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SUPREME COURT OF VICTORIA

JENSEN v ELEFThERIOU

Lush J

21 August 1981 — [1982] VicRp 17; [1982] VR 184**WILFUL TRESPASS – EVIDENCE OF "OCCUPIER" – POWERS OF ARREST – ARREST WITHOUT WARRANT: CRIMES ACT 1958, SS458, 461, 462; SUMMARY OFFENCES ACT 1958, S9(d).**

Police were called to a house where there was a loud noise of music in the early hours of the morning. A female occupier eventually asked if the police could remove some men, including the defendant, from the house. She asked the men to leave but they took no notice. A policeman repeated her request from a position in the front doorway. The door was slammed in the faces of the police officers. The defendant was charged with trespass, assault police, and resist police. The police case did not include any evidence of occupation, so that they were unable to prove that the person said to have given the warning to leave was an occupier. The charge of trespass was dismissed. A submission was upheld that in those circumstances, the arrest of the defendant may not be lawful, and a person had a right to use reasonable force to resist an unlawful arrest.

HELD: Dismissal of the trespass charge did not make the arrest *prima facie* unlawful.

LUSH J: *[After setting out the charges and the evidence, His Honour continued]* ... [5] The reasons given by the Magistrate after an interval for consideration may best be taken from the applicant's affidavit in these proceedings. That affidavit records that, "Upon resuming the Bench His Worship made an order dismissing all the informations for trespass against all the defendants," It then continues,

"In respect of all the informations for resist arrest and assault police His Worship also dismissed those informations. He stated his reasons as – s461 of the *Crimes Act* was food for thought. It is a division that is procedural only mainly to protect members of the Police Force in circumstances such as this. The wording of 'not to be taken as lawful' seems to me to be protection. It surely does not take away the rights of the defendant as stated in *McLiney v Minster* [1911] VicLawRp 67; [1911] VLR 347; 17 ALR 336; 33 ALT 33. This decision is included in *Bourke and Fogarty* but there is no comment and no cases on it. I find the defendants were justified in resisting as there was no excessive force in the resistance. I do also find that the members were acting reasonably and within s458 of the *Crimes Act*."

The grounds upon which the order nisi was granted...

"(2) That the Stipendiary Magistrate was in error in concluding that the arrest of the defendant was unlawful ...

Ground (2) goes to the crux of the case as it was argued before me. It depends upon the construction of the *Crimes Act* ss458, 461 and 462 ... The Stipendiary Magistrate appears to have taken the view that the fact that the trespass charged was dismissed made the arrest on that charge illegal and he appears to have considered that s461 did not cure this illegality ... When s462 is applied to s458(1), that sub-section confers a power to arrest without warrant on any person who finds another person in such circumstances that the person finding him believes, on reasonable grounds, that the person found is committing an offence and if the person finding also believes, on reasonable grounds, that the apprehension is necessary for any one of the reasons set out in subparagraphs (i) to (iv). Since s458 makes lawful an arrest in those circumstances, it is not to the point to say that the suspected offence was never charged, or when charged the charge was dismissed. The fact of dismissal does not remove any of the elements which made the arrest lawful. ...

The Stipendiary Magistrate apparently thought that the dismissal of the trespass charge made the arrest, at least *prima facie*, unlawful. In this, in my opinion, he was wrong. He referred to *McLiney v Minster* [1911] VicLawRp 67; [1911] VLR 347; 17 ALR 336; 33 ALT 33, but the references to reasonable resistance in that case are references to reasonable resistance to unlawful arrest. The arrest in this case was unlawful if the arresting officers failed to show either that they believed

on reasonable grounds that the respondent was committing the offence, or that they believed on reasonable grounds that arrest was necessary for one of the four reasons stated in s458(1)(a). The former was never made an issue or decided in the case. The latter appears to have been found by the Stipendiary Magistrate in the informant's favour. I say that because of his reference to s458 in his reasons for his decision.

Accordingly the case against the respondent so far as it was constituted by the second and third offences charged in the information was decided on one ground only and that ground was wrong. ... Orders made absolute. Dismissal of the relevant charge is set aside; the charge is remitted to Magistrates' Court at Eltham for re-hearing.
