – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S60B(2).

Section 60B(2) of the *Crimes Act* 1958 ('Act') provides:

> A person who —
> (a) has been found guilty of … (i) a sexual offence …and
>
> (b) is found loitering without reasonable excuse in or near—
> (i) a school, kindergarten or child care centre … —
> is guilty of an offence.

F. was charged that being a person found guilty of an offence of wilful and obscene exposure was found loitering without reasonable excuse in or near a child care centre. Evidence was given that F. was parked in his motor vehicle at the side of a busy road at or shortly after peak hour for about 35 minutes opposite a child care centre about 25 metres away. At the hearing, the magistrate upheld a 'no case' submission and dismissed the charge. The magistrate said that the prosecution had failed to prove that the person loitering had an apparent intention of committing a sexual offence. Further, that F's actions could not be considered to be "near" for the purposes of s60B(2). Upon appeal—

HELD: Appeal dismissed.
1. The magistrate's ruling as to the particular intent was insupportable. There is nothing in s60B(2) of the Act which would convey a need to prove an intent to commit a sexual offence. The purpose of the section was to fill a perceived gap in the law namely, the inability of a police officer finding a person who has been convicted of a sexual offence loitering near a school a child care centre or some other place where children congregate, to arrest that person or ask him or her to leave that place. There is nothing to suggest that it would be a necessary part of filling in the perceived gap to require proof in the event of an arrest that the person had an intention of committing some further sexual or allied offence.

2. In relation to the 'nearness' point, it must be a matter of fact and degree in every case. Physical proximity will always be a relevant consideration but will not always be determinative. The fact that the defendant's vehicle was parked on the opposite side of the road to the child care centre, that the road was wide and traffic busy were considerations which could bear upon the significance of the physical proximity otherwise established and which could provide some support for the magistrate's conclusion upon the 'nearness' issue. In the circumstances, it was open to the magistrate to find that the prosecution had not proved the requisite nearness beyond reasonable doubt and dismiss the charge.

ASHLEY J:
1. This is an appeal brought pursuant to s92 of the *Magistrates' Court Act* 1989 against a final order of the Magistrates' Court made on 2 May this year dismissing a charge laid against the respondent, John William Field. The charge, laid under s60B of the *Crimes Act* 1958, was as follows:

> "The defendant at South Melbourne on 13 December 1999, being a person found guilty of an offence specified under s60B(2)(a)(iii) wilful and obscene exposure, was found loitering without reasonable excuse in or near a childcare centre known as Young Melbourne Child Care."

2. The circumstances pertaining to the charge can be briefly set out. There was evidence that on the day in question, between about 8.55 and about 9.30 in the morning, the respondent sat in a parked utility vehicle on the north side of Park St, South Melbourne, near its intersection with Kingsway. On the south side of Park St, opposite the respondent's vehicle, was the childcare centre.

3. Park St in that vicinity is a broad thoroughfare. Estimates of its width given in evidence varied. The greatest estimated width was about 25 metres.

4. In the period that the respondent's car was stationary, traffic in Park St was heavy, although it was said to be thinning at the time when the respondent's vehicle moved away from its parked position.

5. Kingsway near its intersection with Park Street is, of course, a wide thoroughfare. It carries both tram and a very large volume of vehicular traffic.

6. There was evidence that the existence of the childcare centre in what is apparently a disused church was the subject of signage, that in the period during which the respondent's vehicle was parked a parent and child had moved from the north to the south side of Park St, that another parent and child had moved from a vehicle on the south side of Park St to the childcare centre, and that other children were within the childcare centre. There was also evidence that early on in the period in which his car had been observed parked, the respondent had masturbated. It was not suggested in the evidence that the respondent had attempted to make contact with any of the children in the centre or that he had left his vehicle at any time.

7. Various estimates were made in the evidence, not only of the width of Park Street, but also as to the distance between the respondent's vehicle and the nearest point of the childcare centre. According to the learned magistrate the estimates ranged up to 30 metres.

8. At the end of the prosecution case a "no case" submission was made by Mr Brian Bourke of counsel for the respondent. The respondent had in fact been charged with more than one offence and the submission addressed more than the charge the subject of the present appeal. But what counsel submitted with respect to other charges can now be put to one side.

