49/85

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

TOWSE v BRADLEY

Blackburn CJ

15 March 1984; 22 February 1985

(1985) 60 ACTR 1; (1985) 73 FLR 341; (1985) 14 A Crim R 408

CRIMINAL LAW – SUMMARY OFFENCE – HINDERING POLICE IN EXECUTION OF DUTY – EXECUTION OF SEARCH WARRANT – REFUSAL TO OBEY POLICE OFFICER'S REASONABLE DIRECTION – WHETHER HINDERING – POWERS OF POLICE – MISTAKE AS TO POWERS OF POLICE – WHETHER DEFENCE OF MISTAKE AVAILABLE: *AUSTRALIAN FEDERAL POLICE ACT* 1979 (CTH.) S64.

Armed with a search warrant, a police constable entered a house where T. was present with others. After T. was shown the warrant and asked to move into another room, she refused and indicated her intention to leave the house. When the constable attempted to prevent T. from leaving, there was a short struggle, after which T. was arrested for hindering police in the execution of their duties. At the subsequent hearing, T. raised the defence of mistake; however, the charge was found proved. On order nisi to review—

HELD: Order nisi discharged.
(1) Although the defence of mistake of fact is available to a defendant charged with hindering police in the execution of their duty under the *Australian Federal Police Act* 1979 (Cth.), s64(1) there was no evidence to support such a mistake where the evidence relied upon was that the defendant was allegedly mistaken as to the powers of the police under the warrant; that was a mistake of law, not of fact, and was not a defence.
***R v Reynhoudt* [1962] HCA 23; [1962] 107 CLR 381; [1962] ALR 483; 36 ALJR 26, applied.**

(2) As police officers with a warrant are permitted to take all reasonable steps to search the premises, including searching the persons on those premises, and to give such directions as to reasonably facilitate the execution of the warrant, the defendant's persistent refusal to comply with the police officer's direction to move into another room constituted interference or obstruction making the police officer's duty substantially more difficult to perform.
***Leonard v Morris* [1975] 10 SASR 528, applied.**

BLACKBURN CJ: *[After setting out the relevant statutory provisions, the facts, and the Magistrate's reasons for judgment, His Honour continued]:* ... **[4 ACTR]** It is clear that the defence of mistake is available to a defendant charged with this offence: *R v Reynhoudt* [1962] HCA 23; [1962] 107 CLR 381; [1962] ALR 483; 36 ALJR 26; *Leonard v Morris* [1975] 10 SASR 528, per Bray CJ at 533, 534. I have read the statutory provisions which created the offences in Victoria and South Australia respectively, upon which these two cases were decided, and in my opinion there is no material difference between them and the provisions of s64(1) of the *Australian Federal Police Act* 1979. The appellant would have been entitled to be acquitted if she honestly and reasonably believed that the person hindered or resisted was not a police officer, or was not engaged in the execution of her duty at the time.

The argument for the appellant was not that the learned Chief Stipendiary Magistrate should have found that the appellant had one or the other or both of these honest and reasonable beliefs but that he did not deal with the question at all. It was said that there was evidence upon which he should have made a finding one way or the other and that he made an error of law in that he simply ignored the matter. The evidence which was relied on as evidence that the appellant had a material honest and reasonable belief was, in the first place, some of the answers of the appellant to the requests of the police. It should be noted in the first place that the appellant was shown the search warrant and appeared to read it. Her answers included these words, when asked to go into the lounge room: "I am not going. You cannot tell me what to do. I am leaving to go down to the school ... I'll go where I ... well what ... I will go where I like."

The further evidence was that at a slightly later stage the appellant spoke to a solicitor

by telephone. There is no direct evidence of what was said in that conversation, but Constable Waterman also spoke to the solicitor on the subject of whether the police were or were not entitled to carry out a body search under the warrant, and whether the appellant could leave the house to pick up her child whose school had finished at about 3 pm. Apparently after these telephone conversations the appellant complied with the request that she should permit herself to be searched. Counsel for the appellant contended that this all amounted to evidence on which the learned Chief Stipendiary Magistrate could have found that at the time of the acts alleged to constitute hindering the police, the appellant was labouring under the honest and reasonable mistake that Constable Waterman was not engaged in the execution of her duty at the time, in that she was doing something which she was not entitled to do. In my opinion there was no evidence before the learned Chief Stipendiary Magistrate upon which he could have found that the appellant was under any mistake which could have afforded her a defence.

It is not suggested that she was mistaken as to the fact that Constable Waterman was a police officer. If the evidence relied on is evidence that the appellant was mistaken as to the powers of the police under the warrant, (as to which I am very doubtful) that mistake would be a mistake of law and not of fact and such a mistake would not provide a defence. There was therefore no substance in the contention that the appellant could successfully have defended the charge on the ground of mistake, and that the learned Chief Stipendiary Magistrate should have mentioned the point in his reasons for **[5]** his decision. It is perhaps surprising that he did not mention it, but any finding that he made could only have been that the appellant was under a mistake of law. That would not have affected the result.

