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SUPREME COURT OF VICTORIA

BETHUNE and ANOR v HEFFERNAN and HEYWARD

Nathan J

3 October, 15 November 1985

[1986] VicRp 43; [1986] VR 417; (1985) 20 A Crim R 122

SUMMARY OFFENCES – PERSON WHO "WILFULLY TRESPASSES IN ANY PLACE" – ALLEGATION OF WILFUL TRESPASS IN POLICE STATION – PUBLIC RECEPTION AREA OF POLICE STATION – LAWFUL ENTRY TO FOYER – REQUESTED TO LEAVE BY OFFICER-IN-CHARGE OF POLICE STATION – WHETHER REFUSAL TO COMPLY AMOUNTS TO A WILFUL TRESPASS – WHETHER FOYER A "PLACE" – WHETHER OFFICER IN CHARGE OCCUPIER OF THE "PLACE" – AUTHORITY OF SUCH OCCUPIER: *SUMMARY OFFENCES ACT* 1966, S9(1)(d).

H. and H. attended a police station to barrack support for two of their friends who were inside the station under arrest. The sergeant-in-charge of the police station requested H. and H. to leave; however they refused. Upon being ordered to leave or face arrest, they again refused and were then charged with wilful trespass. At the subsequent hearing it was submitted that the sergeant-in-charge lacked the power to revoke the authority of the defendants to remain in the foyer and therefore, there was no trespass. The Magistrate agreed and acquitted the defendants. Upon orders nisi to review—

HELD: Orders absolute.
(1) The phrase "any place" in s9(1)(d) of the *Summary Offences Act* 1966 includes both private and public places.
***Simpson v Knowles* [1974] VicRp 25; [1974] VR 190; (1973) 29 LGRA 313, applied.**

(2) An "occupier" within the meaning of s9(1)(d) of the *Summary Offences Act* 1966 encompasses those persons, who by reason of their office or position, are in charge of public places where some measure of control or regulation is required so that the functions of the place can proceed.

(3) The Officer-in-Charge had the same authority as any occupier of premises to withdraw the licence of any person to remain on those premises. It was not necessary to enquire whether the Officer-in-Charge was authorized by the Crown to exercise his authority.

(4) Accordingly, as the police station foyer was a "place" of which the Officer-in-Charge was the occupier, such person had sufficient authority to revoke the licence of the defendants to remain in that place, and their unjustified refusal amounted to a wilful trespass.

NATHAN J: [1] Heyward and Heffernan caused a ruckus in the foyer of the Mordialloc Police Station at 1.30 a.m. on 28 April 1984. The Sergeant in Charge (Morgan) asked them to leave, then ordered them to do so or face arrest. Heffernan responded in picturesque terms which included, "I'm not goin' nowhere" and Heyward said: "I'm staying here meat head and that's all there is to it". They were charged with trespass and acquitted. The informants obtained Orders Nisi to review the decision on the ground that the Magistrate was bound to find that Morgan was the occupier of the Station or was authorized by the owner or occupier to order them to leave. **[2]** I shall deal with both Orders Nisi together and I shall now elaborate the facts. Two of Heffernan and Heyward's friends had been arrested for street offences outside a hotel. They were taken to the station by the informants. Heyward followed and barracked support from the foyer of the station. Morgan asked him to leave and held the door open. He did. As the second of the two friends was brought into the station Heyward returned to the foyer, this time with Heffernan. They recommenced their barracking which agitated their two friends who were being interviewed in an adjacent area, out of sight but not of hearing. Morgan asked them both to leave. They sat down on chairs available for the public but positioned themselves so as to be obstructive. More barracking ensued. Morgan swore he then said: "Your presence here is causing disruption to the running of this station. The two people just arrested will be placed in the cell and you will not be able to communicate with them. At this point of time I am in charge of this police station and I now revoke any right you

have to remain here. I request that you leave the precincts of this station immediately. If you do not do so you will be trespassing and you will be arrested and charged with trespass." He then attended to the others arrested. Heffernan and Heyward overturned the chairs. Morgan returned and said: "I have warned you to leave the precincts of this building and if you don't do so now you shall be arrested." After abusing Morgan, they were both charged with trespass under s9(1)(d) of the *Summary Offences Act* 1966 (the SOA). It reads:

> **[3]** "Destroying Damaging or Injuring Property - Trespass.
> 9. (1) Any person who—
> (d) wilfully trespasses in any place and neglects or refuses to leave that place after being warned to do so by the owner occupier or a person authorized by or on behalf of the owner or occupier—
> shall be guilty of an offence.
>
> Penalty: 25 penalty units or imprisonment for six months."

