

35/99; [1999] VSC 416

SUPREME COURT OF VICTORIA

De MOOR v DAVIES

Warren J

8 September, 3 November 1999

CRIMINAL LAW – CITIZEN'S ARREST – PERSON FOUND TO HAVE OBTAINED MONEY BY DECEPTION FROM HOTEL STAFF – ENQUIRIES MADE DISCLOSED POSSIBLE COMMISSION OF AN OFFENCE OF DECEPTION – PERSON INTERVIEWED BY HOTEL STAFF – DURING COURSE OF INTERVIEW PERSON RAN FROM HOTEL – PURSUED BY HOTEL STAFF MEMBER AND DETAINED – STAFF MEMBER INJURED DURING SCUFFLE – WHETHER ARREST OF PERSON LAWFUL – "FINDS COMMITTING ANY OFFENCE" – MEANING OF – WHETHER STAFF MEMBER FOUND PERSON COMMITTING AN OFFENCE – CONVICTION IMPOSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, SS458(1), 462.

Section 458(1) of the *Crimes Act* 1958 ("Act") provides (so far as relevant):

"Any person...may at any time without warrant apprehend...any person—

(a) he finds committing any offence...where he believes on reasonable grounds that the apprehension of the person is necessary...

(i) to ensure the appearance of the offender before a court..."

Section 462 of the Act provides:

"In this Act the expression 'finds committing' and any derivative thereof extends to the case of a person found doing any act or so behaving or conducting himself or in such circumstances that the person finding him believes on reasonable grounds that the person so found is guilty of an offence."

During the course of some hours, DeM obtained by deception an amount of money from hotel staff by using an EFTPOS card which had a damaged magnetic strip. A staff member contacted the relevant bank seeking authorisation for the transactions but approval was declined. Whilst DeM was being interviewed by hotel staff and enquiries were being made, DeM ran from the hotel but was apprehended by hotel staff. During the scuffle, one of the hotel staff was injured by DeM. DeM was subsequently charged *inter alia* with recklessly causing injury and obtaining property by deception. At the hearing, DeM pleaded not guilty to the recklessly causing injury charge and guilty to the deception charge. In making a 'no case' submission, DeM submitted that the alleged injury and assault occurred in the course of an unlawful arrest by the staff member and accordingly should be dismissed. The magistrate rejected this submission and after hearing further evidence, convicted DeM. Upon appeal—

HELD: Appeal dismissed.

1. **Section 458 of the Act empowers a citizen's arrest at any time of any person so as to deliver that person to the police where the apprehending person finds the other person committing any offence and where the apprehending person believes on reasonable grounds that the apprehension is necessary, for example, to ensure the appearance of the offender at court.**

2. **Section 462 of the Act does not confine the apprehending person to finding the offender actually engaged in carrying out the offence. The section extends the point of discovery of the commission of the offence to encompass the actual perpetration of the offence or to finding a person behaving in such a manner as to create a reasonable belief of guilt or to find a person in such circumstances so as to create a reasonable belief of guilt.**

Muller v Murphy, ex parte Murphy [1935] St RQd 85; 29 QJPR 17, distinguished.

Lunt v Bramley [1959] VicRp 53; [1959] VR 313; [1959] ALR 764, adopted.

3. **Having regard to all of the circumstances surrounding the use of the EFTPOS card, the staff member was entitled to believe on reasonable grounds that DeM was guilty of obtaining money from the hotel staff by deception. Accordingly, the necessary pre-conditions of s458(1) were made out by the time the staff member pursued and detained DeM.**

4. **In the circumstances, it was open to the magistrate to find that the arrest of DeM was lawful and that the resistance by DeM did not constitute acting in reasonable self-defence.**

WARREN J:

1. The appellant, Paul De Moor, appealed under s92 of the *Magistrates' Court Act 1989* against an alleged error of law made by a magistrate below in convicting the appellant of the charge of without lawful excuse recklessly causing injury to another.

2. The appellant was charged with a total of four charges heard before the Magistrates' Court at Broadmeadows on 10 and 11 December 1998. The charges were: without lawful excuse recklessly causing injury to another and unlawful assault to which charges the appellant pleaded not guilty; the charge of obtaining property by deception to which he pleaded guilty; and the charge of possessing articles for use in connection with theft and which charge was withdrawn by the informant.

