18/82

SUPREME COURT OF VICTORIA

RISTEVSKI v LEUNG

Crockett J

16 February 1982

NUISANCE – BARKING DOG – DISTRESS CAUSED TO NEIGHBOURS – CONDITION LIABLE TO BE DANGEROUS, OFFENSIVE – MEANING OF "NUISANCE" – ABATEMENT NOTICE – WHETHER REQUIRED TO BE GIVEN BEFORE PROSECUTION – DISMISSAL OF CHARGES BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *HEALTH ACT* 1958, SS40, 43(d).

Held: Order nisi absolute. Order for dismissal of charge set aside and remitted for further determination.
1. The provisions of s44 of the *Health Act* 1958 do not create a requirement that, before a person may be informed against for an alleged offence under s40, a notice of abatement must be given, so that should it not be so served, it is then impossible to prosecute for the offence created by the provisions of s40, and alleged to have been committed.

2. *Obiter*: On its proper construction the word "nuisance", and for that matter the word "offensive", must, where those words are used in s40, bear a limited or restricted meaning. However, if they are to bear such a restricted meaning, the meaning ought not to be as restricted as that contended for on the part of the respondent. Whatever meaning the words have they are at least so wide as to encompass a condition or state of affairs properly describable as amounting to a nuisance or as being offensive, as the case may be, provided that such condition or state of affairs is harmful, not only to public health, but to the comfort of life of members of the public within the reach of the activity amounting to a nuisance or which is describable as offensive. If such activity is injurious to personal comfort, it is an activity which falls within the scope of the policy of the legislation.

CROCKETT J: At the relevant time the respondent was the occupier of premises in Hoddle Street, East Melbourne, where he kept a pet dog. Unfortunately, the dog was prone to bark for prolonged periods with the result that a number of the respondent's neighbours complained that they had been distressed by the noise to which they were subjected. Their complaints were made to an officer of the City of Melbourne within whose jurisdiction the subject premises lay. In the result an information pursuant to s40 of the *Health Act* was laid against the respondent by that officer. That section reads:

> "No person shall cause or permit or suffer to exist on any premises owned or occupied by him or of which he is in charge any nuisance or other condition liable to be dangerous to health or offensive."

At the hearing of the information some three neighbours in addition to the informant gave evidence in support of the case against the respondent. The substance of the neighbours' evidence related to the persistency and regularity of the barking and that it occurred at times of day and night so as to cause them considerable discomfort. One such witness – a shift worker – complained that his sleep was disturbed; another, a housewife with a young child, complained of the inability of the child to enjoy undisturbed sleep; and the remaining neighbour complained that, as a student, his capacity to concentrate on his studying was habitually disturbed by the noise of the barking dog. Altogether the evidence showed that these witnesses were subject to a not inconsiderable degree of distress, discomfort, annoyance and irritation. However, the evidence fell short of suggesting, still less of establishing that the distress or discomfort suffered was, or was likely to be, injurious to the health of any of such witnesses or any other person or persons who may have been within the range of the dog's barking.

At the close of the case for the prosecution the respondent, by his legal adviser, made two submissions. The first was that the information should fail because the service of an abatement notice on the respondent was not proved and this, it was submitted, was a necessary prerequisite to the prosecution of the defendant pursuant to s40 of the *Health Act*. That submission the Magistrate rejected. The second submission was to the effect that if the acts complained of could

be said to constitute a nuisance or to be offensive, as those words might ordinarily be understood according either to the law or in common parlance, that would not be sufficient to establish the offence because, so it was argued, those expressions should be read down to mean "acts that were or might be deleterious to public health" which, if they were, might then be said to amount to a nuisance or to their being offensive. This submission the Magistrate upheld and, accordingly, dismissed the information.

The informant obtained an order nisi to review that order of dismissal and it is the return of that order nisi which I now have for determination. In the first place, the respondent sought to uphold the dismissal by repeating before this court the argument that the information necessarily had to fail because there had been no proof of service of an abatement notice. Section 44(1) of the *Health Act* states, in apparently mandatory terms, that it is a requirement of a Council, should it be satisfied of the existence of a nuisance, to serve a notice of abatement upon the author of that nuisance. The section goes on in further sub-sections to provide for the procedure in the event that there be a failure to comply with the notice, The Council is empowered to make a summary complaint upon which, if it is proven that a notice for abatement having been served has not been complied with, the Magistrates' Court, in addition to other matters, may impose a penalty on the person to whom the notice was directed.

