61/80

SUPREME COURT OF VICTORIA

EASTLAKE v HALL

McInerney J

30 July 1980

CRIMINAL LAW – ASSAULT WITH A WEAPON – SELF-DEFENCE – ONUS OF PROOF – DESIRABILITY OF GIVING REASONS FOR DECISION – REASONABLE CONCLUSIONS TO BE DRAWN FROM EVIDENCE – FINDING BY MAGISTRATE THAT CHARGE PROVED – WHETHER MAGISTRATE IN ERROR: *SUMMARY OFFENCES ACT* 1966, S24(2).

E. was convicted of a charge of assault with a weapon. In his defence, E. stated that he was acting in defence of himself and others. The Magistrate found the charge proved. Upon appeal—

HELD: Order nisi absolute. Conviction and sentence set aside. Information dismissed.
1. Once the issue of self-defence as an answer to assault was raised, the prosecution could not succeed unless it satisfied the Magistrate that one or more of the conditions required to show justification by self-defence had not been made out, or that the prosecution had established beyond reasonable doubt that none of those conditions existed.
***R v Yugovic* [1971] VicRp 99; (1971) VR 816 at p822 per Smith J, applied.**

2. E. claimed that he had acted in self-defence. The evidence raised that issue so that the Magistrate was required to consider whether the prosecution negatived beyond reasonable doubt that:
(i) the defendant had at the relevant time believed that he and those with him in the upstairs flat were, or were about to be in danger of being subjected to violent physical assault.
(ii) that the applicant, in taking the gun, was acting in defence of himself and those with him against that violent attack, and
(iii) that the taking of the gun was a method of self-defence reasonably proportionate to the danger apprehended.

3. On the evidence the only reasonable conclusion which a magistrate could have drawn should have been that E. in taking and pointing the gun, was acting in self-defence. The circumstances of the entry were very violent and involved a gross excess of violence on the part of the invading party, and if the circumstances here proved did not entitle E. to defend himself, it is difficult to imagine circumstances which would have so entitled him. E. was entitled to commit the assault in the exercise of his right of defending his premises and those with him, particularly the girls, against violence reasonably apprehended. On the evidence adduced the only conclusion reasonably open was that E. should have been acquitted.

McINERNEY J: This is the return of an order nisi granted on 21 October 1979 to review a conviction recorded at the Magistrates' Court at Camberwell on 2 August 1979 when the applicant, Kenneth Neil Eastlake, was convicted of a charge of assault with a weapon contrary to s24(2) of the *Summary Offences Act* (No. 7405) and was fined $200 in default 20 days' imprisonment. It should be added, that having convicted the defendant on the first count, the Magistrate then accepted a withdrawal of the second information charging him with simply unlawful assault.

The information on which he was convicted charged him in fact with four offences, in each case against the informant William John Hall:

(1) assault with a weapon to which I have referred;
(2) unlawful assaults
(3) with obstructing a member of the Police Force in the execution of his duty and
(4) assaulting a member of the Police Force in the execution of his duty.

In relation to the latter two charges, the Magistrate said he was not satisfied beyond reasonable doubt that the defendant knew that Hall was a member of the Police Force and dismissed those two charges. Whether that dismissal was or was not a correct legal consequence of that finding has not been here debated, but the finding is significant in relation to the conviction on the first charge.

The order nisi was granted on one ground only, that both upon the evidence and the weight of evidence the learned Stipendiary Magistrate was wrong in not finding

> (i) that in all the circumstances that the defendant was entitled to act in defence of himself and those with him, and
>
> (ii) that the defendant in acting in defence of himself and those with him did not use more force than was reasonably necessary in the circumstances.

It appeared to me that the order nisi asserted more than was legally necessary from the defendant's point of view in that it proceeded almost on an assumption that the defendant bore an onus of establishing self-defence. This morning, in consequence of observations I made yesterday, the defendant sought leave to amend the grounds of the order nisi. The Crown neither opposing nor consenting to that amendment, I allowed the amendment to be made, taking the view that it fell within the power of this court to grant the amendment on the principles laid down by the Full Court in *Mortimore v Stecher* [1971] VicRp 106; [1971] VR 866 at pp869 to 870. I applied that decision in a case of *Pruscino v Nibaldi* [1973] VicRp 9; [1973] VR 113; (1972) 27 LGRA 114 in circumstances which in my view are substantially similar to the present circumstances. In that case the ground of the order nisi as initially framed was:

> "That the Magistrate should have found that the drain which the defendant was alleged to have injured was not a drain opened pursuant to the *Drainage of Land Act* 1958 because no map thereof had been prepared or certified or forwarded to the Clerk of the Peace pursuant to s12 of the said Act."

