42/93

SUPREME COURT OF VICTORIA

LOIACONO v WARR and ANOR

Ormiston J

7, 10, 11, 28 May 1993

CIVIL PROCEEDINGS – DETINUE/CONVERSION – DEFENCE OF LAWFUL AUTHORITY – WHETHER ONUS ON PERSON SEIZING PROPERTY TO SHOW LAWFUL AUTHORITY – PURPORTED SEIZURE UNDER FISHERIES LEGISLATION – BELIEF THAT PERSON MAY HAVE COMMITTED OFFENCE – WHETHER SUFFICIENT BELIEF TO JUSTIFY SEIZURE: *FISHERIES ACT* 1968, S49.

1. The statutory authority to seize fishing nets pursuant to s49 of the *Fisheries Act* 1968 requires that a police officer believe on reasonable grounds that the person found has committed an offence under Fisheries legislation. A lesser belief that the person may have committed an offence will not suffice. Accordingly, where a police officer seized nets whilst holding the lesser belief, a magistrate was in error in finding that the defence based on statutory authority was made out and dismissing a claim for damages for wrongful detention of goods.

2. In a claim for detinue and conversion where goods have been seized pursuant to statutory authority, the onus of proving a lawful authority rests on the person seizing the property.

ORMISTON J: *[After setting out the facts, His Honour continued]*... **[23]** The first principal question thus arises, whether it was sufficient to justify a seizure of the nets that the respondent had formed a belief only that the appellant "may have committed an offence". The relevant sub-sections of s49 of the *Fisheries Act* read as follows:

> **[24]**"(1) For preventing the commission repetition or continuation of an offence against this Act or the regulations or a fisheries notice any authorised officer or any member of the police force shall seize any fishing equipment the use of which is prohibited under this Act or the regulations or a fisheries notice in a particular case or may at any time with or without warrant seize any fish he finds taken by any person or in the possession or under the control of any person contrary to this Act or the regulations or a fisheries notice or any fishing equipment which he finds being used contrary to the provisions of this Act or the regulations or a fisheries notice or in committing an offence against any of the provisions of the Act or the regulations or a fisheries notice.
>
> (2) The provisions of sub-section (1) extend to any case where a person is found behaving or conducting himself in such a manner or under such circumstances that the authorised officer or member finding him believes on reasonable grounds, without having observed the commission of an offence against this Act or the regulations or a fisheries notice, that the person found has committed such an offence."

Provision is then made in the section for forfeiture either by the Minister or by a court which is also authorised to order the return of the seized goods to the defendant or owner. Sub-section (5) requires the return of the goods to the owner if proceedings are not taken for an offence within 28 days after seizure, and there are subsidiary provisions not presently relevant to this appeal.

For present purposes it may be assumed, as it was not argued to the contrary, that in defending the appellant's claims in detinue and conversion of the nets, the onus rested on the respondent to show that he had a lawful basis for seizing the nets. No authority was cited but such a conclusion appears consistent with the Court's attitude to claims for intentional torts alleged to be committed by police officers and other persons in authority, where a **[25]** defendant relies on a right in law to do the act about which complaint is made. The authorities are usefully discussed in the second edition (1993) of Trindade and Cane: *Law of Torts in Australia*, at pp279-282. By way of example it has been recently held: "A person who enters the property of another must justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises": *Plenty v Dillon* [1991] HCA 5; (1991) 171 CLR 635; (1991) 98 ALR 353; 65 ALJR 231; [1991] Aust Torts Reports 81-084, CLR at 647 per Gaudron and McHugh JJ; cf. per Mason CJ, Brennan and Toohey JJ at p639. The same general principle

would appear to apply in actions in detinue and conversion where the defendant seeks to justify what would otherwise be an unlawful seizure. The only authority which I have been able to find is the Full Court decision in *Field v Sullivan* [1923] VicLawRp 12; [1923] VLR 70; 29 ALR 38; 44 ALT 117, per Macfarlan J, *passim*, (concurred in by Cussen J), where it appears to have been held that the onus rests on the defendant to show his lawful authority in such circumstances.

The defendant here relied upon his right to seize the nets pursuant to s49 and the assumption has been made that that alleged right was founded upon the basis that the appellant was "found behaving or conducting himself in such a manner or under such circumstances" that Sergeant Warr believed "on reasonable grounds" that the appellant (as "the person found") "has committed such an offence". The relevant offence is that referred to in sub-s(1) being an offence either against the *Fisheries Act* or the regulations under that Act or under a "fisheries notice". The subject matter of the right of seizure is again set out in sub-s(1) and for **[26]** present purposes it must be taken to be "any fishing equipment", being the nets, which, again it is assumed, were alleged to have been found contrary to the provisions of the Act.