In my opinion the provisions of s44 of the Act do not create a requirement that, before a person may be informed against for an alleged offence under s40, a notice of abatement must be given, so that should it not be so served, it is then impossible to prosecute for the offence created by the provisions of s40, and alleged to have been committed. The creation of circumstances which, whilst they may be identical, can, while following different procedures, attract a monetary penalty, does not mean that it is necessary with respect to the s40 offence to follow the procedure referred to in s44. This conclusion is, I think, supported by the observations of Griffith CJ to be found in *McKell v Rider* [1908] HCA 9; (1908) 5 CLR 480, p486.

Accordingly, I turn to consider the primary matter which was the subject of debate before me. The Magistrate found that the barking of the dog amounted to a nuisance at common law and he found also: that it was offensive. ... His attention was directed to s43 of the Act, the introductory words of which are as follows:

> "The following shall be deemed to be nuisances liable to be dealt with in the manner provided in this Act."

There then appear some thirteen sub-paragraphs ((a) to (m) inclusive), describing circumstances or conditions which, for the purposes of the Act, are to be treated as nuisances, which I take to include for the purpose of determining what amounts to a nuisance within the meaning of s40 of the Act. Despite some suggestion by counsel for the informant to the contrary, I think it is true to say that all of the postulated conditions or circumstances to be found in s43 do touch in one way or another upon matters which would ordinarily be considered to be, or possibly to be, dangerous to health or, at all events, that might constitute a threat to health.

Accordingly, the Magistrate was invited to treat the expression "nuisance" and the expression "offensive" as being ones which were not to bear their ordinary meaning or the meaning ordinarily attributed to them in law. Rather, it was said they should be read down to mean a nuisance or a condition which was offensive in the sense that it was dangerous to health or was potentially so. The Magistrate in acceding to that submission said that in his opinion the reference to nuisance in paragraph 43(n) of the *Health Act* (i.e., "any condition whatever which is a nuisance or dangerous to health or offensive") should be confined to matters of a kind referred to in the preceding sub-paragraphs of s43, and that, therefore, the barking of the dog could not amount to a nuisance for the purposes of s43 or, accordingly, s40.

The Magistrate is to be taken, I think, as finding that the conditions or states defined in (a) to (m) inclusive constitute a genus, and that the conditions referred to in (n) are to be construed *ejusdem generis*. Furthermore, having done that, the Magistrate has treated the word "nuisance" where it is used in s40 as meaning no more than the deemed nuisances to be found in s43 including those referred to in but to be treated as restrictively defined by s43(n), or if it is to mean a nuisance other than the deemed nuisances to which s43 refers, nonetheless it does not mean

any common law nuisance but is limited to a kind such as the various provisions to be found in s43 would suggest that the Act is alone concerned with, namely one which is, or potentially is, dangerous to health.

The Magistrate having found that the barking of the dog was offensive then expressed no view as to how that finding could lead to the exculpation of the respondent. On the face of it, far from exculpating him the finding ought to have led to the conclusion that there was a case to answer. I can only conclude that there is left inarticulate in the Magistrate's express reasons the conclusion that the expression "offensive" is to be read down in some way in the same manner as he concluded that the meaning to be attributed to the expression "nuisance" was to be read down. Before me the argument for both parties proceeded on such an assumption. The question then is as to whether or not those expressions in s40 should be so read down. It is this issue which the grounds upon which the order nisi was granted, in substance, raise for determination.

It is clear, I think, that the various conditions referred to in s40 must be construed disjunctively, that is to say, the section creates an offence if there is brought into existence a nuisance or if there is brought into existence any other condition liable to be dangerous to health or if there is brought into existence any other condition liable to be offensive.