Therefore this case presents the novel question whether the trespass provision of the SOA applies to police stations. The learned Magistrate held that the foyer of the station was a public place; he cited *McIvor v Garlick* [1972] VicRp 13; [1972] VR 129. He accepted a submission that Morgan lacked power to revoke the authority of the defendants to remain in the foyer and therefore there was no trespass; he cited *Simpson v Knowles* [1974] VicRp 25; [1974] VR 190; (1973) 29 LGRA 313. I am quite satisfied that the foyer of an open police station is a public place. *Simpson's case* supports that conclusion. *McIvor's case* is not relevant. *Simpson's case* concerned an alleged trespass upon an area within a public park which had been fenced off by building contractors engaged in laying a gas pipeline pursuant to the *Pipelines Act* 1967 (No. 7541). Norris J followed *Randwick Corporation v Rutledge* [1959] HCA 63; (1959) 102 CLR 54; [1960] ALR 66; (1959) 5 LGRA 127; (1959) 33 ALJR 367 and referred to the right of members of the public to have access to a public park. Insofar as *McIvor's case* dealt with the criteria for establishing whether a place is public or otherwise I adopt it. However, that case was concerned with the commission of the summary offences of "behaving in an offensive manner" and "use of indecent **[4]** language" in a public place and is not directly applicable to this situation which creates the offence of trespass "in any place". Newton J (pp133-134) sets out three points of reference. Only the first is pertinent in the context of this case:

> "(1) If at the relevant time members of the public are lawfully entitled, invited or permitted to be there in their capacity as members of the public ... "

Certainly the public reception area of a police station when open for business falls within this class. Public policy dictates that citizens should not be impeded or hindered in their access to the police. Both respondents were perfectly entitled to enter the reception area to accompany or wait for their friends who had been arrested; that entitlement would not have extended to the non-public areas of the station such as the offices, muster rooms or corridors. However, the issue here is not whether the foyer was a public place, but whether Morgan had the authority or was authorized by the owner of the place to oblige the respondents to leave, whereby if they failed to do so they became trespassers. The question thus phrased raised the following issues:

1. Whether the foyer was a place within the meaning of s9(1)(d)?

2. Was Morgan the occupier of the place?

3. Did Morgan have authority on his own account to exclude the respondents?

4. If Morgan was not the occupier was he authorized on behalf of the owner or occupier?

[5] (5) In any event did the failure of the respondents to leave amount to a trespass?

Question 1 – Police foyer as "a place" and "public place"

Mr Power, for the respondents, submitted that the word "place" should be read as applying to private places only, as the section should be interpreted *noscitur a sociis* with the other provisions of s9 as being designed to protect individual or private property. There is no substance to that contention as the following historical examination reveals. The *Town and Country Police Act* 1854 (18 Vict No. 14) sXV (7) was the ancestor of the present provision. It provided:

> " – any person who shall commit any of the next following offences shall on conviction pay to the person aggrieved compensation for ... the injury done in an amount not exceeding 50 pounds and shall also be liable to the penalty and punishment hereinafter specified ... Any artificer workmen, journeymen or apprentice wilfully damaging, spoiling or destroying any goods ... or wilfully breaking or extinguishing any lamp or
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> (7) wilfully trespassing in any place and neglecting or refusing to leave such place after he shall have been warned to do so by the owner or any person authorized by or on behalf of the owner or
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> (8) committing any injury or damage to any property whether private or public not herein before provided shall be liable to a penalty not exceeding 20 pounds or to imprisonment for a period not exceeding three months." (my emphasis)