The other point taken by counsel for the appellant was that it was not shown on the evidence that what the appellant did amounted to hindrance of the police officer in the execution of her duty. Counsel also contended that the learned Chief Stipendiary Magistrate misdirected himself in considering what was necessary to establish the offence, relying on these words:

> "I think that it is fair to say that any conduct on the part of the defendant that makes the discharge of the duties of the police officers more difficult can amount to a hinder and I am satisfied that on this evidence the persistent refusal continued for some time and to that extent I am satisfied that hinder the police is in the technical sense of hindering; the question then is whether it is illegal hindering of police for the purpose of the law."

It is true that the learned magistrate's *ex tempore* definition of the elements of the offences lacks the precision and completeness of the definitions given in the reserved judgments of the learned judges of the Supreme Court of South Australia in *Leonard v Morris*, *supra*. At p531 in that case Bray CJ said: "Any act of interference or obstruction which makes the duty of the police officer substantially more difficult of performance is a hindering within the meaning of the section." At p547 Wells J said:

> "It is sufficient for the prosecution to prove that the defendant voluntarily committed acts that, as in the circumstances as he was aware of them, and he then and there realized, were likely to, and did in fact, substantially impede or obstruct certain acts being done, or about to be done, by another person; that that other person was in fact a police officer; and that the acts seen as likely to be, and that were impeded or obstructed, amounted in fact to the execution by that police officer of his duty or a part thereof."

It must be pointed out that what that learned judge was there doing was providing an answer to the question "what is the *mens rea* necessary in all the circumstances of this case to constitute the offence of hindering, etc?". Nevertheless, what he says sufficiently includes a description of the *actus reus*. In my opinion the learned Chief Stipendiary Magistrate did not misdirect himself, but even if he did, the misdirection did not lead to a conviction which would not have ensued had he directed himself correctly. The police officer was acting in the execution of her duty, in the execution of a search warrant which entitled her and the other police officers to take all reasonable steps to search the premises, and that included searching the persons of those persons on the premises. In the lawful execution of that warrant they were entitled to give such directions to persons in the premises as were reasonable to facilitate its execution. To direct the persons in the kitchen to go into the lounge room was such a reasonable direction. The argument that it would have been quite possible to execute the search warrant, even if the appellant had disobeyed the direction to move into the lounge room, is to shut one's eyes to practical reality. In my opinion it would be absurd to expect police officers to execute search warrants effectively, and with the

minimum of interference with the convenience of the persons on the premises being searched, and yet to hold that they have no power to require persons, within reasonable limits, to move from one part of the premises to another in order to facilitate the search. The fallacy **[6]** in the argument for the defendants is that the direction given by Constable Waterman to the appellant to move from the kitchen to the lounge room was an unlawful direction which the appellant was not required to obey. In my opinion it was a lawful direction. Everything depends, of course, on its reasonableness in the circumstances.

It seems to me perfectly reasonable for police officers in the execution of a search warrant to require persons in a house to move from one portion of the living area of the house to another portion, for the purposes of facilitating the execution of the warrant. As the direction was in my opinion lawful, the appellant's persistent refusal to obey it was, in my opinion, an act of interference or obstruction which made the duty of the police officer substantially more difficult of performance. Those are the words of Bray CJ. I wish to guard against the inference that my conclusion in this case contravenes the accepted principle that mere inaction – doing or saying nothing at all – does not amount to hindrance under statutory provisions such as the one in question here. That principle is of course correct. At pp530, 531 of *Leonard v Morris* Bray CJ said:

> "Some overt act is required and mere inaction cannot amount to hindering."

His Honour proceeded to give an example from the case of *O'Hair v Killian* [1971] 1 SASR 1. The example given from that case was of the leader of a protest march who in the first place gave directions to the marchers which were contrary to later orders lawfully given by police. The failure by the leader, after the police orders had been given, to countermand the instructions earlier given by him was said not to be a hindrance of the police. With this contention I respectfully agree; but the words "some overt act" are in my opinion inadequate if they do not cover deliberate non-compliance with a reasonable direction to move in order to allow the execution of the constable's duty.

I imagine the case of a person who is sitting in a chair in front of a cupboard, and refuses to move so as to allow police executing a search warrant to open the door of the cupboard. To hold that such a refusal would not be hindering the police within the meaning of this section would merely be to encourage or necessitate the application of physical force by the police to such person to allow them to open the cupboard door. It would be absurd if the law were to be such as to necessitate the application of physical force in such a case, with no criminal sanction for anything short of physical resistance to such force. The legislation should be so construed as to discourage, not to encourage, the application of physical force. The facts of this case are not different in kind.

In my opinion the commission of the offence by the appellant was established on the evidence, and the learned Chief Stipendiary Magistrate came to a correct conclusion. The appeal is dismissed and the order nisi discharged.
