21/10; [2010] VSC 183

SUPREME COURT OF VICTORIA

TSOLACIS v DEPARTMENT of TRANSPORT

Beach J

4, 6 May 2010

CRIMINAL LAW – CHARGES LAID IN RESPECT OF SEVEN OFFENCES – STANDARD OF PROOF IN RELATION TO SUCH OFFENCES – FINDING BY MAGISTRATE THAT CHARGES SUBSTANTIALLY PROVED – WHETHER CHARGES PROVED BEYOND REASONABLE DOUBT – WHETHER MAGISTRATE IN ERROR: *CRIMINAL PROCEDURE ACT* 2009, S272.

T. was charged with a number of offences in relation to his being a passenger on a tram. At the hearing, and in finding the charges proved, the Magistrate stated that "I find the charges substantially proved". Upon appeal—

HELD: Appeal allowed. Remitted to the Magistrates' Court for hearing and determination by a different Magistrate.

1. It is trite that in order for T. to be convicted of any of the charges, the elements of each charge had to be established against T. beyond reasonable doubt. Whatever might be encompassed by the expression "substantially proved", charges that are only substantially proved are not proved beyond reasonable doubt.

2. The language of the Magistrate's reasons suggests that T. was found guilty on a standard different from, and lower than, beyond reasonable doubt. For this reason alone, the appeal must succeed. As was said by Dixon CJ in *Dawson v R*, "it is a mistake to depart from the time honoured formula [beyond reasonable doubt]".

***Dawson v R* [1961] HCA 74; (1961) 106 CLR 1; [1962] ALR 365; 35 ALJR 360, applied.**

BEACH J:

Introduction

1. On 19 September 2006, Mr George Tsolacis, the appellant, was travelling on a tram as a passenger. Riding on the tram at the same time as Mr Tsolacis were four authorised officers employed by Yarra Trams (Ms Moisi, Mr Gibson, Mr Lord and Ms Everett). In the course of being asked to produce his ticket and concession entitlement, an altercation occurred between Mr Tsolacis and the authorised officers. As a result of this altercation, Mr Tsolacis was charged with the following offences:

> (1) In Kew, on 19 September 2006, assault Debra Moisi, an officer in execution of her duty.
> (2) In Kew, on 19 September 2006, assault Andrew Lord, an officer in execution of his duty.
> (3) In Kew, on 19 September 2006, failing to comply with the requirement of Debra Moisi, an authorised officer, to produce evidence of an entitlement to a concession.
> (4) In Kew, on 19 September 2006, resist Andrew Lord, an officer in the execution of his duty.
> (5) In Kew, on 19 September 2006, resist Debra Moisi, an officer in the execution of her duty.
> (6) In Kew, on 19 September 2006, unlawfully assault Debra Moisi.
> (7) In Kew, on 19 September 2006, unlawfully assault Andrew Lord.[1]

2. The charges were heard by the Magistrates' Court at Melbourne, constituted by Spooner M. The matter was heard on 4 and 5 June, 14 July and 23 September 2008. On the first day of the hearing, charge 3 was struck out and the Court proceeded to hear charges 1, 2, 4, 5, 6 and 7. Mr Tsolacis pleaded not guilty to all charges. The prosecution called the four authorised officers and a police officer who attended the scene (Senior Constable Benleigh). Mr Tsolacis gave evidence on his own behalf and called one witness, a Mr McGlasham.

3. At the conclusion of the hearing, her Honour heard brief submissions and then delivered judgment in favour of the prosecution, imposed an aggregate fine of $500 without conviction and ordered Mr Tsolacis to pay costs of $171.40.

4. Mr Tsolacis now appeals to this Court against the Magistrate's decision. He brings the appeal under s92 of the *Magistrates' Court Act* 1989, which provides for an appeal on a question of law only.[2] For the reasons given below, Mr Tsolacis' appeal must succeed and the matter will be remitted to the Magistrates' Court for re-hearing and re-determination in accordance with these reasons.