3. On 6 April 1998 the appellant obtained a total of \$610 from staff at the Pascoe Vale Hotel by way of three separate cash advances using an electronic bank transaction card, commonly called an EFTPOS card. The transactions were carried out by the appellant presenting to hotel staff an EFTPOS card which had a damaged magnetic strip. As a result of the damage to the card the hotel's EFTPOS machine would not accept the card. Consequently, on three separate occasions during 6 April 1998 the hotel staff carried out manual transactions by way of completing cash slips by hand and providing the requested amounts to the appellant.

4. The transactions came to the attention of the assistant manager of the hotel, one McDonald, at about 10.30pm. McDonald ascertained from a staff member, one Newland, that the appellant was still on the premises. He sent Newland to bring the appellant to the hotel bottle shop. Newland located the appellant and requested that he go to the bottle shop which he did. Upon entering the area the appellant met McDonald who asked to be shown the appellant's EFTPOS card. The appellant produced the card. In the presence of the appellant, McDonald attempted to swipe the card onto the hotel's EFTPOS machine but the card did not work. McDonald asked the appellant to accompany him into the bistro of the hotel so as to try another machine. The two men went into the bistro, McDonald tried the card on the other machine and it failed again. McDonald went upstairs to the hotel office to try the card on another EFTPOS machine and left the appellant alone in the bistro. The card failed again. McDonald telephoned the relevant bank and sought authorisation for the three transactions over the telephone but approval was apparently declined. McDonald returned to the bistro and asked the appellant to remain where he was until the hotel manager, one Rudewych, arrived. McDonald told the appellant that he was concerned the hotel may have lost the moneys advanced to the appellant. He asked the appellant for identification but he had none. McDonald told the appellant he was concerned that if the appellant left the hotel he could not be found if required.

5. A very short time later Rudewych arrived and was given the card by McDonald and took it away to another area of the hotel. The appellant waited in the bistro. By about 11.00pm the appellant was taken to the bottle shop again and saw Rudewych who directed McDonald to return the appellant to the bistro. At this point, the appellant told McDonald he had had enough and was leaving. McDonald stood in front of the appellant and told him he must stay until the matter was resolved. The appellant pushed McDonald and ran towards the centre of the roadway abutting the hotel. McDonald chased the appellant, fell over, stood up and continued the chase into a nearby street. After the two men traversed a distance of about 60 metres McDonald caught up to the appellant and grabbed his arm. McDonald told the appellant to stop but the appellant swung around and threw an unlanding punch. The appellant complained that McDonald was ripping his shirt. A scuffle broke out between the two men and McDonald alleged the appellant scratched his face. McDonald gained control of the appellant by use of both a headlock and leglock. McDonald alleged that the appellant bit him on the chest and scratched him again. McDonald continued to restrain the appellant until a security guard arrived at the scene. The appellant was escorted back to the hotel. The police were called and the appellant was later charged with the subject charges.

6. At the hearing below evidence was given by McDonald, Newland and Rudewych and the arresting officer, the informant. Under cross-examination McDonald conceded he was not present during any of the cash transactions carried out between the appellant and hotel staff. He also acknowledged that the appellant was detained for a period of between half an hour and one hour before he left the hotel during which period the appellant did not display any behaviour such as

to demonstrate guilt of a criminal offence. McDonald acknowledged, further, that up until the time that the appellant left the hotel he was co-operative and polite. Under cross-examination McDonald stated that he did not have only a mere suspicion about the appellant but was concerned that a criminal offence had been committed by the appellant.

7. At the end of the evidence for the informant counsel for the appellant made a no case submission on the basis that the alleged injury and assault on McDonald occurred in the course of the unlawful arrest of the appellant by McDonald. The submission was disallowed on the basis that under s458 of the *Crimes Act* 1958 the arrest by McDonald of the appellant was arguably lawful. Accordingly, the defence case proceeded and the appellant gave evidence. The magistrate found the charge of without lawful excuse recklessly causing injury proved and convicted the appellant upon that charge and the charge of obtaining property by deception. The charge of unlawful assault was struck out. The magistrate ordered restitution in the sum of \$610 and placed the appellant on a 12 months Community Based Order subject to the performance of 130 hours of unpaid community work.