I pointed out (at p114 of the report) that

> "... to have convicted the defendant it was necessary for the Stipendiary Magistrate have found and that the Stipendiary Magistrate must, in fact, have found, that the drain was opened under the *Drainage of Land Act* and that, further, to obtain an acquittal it was not necessary for the defendant to have persuaded the Magistrate to find that the drain was not a drain opened pursuant to the *Drainage of Land Act*. It was sufficient if the Magistrate was not satisfied beyond reasonable doubt that the drain was a drain opened pursuant to the *Drainage of Land Act*."

I then added:

> "Accordingly, the ground stated in the order nisi assigns a ground which contains more than is necessary to procure the setting aside of the conviction, although if the ground assigned in the order nisi is made out it would, in law, necessarily entitle the defendant to an acquittal, But a sufficient ground would have been that the Stipendiary Magistrate should not have found that the drain which is alleged to have been injured was the drain opened pursuant to the *Drainage of Land Act*."

In the present case, it was not necessary that the defendant should have established in fact that he was acting in self-defence in order to procure an acquittal. It was sufficient if he persuaded the Magistrate that the prosecution had not established beyond reasonable doubt that the defendant was not acting in self-defence.

The amendment which was applied for this morning is in these terms:

> "Upon the evidence and the weight of the evidence the learned Stipendiary Magistrate was wrong in finding beyond reasonable doubt
> (i) that in all the circumstances the defendant was not acting in defence of himself and those with him.
>
> (ii) That the defendant in acting in defence of himself and those with him used more force than was reasonably necessary in the circumstances."

A ground so formulated put all that was necessary as a matter of law for the defendant to have established. It may be observed that a ground complaining that upon the evidence and the weight of the evidence, a tribunal, be it jury or Magistrate, was wrong in a certain finding may be said, in one sense, to allege an error of fact. It alleges an error of law only if the fact-finding tribunal made a finding which was wrong because there was no such finding reasonably open on the evidence or, putting it another way, that it was a finding which no reasonable tribunal could have made in those circumstances.

In drawing that distinction I have drawn on what I said in *Banger v Drift Fruit Juices Pty Ltd* [1974] VicRp 82; (1974) VR 677 at 683; (1974) 30 LGRA 433 where I drew attention to certain passages in the High Court judgment in *Hocking v Bell* [1945] HCA 16; (1945) 71 CLR 430, in the dissenting judgments of Latham CJ at p440 and of Dixon J, as he then was, at pp497-500 – passages which were approved by the Privy Council on appeal in the same case – see (1947) 75 CLR 125 at pp131-2. In the passages to which I allude Latham CJ, and Dixon J, cited with approval the observations of Jordan CJ in *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd* (1941) 42 SR (NSW) 1 at p5; 59 WN (NSW) 22; which observations were cited with approval also, I might add, by Rich J and McTiernan J in their judgments in *Hocking v Bell* [1945] HCA 16; (1945) 71 CLR 430 at pp467-91 and 502-3 respectively.

The distinction is important because if no more had been established than that the verdict was against the evidence and the weight of evidence, the proper course ordinarily would be to remit the matter for re-hearing. A contrary conclusion to that found by the court can be substituted only where on the evidence no other conclusion could be reached than that which is contended for by the appellant. It is my view that on the evidence here no conclusion was reasonably open to the Magistrate other than that the prosecution had not negatived the defence of self-defence. To demonstrate this it becomes necessary to summarise the evidence of the prosecution and the evidence of the defence which must have been accepted by the Magistrate. I use the phrase "must have been accepted" because in this case the Magistrate's reasons for decision are of singularly little assistance. He has failed, in my view, to state findings on the matters on which he should have made findings. The only matters on which he may be regarded as having made findings, as opposed to adverting to topics, are these:

He said, as reported in paragraph 45 of the affidavit;

> "The overtures of this case are vastly different from the object of my enquiry."

I am not sure that I understand what His Worship meant by that. It may be that what he said was "the overtones".

