34/82

SUPREME COURT OF VICTORIA

DAVIS & WILSON v TAHIR

Tadgell J

30 March 1982

CRIMINAL LAW – ASSAULT CHARGES – DEFENDANT SAID TO BE DRUNK AT TIME OF COMMISSION OF OFFENCES – DEFENDANT RECOUNTED THE CIRCUMSTANCES IN WHICH HE HAD STRUCK THE POLICE OFFICER – FINDING BY MAGISTRATE THAT DEFENDANT DID NOT KNOW WHAT HE WAS DOING AT TIME OF ALLEGED OFFENCE – FINDING BY MAGISTRATE THAT DEFENDANT DID NOT FORM AN INTENTION TO STRIKE POLICE OFFICER – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR – WHETHER DEFENDANT KNEW THAT INFORMANT WAS A MEMBER OF POLICE FORCE: *CRIMES ACT* 1958, S37; *SUMMARY OFFENCES ACT* 1966, S52.

Defendant was charged with Assault Occasioning Actual Bodily Harm (1) Assault Police (2) Resist Arrest (2) and Assault (2) and was alleged to have committed the offences when Police attended a domestic dispute at his home. The defendant gave evidence of consuming an indefinite quantity of liquor between 8 p.m and 5.30 a.m., and of events at his home and at the Police Station. A witness gave evidence of the defendant having consumed a mixture of drinks between 8.30 p.m. and 5 a.m., and described him as 'deadly drunk' and 'hardly able to stand'. It was submitted that *R v O'Connor* [1980] HCA 17; (1980) 146 CLR 64; (1980) 29 ALR 449; (1980) 4 A Crim R 348; (1980) 54 ALJR 349 applied, and that requisite intent not formed. The magistrate agreed and dismissed the charges. Upon appeal—

HELD: Appeal upheld. Order of dismissal set aside. Matter remitted to the Magistrates' Court for determination according to law.

1. Whilst there was ample evidence of the fact that the defendant was appreciably affected by alcohol, that he was drunk, that his conduct was out of character and that his insobriety provided an explanation, the evidence, however, cast no reasonable doubt on his intent. The fact that the defendant recalled and recounted a few hours later the circumstances in which, including where and how, he had struck the police officer cannot stand with a finding that at the time of the striking the defendant was not proved beyond reasonable doubt to have been capable of forming an intention to strike the police officer in a manner sufficient to constitute an assault. The inescapable conclusion that the defendant knew what he was doing, and knew it sufficiently to be able to describe it in some little detail a few hours later, led inevitably to the conclusion that he intended to do what he did.

***Head v Baillieu*, unrep, VSC (FC), 26 November 1979, referred to.**

2. Knowledge on the part of the accused that the person assaulted or resisted was a member of the police force, or that he was acting in the due execution of his duty, need not be proved by the prosecution in the first instance as part of its essential case. Accordingly, it was open to the magistrate to find that the defendant had knowledge of the fact that the police officer was acting in the execution of his duty at the time of the assault.

***R v Galvin (No. 1)* [1961] VicRp 113; (1961) VR 733, applied.**

TADGELL J: ... In the light of the statement, taken together with the evidence of the informants, and of the respondent himself, as to the incidents at the respondent's house, the conclusion is in my opinion inescapable that the respondent knew what he was doing at the time of the alleged offences. The fact that the respondent recalled and recounted, a few hours later, the circumstances in which, including where and how, he had struck Sergeant Davis cannot in my opinion stand with a finding that at the time of the striking the respondent was not proved beyond reasonable doubt to have been capable of forming an intention to strike the Sergeant in a manner sufficient to constitute an assault.

It is to be noted that there was no defence raised or open to the effect that the respondent reasonably believed that there was any lawful justification for his conduct towards Sergeant Davis. Had there been any such question genuinely raised it would have been incumbent on the informants to have proved beyond reasonable doubt that the respondent had no such reasonable belief. That there was ample evidence of the fact that the respondent was appreciably affected by

alcohol, indeed that he was drunk, may be conceded. A conclusion that his conduct was out of character was clearly open and that his insobriety provided an explanation for it is entirely probable. The evidence, however, casts no reasonable doubt on his intent. The inescapable conclusion that the respondent knew what he was doing, and knew it sufficiently to be able to describe it in some little detail a few hours later, leads inevitably to the conclusion that he intended to do what he did,

As Lush J said in the case of *Head v Baillieu* (an unreported decision of the Full Court pronounced on 26th November 1979) -

> "There can be no precise definition of a point at which evidence of drunkenness is capable of raising doubt as to the existence of a necessary intention, but there will be situations in which it is possible to say that the evidence falls short of the capacity to raise any such doubt."

In my opinion, this is a case in which the evidence falls short of any such capacity. My conclusion that the necessary intention was established by the evidence has already been stated, and I think I cannot usefully elaborate upon it.

It was submitted that the evidence did not go so far as to entitle the Magistrate to find, in those cases which required that there had been an assault or a resistance of a member of the police force in the execution of his duty, that the respondent had knowledge of that fact. It appears to me that *R v Galvin (No. 1)* [1961] VicRp 113; (1961) VR 733 is authority with respect to the offences alleged under s52 of the *Summary Offences Act* that knowledge on the part of the accused that the person assaulted or resisted was a member of the police force, or that he was acting in the due execution of his duty, need not be proved by the prosecution in the first instance as part of its essential case.

The order of dismissal in each case will be set aside. The information will be remitted to the Magistrates' Court to be further dealt with according to law.
