59/84

HIGH COURT OF AUSTRALIA

HALLIDAY v NEVILL

Gibbs CJ, Mason, Wilson, Brennan and Deane JJ

17 October, 6 December 1984

[1984] HCA 80; (1984) 155 CLR 1; (1984) 57 ALR 331; (1984) 13 A Crim R 250; (1984) 59 ALJR 124; (1984) 2 MVR 161; [1984] Aust Torts Reports 80-315

CRIMINAL LAW AND PROCEDURE – POWERS OF ARREST – ARREST WITHOUT WARRANT – ENTRY ONTO PRIVATE PREMISES – OPEN DRIVEWAY OF RESIDENTIAL PREMISES – NO VISIBLE PROHIBITION UPON ENTRY BY PUBLIC – WHETHER LICENCE IMPLIED IN FAVOUR OF POLICE OFFICER TO EFFECT ARREST OF OFFENDER ON DRIVEWAY: *CRIMES ACT* 1958, SS458, 459A.

N., a police officer, saw H. – known to he a disqualified driver – reversing a motor car out of the driveway of premises at 375 Liberty Parade, West Heidelberg. When H. apparently saw the police officer, he immediately drove back into the driveway, where he was spoken to about his driving. When N. arrested H. for driving whilst disqualified, H. broke away, ran across Liberty Parade and entered his own home at number 370. N. followed him into the house where subsequently, H. was subdued, conveyed into Police custody, and charged with resisting arrest, assault Police and drive whilst disqualified. When the charges came on for hearing, the Magistrate dismissed them, holding that the arrest of H. in the driveway at 375 Liberty Parade, was unlawful since N. was a trespasser on those premises at the time of the arrest. On an order nisi to review, Brooking J [1983] 2 VR 553, held that although N. had no implied licence to enter the premises at 375 Liberty Parade to arrest H., it did not follow that H.'s arrest was unlawful. Accordingly, H. was convicted. On appeal by special leave—

HELD: Gibbs CJ, Mason, Wilson and Deane JJ, Brennan J dissenting.
(1) Appeal dismissed.

(2) The question was whether the police officer had an implied or tacit licence from the occupier to set foot on the open driveway for the purpose of questioning or arresting a person whom he had observed committing an offence on a public highway in the immediate vicinity of that driveway.

(3) As the driveway of 375 Liberty Parade was not closed off by a locked gate, nor was there any notice forbidding the intrusion by visitors upon the open driveway, the proper inference was that N. had an implied or tacit licence from the occupier to act in the way he did.
***Nevill v Halliday* [1983] VicRp 114; [1983] 2 VR 553, not followed.**

(4) Accordingly, N. was lawfully upon the driveway when he arrested H.

GIBBS CJ, MASON, WILSON and DEANE JJ: [1] This is an appeal by special leave from the decision of Brooking J of the Supreme Court of Victoria in which His Honour made absolute orders nisi to review five decisions of a Stipendiary Magistrate dismissing five informations laid against the appellant. The informations charged the appellant with one offence of escaping from legal custody, two offences of resisting police in the execution of their duty and two offences of assault. These charges, together with a charge of driving a motor car while disqualified from obtaining a licence and driving a motor car whilst his blood alcohol content exceeded the prescribed maximum on each of which the appellant was convicted, all arose from an incident which occurred in West Heidelberg shortly after five o'clock one afternoon in January 1982. At that time two police officers named Nevill and Brida were on a motorised patrol of the area. As they drove along Liberty Parade they saw the appellant, who was known to Police Constable Brida as a disqualified driver, reversing a motor car out of the driveway of premises at 375 Liberty Parade. Having driven out into the street, the appellant apparently saw the police car approaching and immediately drove back into the driveway from which he had come. The police officers stopped their vehicle across the mouth of the driveway, alighted and entered the premises at 375 Liberty Parade by walking down the open driveway. There they engaged the appellant in conversation. He had been drinking. He was aggressive and denied that he had driven on the roadway. Police Constable Nevill then arrested

the appellant for driving whilst disqualified; this happened while the three men were standing on the driveway inside the premises near the rear of the car that the appellant had been driving.

Then, while the appellant and Police Constable Nevill were walking back down the driveway towards the police car, the appellant suddenly broke away from Police Constable Nevill's grasp and ran across Liberty Parade and entered his own home at number 370. The police officers pursued him into the house where a scuffle took place before he was finally overcome. The two charges of resisting the police officers and the two charges of assault all relate to the scuffle that occurred in his own home. The Magistrate held that the arrest of the appellant in the driveway of 375 Liberty Parade was unlawful because the arresting officer was a trespasser on those premises at the time of the arrest. He therefore dismissed the five informations to which we have referred.

[2] On the return of the orders nisi to review, Brooking J proceeded on the basis:

(a) that the Stipendiary Magistrate must be taken to have found that at the time of the arrest Police Constable Nevill was in the driveway without the permission of the occupier of 375 Liberty Parade and that he was not prepared to dispute such a finding, and

(b) that the power to arrest without warrant conferred by s458 of the *Crimes Act* 1958 (Vict) as amended did not confer by implication a power to follow the suspect on to private property for the purpose of effecting the arrest.

On that basis, Police Constable Nevill was a trespasser on the premises at 375 Liberty Parade at the time when he purported to arrest the appellant. His Honour came to the conclusion however that, even if that were so, the arrest itself was lawful. It followed, in His Honour's view, that the appellant escaped from lawful custody in breaking away from Police Constable Nevill and that the entry of the police officers into the appellant's home at 370 Liberty Parade in pursuit of him was authorized by s459A of the *Crimes Act*.