> "There are three matters
> (1) Wilful defiance of authority."

I have assumed that that refers to the acts of the defendant and his friends in broadcasting without a licence.

> "(2) A determined effort by the prosecuting officers to determine unlawful use."

I am not sure what he means by that but I take him to have meant that the raiding party were determined to force their way into the premises in order to ascertain whether there was an illegal broadcast.

> (3) Excessive zeal of both parties."

What that adds to the second matter so far as the prosecution witnesses are concerned, I am not sure. Nor am I sure what it means in relation to the defendant and his witnesses. It may refer to the act of taking the rifle, but the Magistrate has not in terms said that. A little later the learned Magistrate went on to say:

> "I have the gravest doubt as to whether the defendant knew Constable Hall was a policeman. I am far from satisfied that the defendant knew the informant was a policeman. Those two charges are dismissed."

Then he proceeds:

> "The defence of self-defence has been raised and I have to consider all the various witnesses, the probity of their evidence and the value of it."

Clearly he had to do that. Then he continued:

> "One matter stands out on which I intend to place reliance. I am satisfied that Ralph Parkhurst"

– I pause there to say he was one of the witnesses for the prosecution

> "was a friend of the defendant and the co-actor with the defendant. Parkhurst did indeed give evidence that the defendant had a rifle at his shoulder. I am not satisfied that Parkhurst's evidence can be discounted by the finding of alcohol. I am satisfied that this defendant did indeed point this rifle and wilfully pointed it with the intention that it instil fear. The defendant did therefore assault Constable Hall with a weapon. The greater proves the smaller and the two charges are proven."

I take the learned Magistrate to have been saying that he was finding that the defendant raised the rifle to his shoulder and did so with the intention that it would instill fear into the informant. Clearly that was a finding of assault, and in making that finding the Magistrate was accepting the strongest case as to the use of the rifle that could be put against the defendant, save for the qualification, that there was evidence that the defendant had pushed the barrel of the rifle through a hole in the door, The Magistrate makes no finding on that matter, concerning which there was evidence contradictory of that proposition. What I have read indicates that the Magistrate found an assault but there is no indication that he had applied his mind to the issues he had to determine if an issue of self-defence arose, as it clearly did on the evidence before him. The Magistrate stated no reasons for rejecting self-defence.

The order nisi does not, however, include a ground that the Magistrate gave no reasons. To have amended the order nisi to include that ground would, in my view, have gone beyond the power of an amendment allowed under the Act. In *Lock v Gordon* [1966] VicRp 23; (1966) VR 185, O'Bryan J, set aside an order of a Stipendiary Magistrate because the Stipendiary Magistrate had refused to give reasons, with the consequence that O'Bryan J professed himself quite unable to determine what evidence the Magistrate had accepted and whether or not the Magistrate had erred in law. I sent for the file in that matter; it disclosed, as I had suspected, that one of the grounds of the order nisi to review was that:

> "The Stipendiary Magistrate failed upon request on behalf of the complainant to state the facts he found upon which his decision was based."

In the absence of such a ground in the present case, the question has exercised my mind as to what consequence flows from the failure of the Magistrate to give reasons. In *Beresford v Ward* [1961] VicRp 99; (1961) VR 632 at p637 Adam J expressed the view that although a judicial officer may as matter of law not be bound to give reasons or sufficient reasons for his decision in the sense that his failure to do so vitiates his decision, it is most desirable that he should, both for the information of the parties and in order to afford assistance to the Court of Appeal in the event of appeal give those reasons. Adam J went on, at lines 47-52 of that page of the report, to consider whether in the absence of evidence of the Magistrate's reasons for decision he could, without that evidence conclude that the Magistrate had erred in law. He expressed the view that he could do so only, if the decision was “otherwise not reasonably explainable". I have accordingly approached this matter on the basis that my enquiry must be to see whether the conviction is one based on findings of fact which no reasonable tribunal could have made.

