27/70

SUPREME COURT OF VICTORIA

FALKNER v BARBA

Gillard J

7-8, 13 October 1970 — [1971] VicRp 39; [1971] VR 332; (1971) 24 LGRA 270

CRIMINAL LAW – DEFENDANT CHARGED BY CITY ENGINEER WITH INTERFERING WITH A SCAFFOLDING INSPECTOR IN THAT HE ASSAULTED HIM – DEFENDANT HAD PREVIOUSLY BEEN FOUND GUILTY OF THE SAME ASSAULT IN RELATION TO A CHARGE LAID BY A POLICE OFFICER – MAGISTRATE DISMISSED THE INFORMATION – HE FOUND THAT THE INFORMANT HAD NO POWER TO ISSUE THE INFORMATION OR PROSECUTE IN HIS PRIVATE CAPACITY – MAGISTRATE HELD THAT THE PREVIOUS CONVICTION OF THE DEFENDANT WAS A BAR TO THE CONVICTION OF THE DEFENDANT IN THE CITY ENGINEER'S INFORMATION – PLEA OF *AUTREFOIS CONVICT* – WHETHER APPLICABLE – WHETHER MAGISTRATE IN ERROR: *LOCAL GOVERNMENT ACT* 1958, S831(3).

HELD: Order nisi discharged.

1. Since a duty was imposed upon the local municipal council to enforce due obedience of the regulations, then clearly it was duty-bound to prosecute any person found within the municipal district allegedly guilty of an offence. Furthermore, since it was in itself empowered to appoint inspectors and since it was further entitled to delegate to any one of its officers the power to prosecute an offender for breach, accordingly, the first ground of the order nisi was upheld.

2. The Council's report clearly gave a mandate to the informant to prosecute the person described in the authority. From all the surrounding circumstances known to the relevant parties, that person was the defendant. It was immaterial that he was not specifically named. The relevant question was whether the officer was authorized to prosecute the defendant as a person sufficiently identified in relation to a breach of law sufficiently specified: compare s866 of the *Local Government Act* 1958.

3. On the material before the magistrate he should have held that the informant was authorized to prosecute. Ground 2 of the order nisi was therefore upheld.

4. In relation to the doctrine of a plea in bar of *autrefois convict* where the ultimate fact alleged by and relied upon by an informant to establish guilt in one information was the same as in a subsequent information of a similar character, then a different result followed, even though the actual offences charged were not the same. When the foundation of each charge was the same, then the doctrine applied.

5. The general proposition that where the ultimate fact established the proof of two offences of a similar character, then it was the doctrine of the common law that the offender could not be convicted of the two offences. The conviction on the first was a bar to the second.

6. For the purposes of this case, when the defendant here had been convicted of assault the offence had passed into conviction. Prior to the present information the defendant had already been placed once in jeopardy by the ultimate fact that he had committed an assault. To adopt the same assault as the basis for a second charge, as the informant did here, was to place the defendant again in jeopardy in relation to that assault, and constituted a negation of the very principle stated by Lord Blackburn in *Wemyss v Hopkins* (1875) LR 10 QB 378; 39 JP 549. In the way the informant adopted the assault as the basis for prosecution here, the offence for which he had been convicted had not passed into the conviction.

7. Accordingly, the Magistrate was justified in finding that the defendant had already been placed in jeopardy for one and the same matter and it was on that basis that he was entitled to dismiss the information.

GILLARD J: On 24 April 1970 Jack Edward Falkner, the City Engineer of the Municipality of Fitzroy, laid an information against Michele Barba in the following terms: –

"The defendant on 22 January 1970 at Fitzroy in Victoria did interfere with the scaffolding inspector,

namely Brian Clarke, in the course of his duties under the *Scaffolding Regulations* 1962 contrary to para. 301 thereof. "Particulars "The defendant assaulted the said Brian Clarke at 170 Kerr Street, Fitzroy."

The information came on for hearing on 16 June 1970 before the Magistrates' Court at Fitzroy and was dismissed. During the course of the hearing in which the defendant was unrepresented, the magistrate challenged the informant's authority to prosecute having regard to the provisions of s831(3) of *Local Government Act* 1958. The magistrate stated that it was his opinion that the effect of the sub-section was to exclude the power of any other person than the two officials mentioned in the sub-section to prosecute. Despite this statement or finding by the magistrate, the solicitor for the informant required the court to hear the evidence.