It is clear, I think, that what might amount to a nuisance could be something different from that which is a condition that is either liable to be dangerous to health or which is dangerous to health, or which is liable to be offensive, or which is, in fact, offensive. The fact that s43 legislates so as to deem to be nuisances certain conditions or states does not mean that what is a nuisance for the purpose of s40 is no more than such deemed conditions or states. The question which has been much debated, however, is whether there may be treated as a nuisance for the purposes of s40 a condition which meets the common law definition of "nuisance" but which is constituted by facts or conditions other than those to be found described in s43. It was contended for the applicant that the expression should not be read down in any such way. A number of arguments was addressed to the court in support of the contention that the expression should in no wise be limited in its interpretation, and a number of provisions in the *Health Act* was referred to in support of those arguments

On the other hand, I was invited on behalf of the respondent to construe the word by reference to the obvious policy or intent of the Act in which it is to be found and by looking at the provisions of the Act as a whole. It was said that if that were done it could be seen that the provisions of the Act generally are concerned with matters of public health or threats to it. Accordingly, it was said that the Act is in no way concerned with nuisances that did not in some way adversely affect the public health, or, at all events, constitute a potential threat to it. It was said that the barking of a dog so as to cause irritation and discomfort, whilst, as the Magistrate found, it might well be a nuisance at common law, is not to be treated as a nuisance as that term should be interpreted in s40 because the evidence did not establish that the barking in any way would adversely affect the health of any of the immediate public or constitute a potential threat to such health.

I think that the resolution of this question is by no means free from difficulty. It is, however, unnecessary, in my view, to express any concluded opinion about it in these proceedings. For the purposes of the disposal of this case, without, as I say, determining the matter, I am prepared to assume that on its proper construction the word "nuisance", and for that matter the word "offensive", must, where those words are used in s40, bear a limited or restricted meaning. However, if they are to bear such a restricted meaning, the meaning ought in my view not to be as restricted as that contended for on the part of the respondent. Whatever meaning the words have I am satisfied they are at least so wide as to encompass a condition or state of affairs properly describable as amounting to a nuisance or as being offensive, as the case may be, provided that such condition or state of affairs is harmful, not only to public health, but to the comfort of life of members of the public within the reach of the activity amounting to a nuisance or which is describable as offensive. If such activity is injurious to personal comfort, in my view it is an activity which falls within the scope of the policy of the legislation. That view is supported by the observations of Stephen J speaking for the Court of Appeal in *Bishop Auckland Local Board v Auckland Iron & Steel Co Ltd* (1882) 10 QBD 138. This case received the recent approval of Lord Wilberforce in *Salford City Council v McNally* (1976) AC 379 at 389. There is nothing, I think, in

any of the other authorities to which I have been referred, which is contrary to that expression of opinion, and, indeed, I think the trend of those authorities supports that construction.

The result is that I think it is plain that the Magistrate has misdirected himself in determining whether there was a case to be answered by the respondent. The question required to be answered is whether the barking of the dog, to the extent and having the effect to which the Magistrate was satisfied the evidence had *prima facie* established at the close of the respondent's case, was such as to be harmful to the personal comfort of those within hearing distance of the dog or not. If it was, then a *prima facie* nuisance, as referred to in s40, had been made out, and there was, accordingly, a case to be answered. If there was not, then there was no case to answer.

I might say that whilst I have some doubt myself whether it is correct to characterise the barking of a dog in the circumstances disclosed by the evidence as offensive, the Magistrate's finding to such effect was not disputed before me. On the assumption, therefore, that the evidence was able to justify such a finding, I am disposed to think that such finding brought the case directly within the provisions of s43(d). Accordingly, by reason of an animal's having been so kept as to be offensive, there was a deemed nuisance which, by virtue of such deeming, was to be treated as a nuisance for the purposes of s40 of the Act. However, it is not necessary to express an opinion about that matter which was an additional argument relied upon by the applicant in this case; but it is, I think, an argument of sufficient weight to encourage me to think that, if I am wrong about the view that I have expressed on the primary matter, the course I am about to order is nonetheless the correct course to be followed.

The order nisi will be made absolute, the order of dismissal will be set aside and the matter is remitted to the Magistrates' Court at Melbourne to be further dealt with in accordance with the reasons which I have given. The respondent is ordered to pay the applicant's costs which I fix at $200 and I grant the respondent an indemnity certificate under s13 of the *Appeal Costs Fund Act*.