Once the issue of self-defence as an answer to assault is raised, the prosecution cannot succeed unless it satisfies the fact-finding tribunal that one or more of the conditions required to show justification by self-defence has not been made out, or to put it another way that the prosecution has established beyond reasonable doubt that none of those conditions exist – see *R v Yugovic* [1971] VicRp 99; (1971) VR 816 at p822 per Smith J, where the observations of Dixon CJ in *R v Howe* [1958] HCA 38; (1958) 100 CLR 448 at p459; [1958] ALR 753; 32 ALJR 212. The defendant claimed in this case that he had acted in self-defence. The evidence raised that issue so that the Magistrate was required to consider whether the prosecution negatived beyond reasonable doubt that (i) the defendant had at the relevant time believed that he and those with him in the upstairs flat were, or were about to be in danger of being subjected to violent physical assault. (ii) that the applicant, in taking the gun, was acting in defence of himself and those with him against that violent attack, and (iii) that the taking of the gun was a method of self-defence reasonably proportionate to the danger apprehended.

There was evidence that the applicant and those with him had earlier in the evening seen the persons in the vicinity of the area whom they suspected to be rival CB broadcasters. The Magistrate was not bound to accept that evidence. It is clear, however, that the first intimation that the applicant and those with him upstairs had of the presence of the people who ultimately proved to be the police were when two of the girls raced upstairs, shut and looked the door after

them and told them that there were men in the flat downstairs. There were in fact men downstairs, the police, and this makes credible, in my view, the allegation that the girls told the defendant of the approach of these men. It is common ground that the door was locked when the police arrived at the landing just outside the door. The defendant said he heard thumps on the door and it is common ground that the door to the flat below had been kicked in. The defendant said he heard a blunt instrument being used to splinter it below, and that there were two blows upon the door. There is no suggestion that the prosecution witnesses knocked before they proceeded to deliver the first blows against the door: indeed, one or more of the prosecution witnesses said they had not knocked.

There was evidence that the second blow at the door broke a hole in the door and there was evidence that this hole had been effected by an axe. The defendant said he saw an axe and it was common ground that an axe was used to break that hole in the door. The applicant said that he saw through the hole a large chap wearing jeans and blue shirt with a pistol held downwards.

The Magistrate was not bound to accept the evidence that the applicant saw a man with a pistol, but the evidence is that all the policemen seeking to effect entry into the premises were in plain clothes. There was nothing in their physical appearance to indicate that they were police; the evidence was that they were in plain clothes, not in uniform. The evidence was that the informant Hall, the man who fired the shot which wounded the defendant was, when he fired, one to two feet from the door.

The applicant testified that he thought the intruders would shoot him. The Magistrate was not bound to accept this evidence, but, in my opinion, a reasonable person in the position of the applicant could have come to no other conclusion that there was danger of a forcible violent entry into the premises and that there was danger that the person seeking to effect that violent entry would use physical violence on the applicant, or one or other of the persons with him in the flat.

The evidence was that there was no means of escape from the flat other than by climbing out the windows. The photographs show that there appears to have been no balcony out into the street, either on the Whitehorse Road or the Barnsbury Road frontage. 'There is a reference in the evidence to a verandah, but it appears, at page 29 of the affidavit, that the only way of escape downstairs was through the internal stairway up which the police were coming.

In those circumstances the only reasonable conclusion which could be drawn by a fact-finding tribunal, was that the defendant and those with him, including three or four girls, had no means of escaping from the violence which was reasonably to be apprehended by him and those people. The girls had in fact hidden behind bedheads or in wardrobes. The only other male in the premises, apart from the applicant was Parkhurst.

The evidence shows that the applicant saw a gun and that he picked it up. There is a conflict of evidence as to whether he was merely holding it, pointing it downwards as one of his witnesses, the witness Olney, asserted or whether he was pointing it from the shoulder, as the witness Parkhurst said. There is a conflict of evidence between the applicant and the police as to whether, as Hall and one other police witness said, the gun barrel was poked through the hole in the door, or whether, as the defendant said, he held the gun, some distance back from the door. Those matters do not seem to me to be material. Whether or not the defendant advanced to the door and poked the barrel out through the door seems to be immaterial. The question is whether he was entitled to use the rifle to instil tear into the intruders and so keep them from invading the premises.

I should add to the evidence to which I have referred, that in the course of their entry into the premises, the informant Hall had pushed open one of the two locked rear gates leading into the yard, that a further locked door on the ground floor was either smashed in by an axe, as the witness Olney says, or broken in by a couple of kicks, as the witnesses Ingram, Hall and Allison say. The prosecution evidence shows that in so doing, the police broke the glass in the rear door downstairs, and it is clear that they caused alarm to the occupant of the downstairs flat, the witness, Dennis.