The victim of the assault was then sworn and he stated that his name was Brian Clarke residing at 216 Rathmines Street, Fairfield, and further stated:

"I am a duly authorized scaffolding inspector employed as building inspector and scaffolding inspector by the Fitzroy City Council. On 22 January 1970 in the course of my duties I visited premises 170 Kerr Street, Fitzroy, and went to the first floor which was in the course of construction. I spoke to individual men who were working on the first floor slab laying bricks on the outside walls and pointed out to them that there was a breach of the Scaffolding Regulations, in that there was no scaffolding outside the brickwork as required by those regulations. I was about to speak to other employees on the same level when the defendant, Michele Barba, walked up and said, 'What is the trouble?' I turned my head slightly towards him and said, 'You know what the trouble is'. He then punched me several times around the face. I had some days off work and it was necessary for me to have medical attention. I reported the matter to the police."

The defendant then cross-examined the witness. The defendant said: "Should you ask who is doing the job?" The witness replied: "No, the regulations place an obligation both on the employer and employee." The defendant then asked the witness where he was standing when the defendant came up and he replied: "I was standing in the centre of the slab. There were employees working on three walls." The defendant then asked the witness: "Why did you not stop and speak to me?" The witness replied: "I did not refuse to speak to you. I said 'You know what the trouble is' and then I went to speak to the other men. I had spoken to several men before you came up to me and I had yet to speak to two more groups." The defendant then said to the witness: "I try to stop you talking to the other men", and the witness replied: "I wanted to ask the men were they aware that scaffolding was required." The defendant then asked the witness: "Do you remember that I came to see you at the Town Hall on 2 March 1970 and ask you if you were still crook?" The witness said "Yes, I was." The defendant then said: "I said I will pay for it. Tell me how much?", and the witness said: "Yes, but I did not discuss that with you."

At this point of the evidence the magistrate apparently caused the court clerk to produce the court register for proceedings held in the Magistrates' Court on 23 February 1970, and the court file in relation to such proceedings. The magistrate then said that he had remembered the defendant having been charged with assault and he produced to the witness, Clarke, the original copy of the information and summons heard on that day, and he asked the witness, Clarke, whether he was the person named as the informant on that summons. The witness, Clarke, replied: "Yes, I was the informant. I reported the matter to the police and the police prosecuted the case against the defendant."

The magistrate then referred to s28 of the *Acts Interpretation Act* 1958 and suggested that it afforded the defendant a defence. Legal argument then took place between the magistrate and the solicitor appearing for the informant. After such discussion the magistrate dismissed the information stating that the defendant had already been convicted of assault. He stated that the defendant was standing twice in jeopardy in respect of the same matter which was a lesser charge constituted by the one act. He added that the informant was the same informant in a different capacity, and if he were able to operate in two capacities he might perhaps launch a further venture in the third capacity. The magistrate also stated that he did not regard the informant as having power to prosecute pursuant to reg 202 of the *Scaffolding Regulations* which did not override s831(3) of the *Local Government Act* 1958.

The informant sought an order nisi to review this decision, and on 15 July 1970 an order

nisi was issued from this Court to the defendant and to the court to show cause why the order made by the magistrate should not be reviewed. The order nisi was granted on three grounds as follows: –

> "1. That the stipendiary magistrate was in error in holding that the provisions of s831(3) of the *Local Government Act* 1958 deprived the informant of any power and precluded him from giving any power to prosecute the information.
>
> "2. That the stipendiary magistrate should have held that the informant had been given authority to prosecute the information by the Council of the City of Fitzroy, and that that authority was sufficient to enable him to prosecute the information, or alternatively, the informant had power to prosecute the information in his private capacity.
>
> "3. That the stipendiary magistrate was in error in holding that the conviction of the defendant by the Court of Petty Sessions at Fitzroy on 23 February 1970 of assaulting one Brian Clarke was a bar to the conviction of the defendant of the offence alleged in the information."

Grounds 1 and 2 might be disposed of very quickly. Section 831(3) provides:

> "The Supervisor of Scaffolding Inspection and any Assistant Supervisor of Scaffolding Inspection may prosecute any person for a breach of or an offence against the provisions of this Part or of regulations made pursuant to this Part."

