21/78

SUPREME COURT OF VICTORIA — FULL COURT

JOHANSON v DIXON (No 3)

Young CJ, Menhennitt and Murray JJ

7-9 March, 24 April 1978 — [1978] VicRp 40; [1978] VR 377

CRIMINAL LAW – CONSORTING – WHILST CONSORTING WITH PERSONS WHO WERE REPUTED THIEVES THERE WAS NO UNLAWFUL ACTIVITY – WHETHER DEFENDANT GUILTY OF HABITUAL CONSORTING: *VAGRANCY ACT*, S6(1)(c).

On two informations under s6(1)(c) of the *Vagrancy Act* 1966, the defendant was sentenced to 12 months' imprisonment, to be served concurrently. On the first information, evidence proved consorting with reputed thieves on 17 occasions between 4/3/75 and 16/12/75, and on the second, 16 occasions between 27/12/75 and 27/2/76. Defendant gave sworn evidence in defence. His appeal on each conviction to County Court was dismissed.

Kaye J referred the matter to the Full Court. He found as facts:
(1) appellant had consorted with persons who were and were to his knowledge reputed thieves on 16 occasions in each information;
(2) that it was habitual;
(3) the defendant had given a good account of his lawful means of support; and
(4) the defendant had not given a good account of his consorting.

The point which arose for determination was, whether a person charged with habitual consorting has a good defence, when, although it was with persons who were to his knowledge reputed thieves, such was innocent in the sense that there was no unlawful or criminal activity or purpose and was purely social.

HELD: Appeals by way of case stated dismissed and the convictions and sentences affirmed.
1. For an account to be a good account of consorting it must be a credible account but it must also indicate that the consorting was not for a purpose inconsistent with the object of the provisions. That object can only be ascertained from a consideration of the language of the paragraph. It is clear that the object of the paragraph is to deter persons from associating together with reputed thieves or with persons who have no visible means of support; the plain inference being that such associating is likely to lead the person in question into the temptation to steal and so into actual stealing.

2. The requirement that a defendant give a good account of his consorting means that he must give a credible account that goes beyond merely stating that his consorting was not for an unlawful purpose. A good account must, however, necessarily include a positive explanation of or positive reasons for the consorting. In either case a defendant must go beyond merely establishing that he consorted with reputed thieves for the purpose of associating with them for such an account adds nothing to the concept of consorting. To establish that the consorting was for the purpose of drinking with or meeting friends would not be to give a good account of consorting for it would establish no more than an association which subjected the defendant to the very temptation which the section is designed to prevent.

THE COURT: *[After setting out the provisions of s6 of the Vagrancy Act 1966, the Court continued]* … At the relevant time s6 of the *Vagrancy Act* 1966 provided as follows:

> '6(1) Any person who—
> (c) habitually consorts with reputed thieves or known prostitutes or persons who have been convicted of having no visible lawful means of support unless such person, on being thereto required by the Court, gives to the satisfaction of the Court a good account of his lawful means of support and also of his so consorting; …
> shall be guilty of an offence'.

The additional facts which Mr Evans wished to place before the Court may be summarised as follows. The appellant in his evidence swore that he had lived in Fitzroy for almost all his life and that the people with whom he was charged with consorting were, by and large, people who also lived in Fitzroy. He swore that the people in question were for the most part his friends and that his purpose in associating with them on each occasion was innocent. The appellant was cross-

examined briefly and the cross-examination was directed to showing that he had been warned by the police on many occasions in relation to his consorting but had nevertheless persisted in doing so. No cross-examination was directed to showing that anything sinister, illicit or illegal had occurred or had been planned or transacted on the occasions when the appellant had been seen to be so consorting.

It was submitted that if the appellant's evidence were accepted it constituted a good account of his consorting within the meaning of the proviso in s6 and that in view of the fact that his evidence was reasonable, probable and credible and had not been challenged in cross-examination, His Honour Judge Hewitt was not entitled to disbelieve it and further that His Honour did not direct his mind to the critical matter that the evidence raised, namely that the appellant had given an account of his consorting which constituted a good account within the meaning of the section.

The forerunner of the Victorian section was enacted in 1931 by the *Police Offences (Consorting) Act* (Act No.3974). In 1935 by s6 of the *Police Offences Act* the Tasmanian Parliament enacted a section very similar to the Victorian section in that a proviso was included enabling a person charged to escape conviction on proving sufficient lawful means of support and 'good and sufficient' reasons' for consorting.