9. Mr Bourke relevantly submitted[1] that so far as the charge of loitering was concerned there must be some nexus between the conduct that is complained of and some paedophilic activity. He called in aid remarks made by the then Attorney-General in the course of parliamentary debate.

10. He submitted that there was no evidence from which an inference could be drawn that the respondent had a motive in some way to act in a paedophilic nature in relation to children. He argued that the word "loiter" was of significance. Although in its natural meaning it might simply suggest indolence, or inactivity, it would be relevant in the present case to consider its relationship with an intended activity on the respondent's part.

11. For the appellant, the prosecuting sergeant submitted that s60B of the *Crimes Act* made no mention of intent, that it was not a necessary ingredient of the offence. It was enough, in the absence of reasonable excuse, that the respondent had been loitering in or near a childcare centre. He drew attention to the period of time for which the respondent's vehicle had been parked on the north side of Park Street.

12. In his reply to the prosecuting sergeant's submission, Mr Bourke submitted that there was absolutely nothing to suggest that there was any conduct by the respondent that in any way was designed to in any way affect, or harm or do any wrong at all to children; and that there was nothing in s60B of the *Crimes Act* to suggest that intent was not relevant.

13. Questioned by the magistrate as to what the intent needed to be Mr Bourke submitted that there had to be an intent, not in relation to the question of doing harm but loitering for that purpose.

14. Notwithstanding that the competing submissions had all been made in the course of a

no case submission, the learned magistrate determined the matter as if at the end of trial. She relevantly said this:

> "On its face, s60B(2)(b) of the *Crimes Act*, does not refer, specifically, to a requirement of intent for the purposes of the offence being proven. I am, however, referred by counsel for the defendant to the second reading speech to the Crimes Amendment Bill, a speech which occurred on 23rd of November 1993 in relation to the current s60B of the *Crimes Act*. In her speech, the Attorney-General justifies the inclusion of a new Section on the grounds that, 'There is no offence covering a person loitering with the apparent intention of committing a sexual offence, including a sexual offence against a child.' In light of these comments and the general principles of statutory interpretation, and in the absence of being taken to any authority to the contrary by the prosecution, I find that such an intent is a requirement for the offence to be made out. On the evidence I have heard before me today, I am not satisfied beyond reasonable doubt that the defendant had such an intention."

The learned magistrate went on to say:

> "I am also troubled by the requirement of the Section which states that 'The loitering must occur in or near a school, kindergarten, or childcare centre.' The defendant's actions occurred on the other side of a busy road, at or shortly after, peak hour. On the evidence I have heard, as to the distance between the defendant's vehicle and any children, that distance ranges up to 20 or 30 metres. I do not consider, therefore, that his actions could be considered to be near, for the purposes of this Section. I therefore dismiss the first charge."

After the magistrate had dealt with each of the other charges laid against the respondent, Mr Bourke noted that "I was really just putting no case submissions to you in relation to those matters." But wisely, no doubt, he went on to say that in view of the magistrate's findings he didn't propose to call any evidence in relation to the one charge that the Magistrate had found proved.

15. According to the order of a Master, made 6 August this year, the questions raised by this appeal are as follows:

> "(i) Did the magistrate err in ruling that in a prosecution for an offence under s60B of the *Crimes Act* 1958, it is necessary to establish that the accused had the intention to commit a sexual offence?
>
> (ii) Could a reasonable magistrate properly instructed have held the offence was not committed 'near a childcare centre?'"

Section 60B of the *Crimes Act*, inserted in 1993, reads relevantly as follows:

> "(1) In this section 'sexual offence' means— (a) an offence against section 38, 39, 40, 44(1), 44(2), 44(4), 45, 46, 47, 47A, 48, 49, 55 or 56; or (b) any offence specified in clause 8, 9, 10 or 12 of Schedule 8; or (c) an offence of conspiracy to commit, incitement to commit or attempting to commit an offence referred to in paragraph (a) or (b).
>
> (2) A person who— (a) has been found guilty of - (i) a sexual offence; or ... and (b) is found loitering without reasonable excuse in or near - (i) a school, kindergarten or child care centre; or (ii) a public place within the meaning of the *Vagrancy Act* 1966 regularly frequented by children and in which children are present at the time of the loitering— is guilty of an offence."