Whether or not it follows that one is able to examine the reasons of the person effecting a seizure under a section such as s49, at the least it would seem necessary for the defendant in the present case to show that he held the required belief. There being no warrant or other formal authority which would give *prima facie* justification for the seizure, a defendant must ordinarily show that he had formed a belief "that the person found" (scil. "behaving or conducting himself" etc.) "has committed such an offence", i.e. an offence under the *Fisheries Act*, the regulations or a fisheries notice. It may be that under sub-s(1) the conditions precedent to the right to seize may be inferred because, for example, the equipment is clearly prohibited or because the person from whom the goods are seized is found committing an offence. Under sub-s(2) however, there should be evidence that the police or other officer has formed the required belief.

In the present case, accepting the appellant's version for the reasons stated above, there is no evidence that Sergeant Warr had formed a belief that the appellant had committed an offence. All that that evidence shows is that at the time of seizure (and even that is doubtful) he believed that the appellant may have committed an offence under the Fisheries legislation.

[27] More importantly it was explicitly conceded by counsel for the respondents that if the only evidence was to the effect that Sergeant Warr believed that an offence may have been committed, then that would not have been a sufficient basis for his seizing the nets. That concession seems to me eminently sensible, as the mere possibility that an offence may have been committed would not appear to sustain the required belief under the section. The words have been carefully chosen and a lesser belief will not suffice. Many cases were cited as to the nature of a "belief", especially as compared with a "suspicion", and it would appear that the following definition by the Full High Court of the word "belief" in sufficiently analogous legislation should be accepted as here applicable: see *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104 at p116; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246:

> "Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

The contrast there made (at pp115-119) between suspicion and belief (both of which appeared in the legislation there under consideration) suggests that, although a degree of surmise or conjecture can properly be an element in belief, an explicit requirement that a belief be held that an offence has been committed does not permit a police or other officer to act only on a belief that an offence may have been committed under this legislation. A similar conclusion was drawn by me some years ago in relation to the concept of suspicion in a case where the person acting on behalf of the Commissioner **[28]** for Corporate Affairs had formed the view that some offence may have been committed under the *Companies Code* where it was held that such a suspicion was insufficient to justify a formal investigation under that Code (as it then stood): *Commissioner for Corporate Affairs v Guardian Investments Pty Ltd* [1984] VicRp 81; (1984) VR 1019; (1984) 9 ACLR 162; (1984) 2 ACLC 165, upon which the appellant relied in this case. Without examining that further, in the light of the concession made, it is clear that the requisite belief was not formed by Sergeant Warr.

In fact the only matter raised by counsel for the respondents on this issue was the matter already discussed, namely what evidence was before this Court as to Sergeant Warr's belief, coupled with the submission that upon an appeal under s109 of the *Magistrates' Court Act* there was no power to reverse a finding of fact. However, it was not argued that, if there were no evidence to support a finding, that would not be a sufficient basis for holding that the Magistrate had misdirected himself on the relevant issue. The authorities cited on this question, which I need not repeat, did not deny that an error of law could occur where there was no evidence to support a particular finding.

Consequently there was no evidence to support a finding that the respondents had made out their defence based on Sergeant Warr's alleged statutory authority to seize the nets pursuant to s49 of the *Fisheries Act*. As I understand the course of proceedings in the Magistrates' Court no other defence was relied upon by the respondents at trial. In the result the appellant had shown that the first-named respondent, and thereby the second-named respondent, had **[29]** wrongfully seized and detained the nets which Mr Loiacono held as bailee for reward from Mr Taranto. Whether the appellant's cause of action be characterised as one in detinue or conversion was not argued before me, nor, as I would understand it, before the learned Magistrate.

However, as the goods were returned to the owner, it would seem preferable to conclude that the appellant is entitled to damages for the wrongful detention of the goods. Although there seemed little evidence as to loss and damage in the court below, there was some evidence that the appellant lost the benefit of a contract to repair the nets at $3.70 per metre. However, I was not confident that all relevant evidence on this issue was before this Court, nor did I have the advantage of any argument as to the proper quantum. I asked whether, if the appellant succeed, the parties might agree on the amount of damages as the sum claimed was only $1,680, but no agreement was expressed and there were no findings by the Magistrate on this issue.

Consequently it will be necessary to remit this matter for the damages to be assessed in the Magistrates' Court, unless the parties can now agree on the quantum. *[His Honour then dealt with a matter not relevant to this report]*

APPEARANCES: For the appellant Loiacono: Mr J Isles, counsel. McIntyre & Carter, solicitors. For the respondent D Warr & Sons: Mr BM Dennis, counsel. Victorian Government Solicitor.