It is undisputed that when the police went up to the small landing they found the door

leading into the flat locked. The police evidence was that they did not knock on the door. There is evidence from the police that they called, "Come out. Police here. Come out Eastlake." One of the witnesses for the defence said she heard the word, or the name, "Eastlake" called out, but the applicant denied that he had heard any reference to "police" or heard his name called out, and the magistrate, in finding that the applicant did not know that the intruders were police must be taken, in my view, either to have rejected the police evidence on that point, or more probably, to have not been satisfied beyond reasonable doubt that the applicant heard those words. A police officer having hacked a hole in the door with an axe, another policeman, the witness Ingram, moved in with the bolt cutters to try and cut open the lock. Ingram testified that through the hole he saw a man with a gun and shouted a warning, "Look out, he's got a gun", and that he then fled downstairs. Whether the gun was pushed out one inch or two inches through the barrel as one or more of the police witnesses say, does not, as I said before, matter.

In my view there is no reasonable view of the evidence which would justify a finding that the applicant did not believe that a violent entry was being attempted into his premises and that a violent assault on him and his companions was about to be made. It is difficult to imagine circumstances more consistent with that view. The circumstances indeed, in my view, are only consistent with that view, namely, that such a belief was in fact entertained by the applicant. The objective facts all pointed that way so that any reasonable person placed in the position of the applicant must have entertained that view. The finding that no such belief was entertained by the applicant or that no such belief would have been entertained by a reasonable person in the position of the applicant, armed with the knowledge and disadvantaged perhaps by the lack of knowledge of the applicant that the intruders were police, could not reasonably be made. The objective facts all pointed to the existence of such a belief: the smashing and forcing open of the doors downstairs, the battering-in of the upstairs door with an axe, the fact that the police were in plain-clothes, plus the finding that the applicant was not shown to have known that the intruders were police, coupled with the circumstance that there was no way of escaping other than climbing out of the windows and either trying to scramble down a bare wall – in either event into an area where the applicant and his friends would be at the mercy of men whom the applicant believed were violent assailants.

In those circumstances a finding that the applicant in picking up the gun did so in order to defend himself and his companions would have been a reasonable finding and necessarily a finding that the applicant was acting in self-defence. It would be unreasonable to hold that the act of taking a gun and pointing it in the direction of the assailants was a use of force not reasonably proportionate to the danger which the applicant as a reasonable man entertained or could have entertained at that moment.

I am of the opinion that on the evidence the only reasonable conclusion which a magistrate could have drawn should have been that the applicant, in taking and pointing the gun, was acting in self-defence. The circumstances of the entry were very violent and involved a gross excess of violence on the part of the invading party, and it is difficult to imagine any case in which a householder would be entitled to defend himself. If the circumstances here proved did not entitle the applicant to defend himself, it is difficult to imagine circumstances which would have so entitled him. The Magistrate has simply found that he committed an assault. If he did in fact, as the Magistrate found commit that assault, it was, in my view, an assault which he was entitled to commit in the exercise of his right of defending his premises and those with him, particularly the girls, against violence reasonably apprehended. It was, however, not necessary for the applicant to have persuaded the Magistrate that the gun was taken and pointed in self-defence. It is sufficient that the prosecution could not, on the evidence, have negatived self-defence beyond reasonable doubt. I was at one stage disposed to consider whether I should send the matter back for re-hearing but as Mr Byrne pointed out this case had involved a three-day hearing. It would be unreasonable to expect the Magistrate who heard the case to recall the evidence then given and, indeed, it would, in my view, be undesirable for a Magistrate who had heard that evidence to re-hear the case. In any case, however, in my view, on the evidence adduced and adduced after a very full hearing the only conclusion reasonably open was that the defendant should have been acquitted and it would, in my view, be improper to expose him to the expense of a re-hearing when, on the evidence at a very full investigation of the facts at the first hearing, he ought to have been acquitted.

In the result I consider that the ground of the order nisi as amended is made out.

Consequently, the order nisi as so amended will be made absolute, the conviction recorded against the defendant on August 2nd, 1979, and the sentence then imposed must be set aside and in lieu thereof it should be ordered that the information on which he was convicted should be dismissed. I therefore made the Order that the informant pay to the applicant the sum of $200 for his costs of and incidental to these proceedings. I grant a stay of fourteen days.