8. The appellant brings an appeal to this court on the basis that the magistrate made an error of law in finding that the arrest by McDonald of the appellant was lawful under s458(1) of the *Crimes Act*.

9. On behalf of the appellant before this court it was submitted that the only source of a lawful power to arrest that McDonald may have had lay in s458(1) of the *Crimes Act*. It was submitted, further, that before McDonald was entitled to exercise a power of arrest in relation to the appellant he was required to have found the appellant committing an offence for the purposes of ss458(1) and 462 of the *Crimes Act* and to have formed a belief on reasonable grounds that the appellant had committed an offence. It was submitted, further, that the existence of the provisions of s459 of the *Crimes Act* under which only a member of the police force may exercise a lawful power of arrest demonstrates that the intention of Parliament was to strictly limit the circumstances of a citizen's arrest. It was submitted, in addition, that a person who is the subject of an unlawful arrest is entitled to use all reasonable means to resist the arrest, that is, to act in reasonable self-defence and that the appellant had acted properly in attempting to resist the unlawful arrest of McDonald as he did.

10. In summary, it was submitted on behalf of the informant in this court that the evidence supported a finding that the appellant had been found committing an offence by McDonald. It was further submitted that the intention of s462 of the *Crimes Act* was to encompass the circumstances in which the appellant was found by McDonald.

11. The questions of law to be determined are, firstly, whether under ss458 and 462 of the *Crimes Act* there was evidence to support a finding that the appellant had been found by McDonald to be committing any offence; secondly, whether under the sections there was evidence to support a finding beyond reasonable doubt that McDonald held a belief on reasonable grounds that the appellant had committed an offence; thirdly, whether there was evidence to support a finding that the appellant had not acted in self-defence.

12. There was no dispute between the parties that McDonald was only entitled to act as he did by virtue of s458 of the *Crimes Act*. It was submitted on behalf of the appellant that at the time McDonald commenced to deal with the appellant and, particularly, when the appellant ran away from the hotel, the appellant had not been found committing an offence. The appellant was not found "red handed" or engaged in the act of obtaining property by deception, the charge to which he pleaded guilty. The evidence is not altogether clear as to the times that the three cash transactions were carried out by the appellant. However, it is clear that the transactions occurred throughout the day of 6 April 1998. It is also clear that some indeterminate period of time had elapsed between the time when the appellant carried out the transactions and the time when the hotel staff became concerned. It is clear, also, that by the time McDonald came on to the scene the actual acts that constituted the transactions were completed. It was submitted on behalf of the appellant, therefore, that at the time McDonald dealt with the appellant and when he ran away the offence was complete, McDonald acted unlawfully and the appellant acted in self-defence. Section 458(1) of the *Crimes Act* provides:

"458. Person found committing offences may be arrested without warrant by any person"

(1) Any person, whether a member of the police force or not, may at any time without warrant apprehend and take before a bail justice or the Magistrates' Court to be dealt with according to law or deliver to a member of the police force to be so taken, any person—

(a) he finds committing any offence (whether an indictable offence or an offence punishable on summary conviction) where he believes on reasonable grounds that the apprehension of the person is necessary for any one or more of the following reasons, namely—

(i) to ensure the appearance of the offender before a court of competent jurisdiction;

(ii) to preserve public order;

(iii) to prevent the continuation or repetition of the offence or the commission of a further offence; or

(iv) for the safety or welfare of members of the public or of the offender;

(b) when instructed so to do by any member of the police force having power under this Act to apprehend that person; or

(c) he believes on reasonable grounds is escaping from legal custody or aiding or abetting another person to escape from legal custody or avoiding apprehension by some person having authority to apprehend that person in the circumstances of the case."

13. In summary, the provision empowers a citizen's arrest at any time of any person so as to deliver that person to the police where the apprehending person finds the other person committing any offence and where the apprehending person believes on reasonable grounds that the apprehension is necessary for specified reasons. For present purposes those reasons include ensuring the appearance of the offender at court. Hence, s458(1) requires a two-fold test to be satisfied before the liberty of the individual can be infringed by a member of the public.