In New Zealand, New South Wales, Queensland, South Australia and Western Australia the Courts have rejected the notion that there is any implication of criminal or unlawful activity in relation to the offence of consorting. The offence consists of habitual consorting with persons who were and were to the knowledge of the defendant reputed thieves *simpliciter*. It would not be a defence for the defendant to show that his purpose in consorting was innocent merely in the sense that it was not attended by any criminal or unlawful activity. ...

In *Young v Bryan* (1962) Tas SR 323 Burbury CJ also rejected the argument that good and sufficient reasons were synonymous with a mere absence of nefarious purpose. At p332 His Honour said:

> 'The proposition that the words "good and sufficient reasons" are synonymous with the words "lawful purpose" needs only to be stated to exhibit its fallacy. The words are not synonymous. No doubt no reason which is unlawful can qualify as a good or sufficient reason but to say that every reason in which it is not unlawful is a good and sufficient reason is to depart from the clear words of the statute. The statute plainly says that a defendant must have good and sufficient reasons for consorting with the persons with whom he is charged with having consorted. Proof that there was nothing unlawful in a particular instance of association (i.e. that no criminal or dishonest purpose was furthered by it) does not establish that the defendant had good and sufficient reasons for the association. If that were sufficient then the offence created by section 6(1) would be converted into something akin to an unlawful conspiracy but with the burden of proof to establish that the association was lawful placed on the defendant. But section 6(1) plainly makes habitual consorting with reputed thieves in itself an offence even though there be no criminal purpose advanced by it.

It was sought to distinguish between the phrase appearing in the Victorian section 'a good account' and the phrase in the Tasmanian section 'good and sufficient reasons' but we can see no substantial basis for thinking that in the ultimate the two phrases have any essentially different meaning.

It is important to bear in mind that the section requires proof of habitual consorting. If a single instance of consorting with reputed thieves were sufficient to constitute an offence, it would be more tempting to hold that unlawful purpose or activity of some kind was implicit. But habitual consorting denotes a course of conduct which taken as a whole constitutes not a number of offences but one offence.

The appellant contended that the phrase 'a good account of his so consorting' is satisfied by a defendant who establishes that his consorting was for an innocent purpose. We have, however, reached the conclusion that so wide a contention should be rejected. The offence created by the section is established if it is proved that the defendant habitually consorted with persons he knew were reputed thieves. The offence does not require the prosecution to prove that the defendant consorted with reputed thieves for an unlawful purpose. The purpose of the consorting is irrelevant to the commission of the offence. Accordingly an account of the consorting which

merely establishes that the consorting was not for an unlawful purpose cannot be a good account because it would do no more than prove facts which are irrelevant to the offence. It is, we think, clear that the object of the paragraph is to deter persons from associating together with reputed thieves or with persons who have no visible means of support, the plain inference being that such associating is likely to lead the person in question into the temptation to steal and so into actual stealing. It appears to us, to follow that the requirement that a defendant give a good account of his consorting means that he must give a credible account that goes beyond merely stating that his consorting was not for an unlawful purpose.

A good account must, however, necessarily include a positive explanation of or positive reasons for the consorting. In either case a defendant must go beyond merely establishing that he consorted with reputed thieves for the purpose of associating with them for such an account adds nothing to the concept of consorting. To establish that the consorting was for the purpose of drinking with or meeting friends would not be to give a good account of consorting for it would establish no more than an association which subjected the defendant to the very temptation which the section is designed to prevent.

It follows from what we have said that we disagree with the reasons and conclusions of McGarvie, J as to the meaning and effect of s6(1)(c) of the *Vagrancy Act*. (See *Johanson v Dixon (No.1)* [1977] VicRp 64; (1977) VR 574 at 580.) Nor do we agree that the reasons of O'Bryan, Dean and Smith JJ in *Byrne v Shearer* [1959] VicRp 80; (1959) VR 606; [1959] ALR 1142 support the view expressed by McGarvie J. By using the word 'innocent' in that case their Honours intended, in our opinion, to convey more than that there had to be a mere absence of unlawful or criminal purpose or activity. See per O'Bryan J at p608, per Dean J at p611 and per Smith J at p612. Each of their Honours used the word 'innocent' in connection with the account of his consorting by the defendant and nothing in any of the three passages cited suggests that they put upon the section a construction different from that which we place upon it.