That sub-section was re-enacted with only minor changes in all successors of the 1854 Act before the 1966 Act which greatly simplified this section. In 1970 by Act No. 8085 the words "or occupier" were added in the places where they still appear. A recitation of the provisions **[6]** plainly reveals that it is directed to both public and private places; it provides for remedies both of a private and public character. Further there is ample authority in which the provisions of the section were applied to publicly owned places (see e.g. *R v Harris* [1871] LR 1 CCR 282; (1871) 11 Cox CC 659 – a lavatory in a Sunday School. In *Fisher v Wheatland & Ors* [1863] 2 W & W (1) 130 the plaintiff, headmaster of a government school at Geelong sued the Local Board of Management on two counts of false imprisonment and trespass, the plaintiff having refused to leave the school when requested to do so. One of the defendants pleaded justification under s157 of the 1854 Act of which Stawell CJ, speaking apparently for the Full Court, said at p134:

> "we think that the cases contemplated by the clause in the Act referred to are those where one person in actual and undisputed possession finds another who trespasses, and who after he has been warned by the owner, or a person authorised on his behalf, to leave, neglects or refuses to do so; no question either as to title or possession arising in any way. There the trespasser by remaining does an act partaking to a certain extent of a criminal character, and the law referred to affords a protection against such acts."

Another example is *Moloney v Whitwell* [1924] VicLawRp 73; [1924] VLR 454; 30 ALR 343; 46 ALT 62, and *Simpson's case* per Norris J which is directly applicable as the beach foreshore in that case was held to be a public place. The enclosure fenced off by the contractors under the terms of the *Pipelines Act* was not converted into a private place which entitled the contractors to exclude the respondents from entry. Further, the terms of the Act are specific. The reference **[7]** to 'any place' does, in my mind, include both private and public places. There is no ambiguity or any place for construing the SOA strictly because it might extend the categories of criminal offences (*vide Beckwith v R* [1976] HCA 55; [1976] 135 CLR 569 per Gibbs J, as he then was, at p576); [1976] 12 ALR 333 at p339; 51 ALJR 247; 28 ALT 39:

> "The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences."

Question 2 – Morgan as an Occupier

The second question posed is whether Morgan was the occupier of the place. Morgan had introduced himself as being the Officer in Charge of the Police Station at the time of the ruckus and it was he who requested the respondents to leave. The ambit of the common law as to who is an occupier, as distinguished from the duty of care imposed upon such persons, remains unaffected by the *Occupier's Liability Act* 1983 (No. 9995). It is to the common law I must look to answer this question. The compass of the word "occupier" is most often described by the enacting words and their context. In *Koowarta v Bjelke-Peterson & Ors* [1982] HCA 27; [1982] 153 CLR 168; (1982) 39 ALR 417; (1982) 56 ALJR 625 Brennan J at p267, albeit considering the *Racial Discrimination Act* where it refers to the occupation of land, said; [1982] 39 ALR 417 at p493; (1982) 56 ALJR 625:

> "*prima facie* the reference is to the physical occupation of the land by natural persons."

[8] He approved *Madrassa Anjuman Islamia of Kholwad v Johannesburg Municipal Council*

[1922] UKPC 22; [1922] 1 AC 500 per Viscount Cave, who delivered their Lordships' judgments, at p504:

> "The word 'occupy' is a word of uncertain meaning. Sometimes it denotes legal possession in the technical sense, as when occupation is made the test of rateability; ... At other times 'occupation' denotes nothing more than physical presence in a place for a substantial period of time, as where a person is said to occupy a seat or pew, or where a person who allows his horses or cattle to be in a field or to pass along a highway, is said to be the occupier of the field or highway for the purpose of s68 of the *Railway Clauses Act*, 1845 ... Its precise meaning in any particular statute or document must depend on the purpose for which, and the context in which, it is used. In the present case it appears reasonably clear that the word is used in the second or more popular sense above described."

His Honour then examined the various such sections of the *Racial Discrimination Act* and said at p268; ALR at p494:

> "Occupation for the purposes of para (d) is not necessarily exclusive occupation. It may be occupation with others; it may be as a licensee or invitee of another occupier. It follows that if an owner of land or another with the requisite authority refuses permission to a person physically to occupy it, that is a refusal of permission to occupy land within para (d)."