14. Section 462 of the *Crimes Act* inserts a statutory definition into the Act of the term "finds committing". It provides:

"462. Definition of 'finds committing'"

In this Act the expression 'finds committing' and any derivative thereof extends to the case of a person found doing any act or so behaving or conducting himself or in such circumstances that the person finding him believes on reasonable grounds that the person so found is guilty of an offence."

15. Hence, s462 does not confine the apprehending person to finding an offender actually engaged in carrying out the offence. The section extends the point of discovery of the commission of the offence to encompass the actual perpetration of the offence, alternatively, to finding a person behaving or conducting him or herself so as to create a reasonable belief of guilt or, alternatively, to find a person in such circumstances so as to create a reasonable belief of guilt. In this matter McDonald did not find the appellant engaged in the act. He did not find the appellant behaving or conducting himself so as to create a reasonable belief in McDonald that he was guilty of an offence. Nevertheless, there were relevant circumstances in which McDonald found the appellant. Those circumstances were that McDonald was part of the management of the hotel, he was called in after staff were concerned about the cash transactions, the appellant remained on the premises, the appellant had in his possession the card that was the subject of the transactions and which was damaged, McDonald believed the card had been deliberately damaged. McDonald tried the card in a number of machines without success and to obtain bank authorisation and failed together with the fact that the appellant could not produce any identification when requested to do so.

16. In my view, all of these matters together created a set of circumstances whereby McDonald found the appellant in such circumstances that entitled McDonald to believe on reasonable grounds that the appellant was guilty of obtaining the moneys through the three transactions by unlawful means. The evidence of these circumstances was before the Magistrate who also had the benefit of observing and assessing the witnesses, especially McDonald and the appellant. An appellate court will rarely interfere with a finding of fact and, in particular, a finding of credit made in a court below: *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301. In my view that principle applies in the present case and there is no basis to set aside the findings of fact and credit made by the Magistrate below.

17. It was submitted for the appellant that a different construction ought be placed upon s462 of the *Crimes Act*. It was urged that interference with the liberty of the subject must be viewed in the strictest terms. The principle is well known: *Trobridge v Hardy* [1955] HCA 68; 94 CLR 147,

152; [1956] ALR 15, (per Fullagar J); also, *R v Purdy* [1975] QB 288; (1974) 3 All ER 465, 468 (per Lord Roskill). However, s458 specifically countenances interference with the liberty of the subject by virtue of permitting a citizen's arrest in strict circumstances. In my view, the strict circumstances of s458(1) were satisfied at the time McDonald pursued and detained the appellant on the basis of the evidence before the Magistrate below.

18. It was also submitted for the appellant that the necessary pre-conditions to satisfy s458(1) were not made out at the time McDonald pursued and detained the appellant and therefore the arrest was unlawful. Reliance was placed upon the principle that the subject is immune from arrest unless and until the conditions governing the exercise of the power of arrest are fulfilled: *Webster and Daff v McIntosh* [1980] FCA 128; (1980) 49 FLR 317; (1980) 32 ALR 603; (1981) 3 A Crim R 455, 458; (1980) 32 ALJR 24 (per Brennan J); also, *Donaldson v Broomby* [1982] FCA 58; 60 FLR 124; (1982) 40 ALR 525; (1981) 5 A Crim R 160, 164 (per Deane J). The authorities cite the proper principle to be applied. The liberty of the subject cannot be infringed by a citizen's arrest unless the apprehending person finds an offender committing an offence as defined by s462 and where the apprehending person believes on reasonable grounds that the arrest is necessary to ensure the offender attends court. In my view, as already described, the necessary pre-conditions of s458 were made out at the time that McDonald pursued and detained the appellant.

19. It was further submitted on behalf of the appellant that in order for the arrest of the appellant to have been lawful it was necessary for McDonald to actually find the appellant in the act of the offence. Reliance was placed upon a judgment of the Full Court of the Supreme Court of Queensland in *Muller v Murphy, Ex parte Murphy* [1935] St RQd 85; 29 QJPR 17. The case was one in which the accused was charged with habitually consorting with reputed criminals or known prostitutes and deemed to be a vagrant under the relevant vagrancy statute. The circumstances supporting the charge were alleged to have occurred over a period of six months and witnessed by seven different constables on 15 different occasions. The Full Court held (at 92, 93) the phrase "finds committing an offence" was intended to apply where a person is found actually committing a specified act or acts and did not apply to acts that consist of a general course of conduct.