The grounds of appeal

5. In his amended notice of appeal,[3] the appellant set out his grounds of appeal as follows:

> "1. The Respondent deliberately provided false, misleading information, both in document form and in evidence during the hearing. None of the alleged factual information was true or correct, including evidence about medical injuries sustained during the incident or medical treatment received, subsequently. *Transport Act* 1983 – Sect 224, *Evidence Act* 1995
> 2. The Respondent failed to request for the ticket to be surrendered, had no valid reason for holding onto the ticket, and no receipt was issued as required. Proof is the fact, the responsible officer provided constantly a different reason both in her Brief of Evidence and during oral examination and cross examination. *Transport (Ticketing) Regulations* 2006 – Sec 19. *Evidence Act* 1995
> 3. The *Transport Act* 1983 provides that if a reasonable excuse exists, it is lawful to resist, obstruct or refuse to comply with a lawful request or direction, including assault.
> 4. No reasonable steps were taken to ascertain the nature of the dispute by two of the arresting officers. *Transport Act* 1983 stipulates they must query they (sic) nature of the dispute before getting involved.
> 5. The arresting officers failed to show that they believed on reasonable grounds, that:
> A. that the appellant was committing an offence, or
> B. that the arrest was necessary.
> 6. There was insufficient evidence with respect to charges 1, 2, 4, 5 and 6 to make the orders that the Magistrate did.
> 7. Respondent's case not proven beyond reasonable doubt.
> 8. The Magistrate erred in not dismissing the remaining charges because a finding of substantially proven is not permitted by the *Evidence Act*. It must be beyond reasonable doubt.
> 9. On the evidence, the balance of probabilities favours the appellant."

6. Whilst the grounds of appeal refer to the *Evidence Act* 1995 (Cth), I should say for the sake of completeness that the proceeding below was governed by the provisions of the *Evidence Act* 1958 (Vic). However, as will be seen from the reasons which follow, nothing turns on this point in this proceeding.

The Magistrate's decision

7. Her Honour's reasons for accepting the prosecution case in relation to the charges were as follows:

> "Having considered the evidence and the submissions, I find the charges substantially proved, despite the defendant's denials of the assaults alleged against him and his contention that he had a reasonable excuse under the *Transport Act* to behave as he did. These charges arose out of a fairly innocuous ticketing incident on 19 September 2006. On that particular day, an authorised Yarra Trams officer, Ms Mozee, (sic, Ms Moisi) had boarded a tram, on which the defendant was also travelling, with fellow ticket inspectors. When she approached the defendant to check his ticket, he handed it to her, but declined to show her his concession entitlement until she returned it. This silly standoff was the trigger of a most unfortunate series of events.
>
> The defendant proceeded to get off the tram and, not surprisingly, he was followed by the ticket inspectors. He initially ignored their request to show his entitlement and went to walk off. When he was pursued by Ms Mozee (sic), he grabbed her wrist. She broke his hold and he grabbed her again and held up a fist and ended up striking one of the other officers, Mr Lloyd. A third officer, Mr Gibson, then informed the defendant that he was under arrest for assault. He resisted an attempt to take hold of him and proceeded to push and try and break free. At one stage, three officers were observed to be holding him very tightly against a fence. A very believable defence witness, Mr McGlasham, who gave evidence this morning, told the court of how he observed the officers restraining the defendant. Whilst he felt that the officers' behaviour was heavy-handed, he had not seen the preceding events and could not disagree that the officers may have been telling the defendant to stop struggling.
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> Indeed, that is what the officers told the court they had said to the defendant on occasions during the ordeal. Unfortunately the police took some 25 minutes or so to arrive, whereupon calm returned to the situation. Whilst the defendant displayed considerable forensic ability in the conduct of his defence, and whilst he did highlight some inconsistencies in the evidence of the authorised officers, the weight of the evidence was against him. He has made submissions based on his denials of the

> assault which I have found proved against him. He has also submitted that as charge 3 was struck out, the authorised officers' actions flowing from that were illegal, and further, that as they behaved contrary to the provisions of the Act the charges should be dismissed, but I disagree.
>
> Although the defendant was his own worst enemy in my view on this particular occasion, I consider that the case does highlight some shortcomings in the management of difficult tram travellers. The delay in the police attendance was unfortunate, but I feel that more could have been done to diffuse a very difficult situation. Now, Mr Mosco, which assaults are you going to be proceeding with? I would be proposing to strike out a couple of them in the alternative."