Prior Victorian authorities also used this approach: *R v Sayers & Anor* [1867] 4 WW & a'B(1) 46 a Full Court decision dealing with *Police Offences Act* 1865 s35(4): "an occupier of a house frequented by reputed thieves", held that the word occupier therein should be used in the sense of being a "keeper" and as such both spouses may be occupiers of a house. In *Silvester v Hodder* [1956] VicLawRp 106; [1956] VLR 733; [1957] ALR 259 Sholl J held that a mere lodger **[9]** who permitted his room in a boarding house to be used by reputed thieves may be an occupier. McInerney J in *Fox v Warde* [1978] VicRp 37; [1978] VR 362 when considering the offence of occupying premises for the purposes of prostitution considered that the use made of the premises was a relevant factor as was the extent of control. The occupier's control did not need to be permanent or exclusive of others but it had to be more than merely transitory. He sounded a cautionary note which I endorse (p368):

> "I do not intend to go further than the facts of this case. I have no intention of attempting to formulate a judicial definition of the word "occupier". Such a cause would be extremely dangerous and calculated to be misleading to those who hereafter have to apply the law."

See also *Smith v Taylor* [1978] 24 ACTR 9 – squatters occupying a Commonwealth place, a hostel. I am satisfied that an "occupier" within the meaning of SOA s9(1)(d) encompasses those persons, who by reason of their office or position, are in charge of public places where some measure of control or regulation is required so that the functions of the place can proceed. The word also extends to private places but that is not of concern here. Morgan was at the relevant time in charge; the fact that at some other time of the day or on some other shift some other person might be in charge is not decisive. His obligation was to ensure that the public place i.e. the foyer could be used for the purpose for which it was intended namely recourse to it by the public. If it became impossible or difficult for that to be done he had sufficient authority on his own account to regulate the **[10]** use of that space, including the power to exclude some persons.

The foyer could not be regarded as unoccupied space nor could the police station itself be considered unoccupied; or occupied by the abstract notion of "the Police Force". It may or may not have been constructed on Crown land. There is no evidence one way or the other as to who or what is the legal owner of the land, nor for the purposes of deciding who is the occupier is the question of ownership decisive. I must interpret the word in the context of the statute and that is one which creates a number of statutory offences prohibiting certain types of behaviour. Section 9, when read in its entirety proscribes individual conduct; for example (a) any person who damages a dam or (c) no person may wilfully damage property, likewise (d) no person may trespass when asked to leave by the occupier.

There are no words of limitation as to who is an occupier or who may be a trespasser. In my view the concept of the Act was to proscribe all trespasses whenever occurring and the concept of the occupier having authority to do so should also be given its natural and expansive meaning. Further, the private and public areas of the police station cannot be segregated. Morgan was in charge of the whole station; his authority as the Officer in Charge as occupier, albeit temporarily,

covered the entire premises. The classes of persons who may be occupiers of public places by virtue of their office is not closed; it could extend for example to Railway station masters or Officers in Charge of Fire and Ambulance stations.

[11] Question 3 – Morgan's Authority

I turn to consider the third question whether Morgan had authority on his own part to exclude the Respondents; that necessitates and examination of his status and role as the public officer in charge of the station at the time. It is now settled law that a policeman, when performing his duties, acts as an officer of the Crown and a public servant; his relationship to the Crown is not however one of master and servant nor, it would seem, as its agent. He exercises an original authority arising from his status as a constable: *Enever v R* [1906] HCA 3; [1906] 3 CLR 969 per Griffith, CJ at p977; [1906] 12 ALR 592 at 595:

> "A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application";

also *Attorney-General for NSW v Perpetual Trustee Co Ltd & Ors* [1955] AC 457; [1955] 1 All ER 846; [1955] 2 WLR 707; see also *Police Regulation Act* 1958 (No. 6338) s11:

> "Every constable shall have such powers and privileges and be liable to all such duties as any constable duly appointed now has or hereafter may have either by the common law or by virtue of any Act of Parliament now or hereafter to be in force in Victoria, and any member of the police force of higher rank than a constable shall have all the powers and privileges of a constable whether conferred by this Act or otherwise."