In the course of his argument, counsel for the appellant has raised issues of fundamental importance touching the liberty of the subject. It is unnecessary however that we embark on a consideration of those issues. It is common ground that the appeal must fail unless Police Constable Nevill was, at the time he arrested the appellant in the driveway of premises at 375 Liberty Parade, a trespasser on that driveway. The evidence on that question is sparse. On that evidence however, we consider that the only conclusion which is open as a matter of law is that Police Constable Nevill had an implied licence from the occupier of the premises to be upon the driveway.

While the question whether an occupier of land has granted a licence to another to enter upon it is essentially a question of fact, there are circumstances in which such a licence will, as a matter of law, be implied unless there is something additional in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated or was revoked (cf. *Edwards v Railway Executive* [1952] AC 737, at p744). The most **[3]** common instance of such an implied licence relates to the means of access, whether path, driveway or both, leading to the entrance of the ordinary suburban dwelling house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorized, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house. Such an implied or tacit licence can be precluded or at any time revoked by express or implied refusal or withdrawal of it. The occupier will not however be heard to say that while he or she had neither done nor said anything to negate or revoke any such licence, it should not be implied because subjectively he or she had not intended to give it (see, generally, *Robson v Hallett* [1967] 2 QB 939, at pp950-952, 953-954; [1967] 2 All ER 407; *Lipman v Clendinnen* [1932] HCA 24; [1932] 46 CLR 550, at pp556-667; 39 ALR 20; *Lambert v Roberts* [1980] 72 Cr App R 223, at p230; [1981] 2 All ER 15). Nor, in such a case, will the implied licence ordinarily be restricted to presence on the open driveway or path for the purpose of going to the entrance of the house. A passer-by is not a trespasser if, on passing an open driveway with no indication that entry is forbidden or unauthorized, he or she steps upon it either unintentionally or to avoid an obstruction such as a vehicle parked across the footpath. Nor will such a passer-by be a trespasser if, for example, he or she goes upon the driveway to recover some item of his

or her property which has fallen or blown upon it or to lead away an errant child. To adapt the words of Lord Parker CJ in *Robson* (at p950), the law is not such an ass that the implied or tacit licence in such a case is restricted to stepping over the item of property or around the child for the purpose of going to the entrance and asking the householder whether the item of property can be reclaimed or the child led away. The path or driveway is, in such circumstances, held out by the occupier as the bridge between the public thoroughfare and his or her private dwelling upon which a passer-by may go for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property.

The evidence indicates that the premises of 375 Liberty Parade were residential premises with an open driveway to the roadway. There is no suggestion that the driveway **[4]** was closed off by a locked gate or any other obstruction or that there was any notice or other indication advising either visitors generally or a particular class or type of visitor that intrusion upon the open driveway was forbidden. That being so, a variety of persons with a variety of legitimate purposes had, as a matter of law, an implied licence from the occupier to go upon the driveway. The question which arises is whether, in those circumstances, the proper inference as a matter of law is that a member of the police force had an implied or tacit licence from the occupier to set foot on the open driveway for the purpose of questioning or arresting a person whom he had observed committing an offence on a public street in the immediate vicinity of that driveway.

The conclusion which we have reached is that common sense, reinforced by considerations of public policy, requires that that question be answered in the affirmative. That conclusion does not involve any derogation of the right of an occupier of a suburban dwelling to prevent a member of the police force who has no overriding statutory or common law right of entry from coming upon his land. Any such occupier who desires to convert his path or driveway adjoining the public road into a haven for minor miscreants can, by taking appropriate steps, preclude the implication of a licence to a member of the police force to enter upon the path or driveway to effect an arrest with the result that a police officer's rights of entry are restricted to whatever overriding rights he might possess under some express provision or necessary implication of a statute (cf. *Crimes Act*, s459A and note generally *Morris v Beardmore* [1981] AC 446; [1980] 2 All ER 753; [1980] RTR 321; (1980) 71 Cr App R 256; [1980] 3 WLR 283; (1980) 144 JP 331 and the discussion in the judgment of Kennedy J, in *Dobie v Pinker* [1983] WAR 48, at pp53ff.) or the common law.

All that that conclusion involves is that, in the absence of any indication to the contrary, the implied or tacit licence to persons to go upon the open driveway of a suburban dwelling for legitimate purposes is not so confined as to exclude from its scope a member of the police force who goes upon the driveway in the ordinary course of his duty for the purpose of questioning or arresting a trespasser or a lawful visitor upon it. It follows that Police Constable Nevill was lawfully upon the driveway of 375 Liberty Parade when he arrested the appellant. It should be mentioned that it was submitted on behalf of the appellant that the Court should not substitute a different conclusion of its own for the finding at first instance that Police Constable Nevill was on the driveway **[5]** without the permission or licence of the occupier. The matter having come before the Supreme Court by way of order to review, the finding of the magistrate should not so it was said, be disturbed unless there was no evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come" (see *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 2, at p11; (1972) 30 LGRA 19).

The answer to that submission is that, there being no real dispute about the underlying objective facts and no suggestion that the occupier of 375 Liberty Parade did anything to negate or rescind any implied licence, the question whether those facts gave rise to an implied licence in favour of Police Constable Nevill was and is a question of law. We would dismiss the appeal.

[Brennan J delivered a separate judgment in which he dissented from the majority judgment]