16. Reading subsection (2) at face value I should have thought that, in order to make out an offence, it was necessary for the prosecution to prove that the defendant had been found guilty of a sexual offence as defined, or one of the other offences referred to in s60B(2)(a)(ia) - (v) and that such person was found loitering in or near a school, kindergarten or childcare centre. In those circumstances, absent reasonable excuse – which could open up a broad range of circumstances – an offence would be made out.

17. The learned magistrate took the view that it was a necessary part of the prosecution proofs that the defendant loiter with an apparent intention of committing a sexual offence, including a sexual offence against a child. She did not deal with issues of intention other than that matter of intention. So the question whether any other intent must be proved by the prosecution under s60B does not arise on this appeal.

18. In my opinion the learned Magistrate's ruling as to the particular intent was insupportable.

There is absolutely nothing in s60B(2) which would convey a need to prove any such thing. If the legislature had intended that such an intent be necessary, one would have expected it to be set out in the section. In the past, loitering with particular intent has been the language of a number of statutory offences. Not so here.

19. I further consider that there was great difficulty in framing an intention in the way that the learned magistrate did. To do so invites the question, "What is meant by, or comprehended by a sexual offence including a sexual offence against a child?" Is "sexual offence" to be given the meaning assigned it by s60B(1)? Or is it to have some other, and broader meaning? If it is to be confined to a s60B(1) meaning, might not the intended reach of s60B(2) be in part frustrated?

20. The difficulty that I have had in accepting the learned Magistrate's ruling was further illustrated when, in the course of Mr Bourke's submissions today, he framed the intent that it would be necessary for the prosecution to establish. He spoke of some conduct involving interference with children – harassment, interference or touching. That was a narrower formulation than would be encompassed by what her Worship relevantly said.

21. Her Worship appears to have been influenced by what the then Attorney-General said when speaking to an amendment to the *Crimes Amendment Bill* 1993. It appears that the bill was introduced, not containing any reference to what is now s60B, on 22 October 1993. Probably on 23 November, when the bill was in its committee stage in the Assembly, an amendment was introduced which in due course became s60B. In introducing the amendment the Attorney-General said this:

> "The amendment adds to the purposes of the Bill by including a new offence of loitering by sexual offenders. It also foreshadows that a new clause relating to the proposed new offence will be inserted. Although at present there is an offence covering a person suspected of being found about to commit a property offence because he is found loitering in a place or at or near a potential crime target, there is no offence covering a person loitering with the apparent intention of committing a sexual offence, including a sexual offence against a child."

22. The last portion of the passage just quoted was replicated by the learned magistrate in her ruling.

23. When the bill eventually came on for second reading in the Legislative Council it now incorporated what became s60B. Mr Storey, making the Second Reading speech, relevantly said this:

> "The Bill also inserts the new offence of loitering by a sexual offender into the *Crimes Act*. The intention of this offence is to offer some measure of protection to children from sexual assaults by strangers. It will now be an offence for a person found guilty of a sexual offence to loiter without reasonable excuse in or near areas where children congregate. The provision covers schools, kindergartens, child-care centres and any other public place where children regularly frequent. It will also be an offence for a person with a conviction for obscene and wilful exposure or the possession of child pornography to loiter outside places where children congregate without a reasonable excuse. The government believes that offence will ensure that police have the appropriate power to minimise opportunistic sexual assaults against children."[2]

Those remarks were not before the learned magistrate when she made her ruling.

24. Section 35 of the *Interpretation of Legislation Act* 1984 provides that in the interpretation of the provision of an Act consideration may be given to any matter or document that is relevant, including reports of proceedings in any House of the Parliament. The section further provides that a construction that would promote the purpose or object underlying an Act is to be preferred to a construction that would not promote that purpose or object. Those provisions are well known.

25. It was surely open to the learned magistrate to be informed of what the Attorney-General had said. That is so not withstanding that the Attorney's remarks were not made, contrary to what her Worship said in her ruling, in the Second Reading Speech. Likewise it is surely open to note what was said by Mr Storey on behalf of the Minister in the Second Reading speech in the Legislative Council.