20. In my view, *Murphy* is distinguishable from the present case. Firstly, s462 of the *Crimes Act* contemplates a person being found after the criminal act has been committed and goes beyond the "red handed" circumstance contemplated in *Murphy*. Secondly, the Queensland case was concerned with conduct over a period of six months whereas in the present matter the three transactions occurred on the one day at the same venue and events culminated in the concerns of the hotel management as pursued at about 10.30pm onwards that same day.

21. Of greater relevance to the construction of ss458(1) and 462 of the *Crimes Act* are the considerations of this Court of the legislation that preceded the sections. Sections 458 and 462 together with other sections were inserted by the *Crimes (Powers of Arrest) Act* 1972. The powers of arrest amendments followed a report of the Statute Law Revision Commission upon arrests without warrant and related matters dated 14 November 1968. Subsequently, the Chief Justice's *Law Reform Committee* reviewed the Statute Law Revision Committee report on two occasions. Eventually, the Chief Justice's Law Reform Committee adopted a report on the matter on 20 November 1969. The reports throw little light upon the term "finds committing".

22. The legislative predecessor of ss458 and 462 of the *Crimes Act* was s51 of the *Summary Offences Act* 1966, formerly s202 of the *Police Offences Act* 1958. Both sections authorised arrests without warrant of any person being found offending against any of the provisions of the subject Act. In *Lunt v Bramley* [1959] VicRp 53; (1959) VR 313, at 319; [1959] ALR 764 Adam J considered that the expression "found offending" in s202 of the *Police Offences Act* was to be given an extended meaning by virtue of the words in the section "a person found doing or committing any act. matter or thing or behaving or conducting himself in such a manner or under such circumstances that the person so finding him believes on reasonable grounds, that the person so found has in respect of any such act, omission, behaviour or conduct committed an offence ..." The accused in that case was found guilty in the Magistrates' Court of using indecent language in a public place. However, as there was no evidence or no sufficient direct evidence of members of the public having heard the relevant language Adam J held that the accused had not been "found committing" an offence for the purposes of the legislation and the conviction was set aside. Nevertheless, the learned Judge recognised that the words of the statute "found committing" were extended to apply beyond the

circumstances of finding an offender in the process of actually committing the offence. This view was cited with approval by McInerney J in *Lynch v Hargrave* [1971] VicRp 11; [1971] VR 99, 108.

23. I consider that the approach applied in *Lunt* and as adopted in *Lynch* combined with the insertion of wording in s462 of the *Crimes Act* in almost identical terms to those in s51 of the *Summary Offences Act* and s202 of the *Police Offences Act* support the proposition that the application of the words "finds committing" is intended to be given an extended meaning to encompass circumstances beyond actually finding an offender engaged in the relevant act.

24. For these reasons I find that there was evidence for the purposes of ss458 and 462 of the *Crimes Act* to enable the Magistrate to find, as he did, that the appellant was found committing an offence by McDonald and, further, that McDonald held a belief on reasonable grounds that the appellant had committed an offence.

25. The second question of law is whether there was evidence to support the finding that the appellant had not acted in self-defence. The question of whether he acted in self-defence was dependent upon whether the arrest of the appellant was unlawful. A person who is the subject of an unlawful arrest is entitled to use all reasonable means to resist the arrest: *Zecevic v DPP* [1987] HCA 26; (1987) 162 CLR 645; (1987) 71 ALR 641; (1987) 25 A Crim R 163; 61 ALJR 375. In light of my finding that it was open to the Magistrate to find as he did with respect to ss458 and 462 of the *Crimes Act*, it logically follows that the arrest by McDonald of the appellant was lawful and that the resistance by the appellant of McDonald did not constitute acting in reasonable self-defence. It follows that it was open to the Magistrate to find that the appellant had not acted in reasonable self-defence.

26. Accordingly, the appellant fails and the appeal will be dismissed.

APPEARANCES: For the applicant De Moor: Mr I Alger, counsel. Victoria Legal Aid. For the respondent: Ms S Pullen, counsel. Mr P Wood, Solicitor for Public Prosecutions.