8. After discussion with the prosecutor (Mr Mosco), it would appear that charges 6 and 7 were withdrawn or struck out. Her Honour then inquired whether anything was alleged. Nothing was alleged. Her Honour then concluded that as there was no prior history, she proposed to impose an aggregate fine of $500 without conviction and an order that the appellant pay costs in the sum of $171.40. It would appear from the register that these orders were made in respect of charges 1, 2, 4 and 5.

The resolution of this appeal

9. It is trite that in order to be convicted of any of the charges he faced, the elements of each charge had to be established against the appellant beyond reasonable doubt. Whatever might be encompassed by the expression "substantially proved", charges that are only substantially proved are not proved beyond reasonable doubt.

10. If the Magistrate had found some of the charges proved and some not proved, then it might have been possible to describe the overall result as one where the charges were substantially proved. However, that is not this case. It is clear from her Honour's reasons for judgment that her Honour found all of the charges proved, and merely struck out (or permitted the prosecutor to withdraw) charges that were alternative.

11. Further, there may be cases where one could look at the whole of the judgment and say that whilst the Magistrate has referred to charges being "substantially proved", it is clear that reasons have been given for finding each element of each charge established proven beyond reasonable doubt. Again, that is not this case. The reference to the charges being "substantially proved" is, in my view, exacerbated by the statement in her Honour's reasons that whilst the appellant highlighted some inconsistencies in the evidence of the authorised officers, "the weight of the evidence was against him". The use of this language suggests that her Honour may have engaged in a balancing exercise, rather than asking herself whether each element of each charge had been established beyond reasonable doubt. It is regrettable that in giving her reasons her Honour did not identify the elements of each charge she found "substantially proved".

12. Counsel for the respondent submitted that a reading of the whole of her Honour's reasons discloses that her Honour in fact found matters proved beyond reasonable doubt. It was put that the findings of fact made by her Honour disclosed that matters had been proved beyond reasonable doubt. I disagree. The language of the findings made by her Honour was, in my view, equally apposite to a case where the burden of proof was something less than beyond reasonable doubt. It was language of a kind that is often used in the resolution of civil disputes. That is, where the standard of proof is on the balance of probabilities.

13. The short point is that the language of her Honour's reasons suggest that the appellant was found guilty on a standard different from, and lower than, beyond reasonable doubt. For this reason alone, the appeal must succeed. Whilst an attempt was made by counsel for the respondent to equate "substantially proved" with "beyond reasonable doubt", this attempt failed for the reasons given by the High Court in *Green v The Queen*.[4] As was said by Dixon CJ in *Dawson v The Queen*,[5] "it is a mistake to depart from the time honoured formula [beyond reasonable doubt]".[6]

14. During the course of argument, counsel for the respondent referred me to authorities dealing with the supporting of a decision below upon grounds different from those articulated by the Court below. For example, I was referred to *Preston Ice and Cool Stores Pty Ltd v Hawkins*,[7] where Smith J said:[8]

> "The defendant is clearly entitled to support the Magistrate's order dismissing the complaint upon any ground which was open to him at the stage when the order was made."

However, this line of authority has no application in this case. Finding a defendant guilty on a standard lower than beyond reasonable doubt is not a matter that is capable of correction if that is what has occurred. Even if it could be said that the case was overwhelming against the appellant (and I take leave to doubt that in this case), the appellant is entitled to a trial where, in order to be found guilty, each element of the relevant charge must be proved beyond reasonable doubt.