Also s13(3):

> "(3) Every person who has taken and subscribed such oath shall be taken to have, from the day on which such oath has been taken and subscribed, thereby entered into a written agreement with, and shall be thereby bound to serve Her Majesty as a member of the force, and in whatsoever capacity he is hereinafter required to serve, and at the current rate of pay of any rank to which he is appointed or reduced until legally discharged; and such agreement shall not be **[12]** set aside cancelled or annulled for want of reciprocity, but every such agreement shall be determined by the discharge dismissal or other removal from office of any such person, or by the acceptance of the resignation of the Chief Commissioner or of any officer by the Governor in Council, or by acceptance of the resignation of any member of the force of or below the rank of senior sergeant by the Chief Commissioner."

The oath is to be the equivalent of an agreement (see *Bertrand v R* [1949] VicLawRp 10; [1949] VLR 49 at p53; [1949] ALR 311, also *Chapman v Commissioner, Australian Federal Police* (1983) 50 ACTR 23; (1983) 76 FLR 428; (1983) 50 ALR 23; *Irwin v Whitrod (No. 2)* [1978] Qd R 271.) There is a plenitude of authority for the proposition, and it is trite to say, that a policeman has such lawful powers as are necessary for him to maintain the peace or prevent breaches of it, e.g. *Mackay v Abrahams* [1916] VicLawRp 83; [1916] VLR 681; 22 ALR 385; 38 ALT 78 (constable's implied licence to enter shop premises to investigate an alleged offence); *Halliday v Nevill* [1984] HCA 80; (1984) 155 CLR 1; [1985] 59 ALJR 124; [1985] 57 ALR 331. It must follow from this that he must have the same authority as any occupier of premises to withdraw the licence of any person to remain on those premises.

Question 4 – Morgan's authorization by the owner or occupier

Although it may be usual for police stations to be situated on Crown land this is not invariably so, e.g. police posts at racecourse or football grounds owned by clubs. As I have no evidence of the ownership of the Mordialloc police station I cannot presume it to the Crown, and hence I cannot presume that the Crown as owner authorized Morgan to revoke any licence of a member of the public to remain. As I have already decided he had **[13]** sufficient authority to revoke such licence by reason of his being the constable in charge, the question of whether he was authorized by the Crown exercising its authority through the Police Force as occupier becomes unnecessary to answer. However, in my view the previously cited authorities establish the proposition that no express or implied authorization is required. Morgan exercised his independent authority. It is probable that some lesser ranking police person having temporary but immediate control over that particular section of the station would also have authority, for example the constable at the enquiry counter or the constable temporarily in charge while the other members were at lunch.

Question 5 – Did the Respondents' acts amount to a trespass?
Heffernan and Heyward had a right or licence to be in the foyer. Morgan was its occupier at the time; his request twice repeated revoked that licence and it was their own act of refusing to leave which constituted the trespass: *La Trobe University v Robinson & Pola* [1972] VicRp 104; [1972] VR 883. McInerney J said at p897:

> "It may be pointed out that in a prosecution under this section (9(1)(d)) it is not sufficient to prove wilful trespass by the defendant: what must be proved is that there has been a wilful trespass coupled with a neglect or refusal to leave after being warned to do so ... "

On the given facts I am satisfied that both defendants became trespassers and attempted to assert a right they did not have. A much more difficult issue would arise if a police person out of caprice or malice sought to revoke the licence of a member of the public to be upon a public place. The police person would probably not be **[14]** authorized to act in that vein and the revocation might be ineffective. I do not seek to decide all the circumstances but it is proper to say that the authority should be used sparingly. As I have said public policy requires unfettered access to public places especially police stations and the authority of police persons to exclude must be exercised with that policy in mind. In this instance, there were other offences which could have applied to the respondents and in fact one pleaded to a charge of resisting arrest.

Conclusion
A police station foyer is a place as well as being "a public place" of which the Officer in Charge is the occupier. That person has the authority when properly exercised to withdraw the licence of members of the public to remain in that place and their unjustified refusal to do so will amount to a breach of s9(1)(d) of the *Summary Offences Act*. The Orders nisi will be made absolute; they were sufficiently wide in ambit to cover the arguments raised and disposed of in this judgment.

Solicitor for the informants: RJ Lambert, Crown Solicitor.
Solicitors for the defendants: Joseph Lynch and Window.