26. I should have thought, reading both sets of remarks, that neither of them justifies reading

into s60B(2) the words which in substance the magistrate read in. Even the remarks made by the Attorney-General, which were the highwater mark of the respondent's case, do not carry the matter very far. The paragraph in her remarks immediately following the paragraph which I set out a few moments ago shows that the purpose of the section was to fill a perceived gap in the law, that is, the inability of a police officer finding a person who had been convicted of a sexual offence loitering near a school, a childcare centre or some other place where children congregate, to arrest that person or ask him (or her) to leave that place. There is nothing in those remarks which suggests that it would be a necessary part of filling in the perceived gap to require proof in the event of an arrest that the person had an intention of committing some further sexual or allied offence.

27. I go to the second of the questions framed by the Master. It was not suggested that the learned magistrate had misdirected herself as to what was comprehended by the word "near". I must assume that she correctly directed herself as to that matter. The question is simply whether it was open to a reasonable person in her Worship's position to find that she was not satisfied that the prosecution had proved beyond reasonable doubt that the loitering, which must be assumed for present purposes to have taken place, occurred near a childcare centre.

28. The way in which her Worship resolved the matter was, I must say, unsatisfactory. A no case submission was made to her. That submission did not address the issue of nearness, an issue that had been addressed in the evidence. It is true that at the end of a proceeding in the Magistrates' Court, submissions of fact, at least most often, are not entertained. On the other hand it is unsatisfactory, to say the least of it, that in the context of a no case submission a magistrate should resolve the matter before her as if a submission had been made at the end of trial, and in doing so should address a matter not the subject of submission at all.

29. That said, the prosecutor did not make a complaint about what had occurred, but apparently was content to treat the conclusion expressed as a conclusion expressed at the trial's end. Perhaps because it is not the practice to advance submissions on the facts in the Magistrates' Court, he seems to have accepted what had occurred.

30. Despite what I consider to have been the unsatisfactory way in which the issue was resolved, I should have regard to the way in which the prosecution was content to deal with it below. I should also have regard to the fact that no complaint is now made that it was inappropriate, or more than that, for the magistrate to have dealt with the issue of nearness in the context that she did. In the event, it is necessary to resolve the second question simply according to its terms as framed by the Master.

31. The question is not whether I would have decided what might shortly be called the nearness point in the way that the magistrate did. Had it been a matter for determination at first instance I very much doubt, despite everything that Mr Bourke put to me today, that I would have resolved the matter in that way. But the question is whether it was open to a reasonable magistrate, properly instructed, to arrive at the conclusion that she did – that is, in effect, that the prosecution had not proved the requisite nearness beyond reasonable doubt.

32. In seeking to show that the Magistrate's conclusion was not open the appellant carries a heavy burden. It is not a burden that it is impossible to discharge, but the cases show that it is difficult to discharge.

33. I am not prepared to say that it was not possible for a reasonable magistrate properly instructed, to conclude the nearness issue as her Worship did. Nearness must be a matter of fact and degree in every case. Physical proximity will, I should think, always be a relevant consideration. But that is not to say that it will always be determinative.

34. Here what seems to have persuaded the magistrate that the prosecution had not made out its case was the fact that the respondent had parked his vehicle on the opposite side of the road to the childcare centre, it being a roadway which was not only wide, but which was very busy throughout the period that the vehicle was so parked. It was not said for the appellant that her Worship misdirected herself in having regard to those considerations. Assuming that she could have regard to them, they were considerations which could bear upon the significance of the

physical proximity otherwise established. They provide some support for her Worship's conclusion upon the nearness issue.

35. In the course of argument I drew attention to the fact that in her reasons the learned magistrate referred to a distance between the defendant's vehicle and children, rather than to the distance between the defendant's vehicle and the childcare centre. But, as I have repeatedly noted, no misdirection is alleged; and I think it is likely in fact that her reference to children was really a reference to the centre in which, on the evidence, children were playing.

36. The appeal must be dismissed.

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[1] See variously at pp.78-87 of Exhibit MP3 to the affidavit of Murray Phillips, sworn 3 August 2001 in support of the present appeal.
[2] *Hansard*, Legislative Council, 30 November 1993, p1356.

APPEARANCES: For the appellant DPP: Mr K Armstrong, counsel. Solicitor for Public Prosecutions. For the respondent Field: Mr B Bourke, counsel. Bullards, solicitors.