15. Having disposed of the appeal on this ground, it is, strictly speaking, not necessary to consider the appellant's other grounds. However, I should say for completeness that in his other grounds, the appellant sought to agitate matters that were either irrelevant to the ultimate resolution of the charges against him or matters that were mere questions of fact. It is to be remembered that a question of law is not involved in a decision simply because a conclusion of fact may be demonstrably unsound.[9]

16. Specifically, the appellant sought to contend that he could not be convicted of the charges because of inconsistencies and discrepancies in the prosecution case. However, the transcript reveals evidence upon which it would be open to find charges 1, 2, 4 and 5 proved.[10] Whilst this Court might form the view that in the circumstances of the inconsistencies established by the appellant and in circumstances where the material suggests he was a man of previous good character,[11] reasonable doubt might exist in relation to the charges, that is not a matter for this Court.

17. The appellant made no complaint about the adequacy or otherwise of her Honour's reasons. However, it is perhaps unfortunate, that more extensive reasons were not given as to why the prosecution case was accepted. This is particularly so having regard to the reference to the unidentified inconsistencies referred to in her Honour's reasons. It may be that more extensive reasons would have alleviated the concerns of the appellant, as expressed in his grounds of appeal, affidavits and submissions, relating to the acceptance of the evidence of the prosecution witnesses. In any event, it is not necessary to say more about this in the current proceeding.

Conclusion

18. It follows from what I have said above that the appeal must be allowed. In my view, the matter should be remitted to the Magistrates' Court at Melbourne for re-hearing and re-determination by a different Magistrate.[12]

19. I will hear the parties on the precise form of order and the question of costs.

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[1] Charges 1 to 5 were laid under provisions of the *Transport Act* 1983 and charges 6 and 7 were laid under s23 of the *Summary Offences Act* 1966.

[2] Whilst s92 of the *Magistrates' Court Act* was repealed, by s427(1)(d) of the *Criminal Procedure Act* 2009, s14(2) of the *Interpretation of Legislation Act* 1984 permits this appeal to be continued as if s92 had not been repealed: see generally *Secretary to the Department of Justice v Fletcher* [2010] VSC 170, [15]-[43], per Bongiorno JA. See further s272(1) of the *Criminal Procedure Act* 2009.

[3] Filed pursuant to an order of Daly AsJ.

[4] [1971] HCA 55; (1971) 126 CLR 28; [1972] ALR 524; 46 ALJR 545. See further *R v Chatzidimitriou* [2000] VSCA 91; (2000) 1 VR 493; (2000) 112 A Crim R 95.

[5] [1961] HCA 74; (1961) 106 CLR 1, 18; [1962] ALR 365; 35 ALJR 360.

[6] Whilst this was said by Dixon CJ in respect of a summing up in a criminal trial, his Honour's view is equally apposite to a case of the present kind.

[7] [1955] VicLawRp 17; (1955) VLR 89; [1955] ALR 371.

[8] Ibid at p92.

[9] *Transport Accident Commission v O'Reilly* [1998] VSCA 106; [1999] 2 VR 436, [58]; (1998) 28 MVR 327; (1998) 14 VAR 189 per Callaway JA.

[10] This was not a case in which it could be said that there was no evidence to support a particular charge so that a finding to the contrary would constitute an error of law: see generally *Sinclair v Mining Warden of Maryborough* [1975] HCA 17; (1975) 132 CLR 473, 481 and 483; (1975) 5 ALR 513; (1975) 49 ALJR 166; (1975) 34 LGRA 1; *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 355-6; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1 and *Bruce v Cole* [1998] NSWCA 45; (1998) 45 NSWLR 163, 187-8.

[11] Nothing was alleged to the contrary when the issue of penalty arose – although it would appear that the appellant did not put his character in issue at the time her Honour heard the charges.

[12] See generally *Body Corporate Strata Plan (No. 4166) & Ors v Stirling Properties Limited* [1984] VicRp 73; [1984] VR 903, per Ormiston J (as his Honour then was) at 912; (1984) 56 LGRA 227.

APPEARANCES: The appellant Tsolacis appeared in person. For the respondent Dept of Transport: Ms FL McKenzie, counsel. Department of Transport Legal Division.