This provision by the use of the expression "may prosecute" clearly invested the specified officers with power to prosecute. It imposed no duty upon them to do so, and it left untrammelled the powers otherwise existing and committed to other persons.

By s826 it is provided that subject to Pt XLIII the regulations shall be administered within the municipal district of any municipality by the council of that municipality. The City of Fitzroy, therefore, was bound to administer and enforce observance of the regulations within its municipal district.

Furthermore, by s832 it is provided:

> "The council of every municipality shall appoint such officers to discharge the duties of inspectors under this Part as are necessary for the purpose."

And subs(2):

> "Inspectors shall make such inspections and discharge such other duties as the council directs in order to secure the due observance of this Part and the regulations."

The council apparently appointed Clarke as its inspector under that section, and he apparently was carrying out his duties on the specified date.

By s833C(1)(j) the Governor in Council may make regulations for or with respect to imposing penalties, not exceeding in any case $400, for interfering with or obstructing an inspector or the supervisor of scaffolding inspection or any assistant supervisor of scaffolding inspection in the execution of his duties under the regulations, or for any contravention of or failure to comply with the regulations. It was for a breach of a regulation made under this power that the defendant was prosecuted.

Since a duty was imposed upon the local municipal council to enforce due obedience of the regulations, then clearly it was duty-bound to prosecute any person found within the municipal district allegedly guilty of an offence. Furthermore, since it was in itself empowered to appoint inspectors and since it was further entitled to delegate to any one of its officers the power to prosecute an offender for breach, accordingly, the first ground of the order nisi must be upheld.

The authority to the informant to prosecute was given by the council adopting a report of the whole council sitting in committee, when it endorsed a recommendation by Falkner, the City Engineer, in a report which was headed "Criminal Assault on Building Inspector", namely:

> "Report that on Thursday, 22 January 1970 whilst making an inspection in company with By-

> Laws officer at factory premises, number 170 Kerr Street, the building inspector, Mr Brian Clarke, was assaulted from behind by an employer of persons, namely, a subcontractor-bricklayer, and that criminal action being taken by the police in this case will take place at the Fitzroy Court on 23 February. Note that the building inspector and the By-Laws officer had been inspecting bricks dumped on the footpath and a summons has been served in relation to another building for failure to erect a scaffold. Also, that Mr Clarke had been medically examined by the Medical Officer of Health, Dr. McColl, with regard to the injuries sustained. Committee endorses recommendation by the engineer that he be authorised to prosecute the employer of persons for interfering with the scaffolding inspector in the course of his duties and for failure to provide a scaffold in accordance with the requirements of the *Scaffolding Regulations* 1962 (as amended) and the *Local Government Act*, s833. Further, that he be authorised to prosecute the owner of property at number 166 Kerr Street the same person, for not having obtained a building permit *etcetera*."

Several things become clear from this report.

> (a) The incident giving rise to the prosecution for a breach of the *Scaffolding Regulations* was an assault on 26 January 1970 at 170 Kerr Street on the building inspector, Clarke, by a person called therein "an employer of persons".
>
> (b) Criminal action was being taken by the police in relation to this incident at the Fitzroy Court on 23 February 1970.
>
> (c) The engineer was authorized to prosecute the employer of persons for interfering with the scaffolding inspector in the course of his duties.

In my view, this clearly gave a mandate to the informant here to prosecute the person described in the authority. From all the surrounding circumstances known to the relevant parties, that person was the defendant. It is immaterial that he was not specifically named. The relevant question is whether the officer was authorized to prosecute the defendant as a person sufficiently identified in relation to a breach of law sufficiently specified: compare s866 of the *Local Government Act* 1958.

I am of the opinion that on the material before the magistrate he should have held that the informant was authorized to prosecute. Ground 2 of the order nisi, therefore, must be upheld.

The real matter for debate before me arose from ground 3. Mr Henshall, in a very able argument, conceded that he would find it difficult to rely upon the provisions of s28 of the *Acts Interpretation Act* 1958 to bar the prosecution: compare *R v Cleary* [1914] VicLawRp 83; [1914] VLR 571; 20 ALR 329; *R v McNicol* [1916] VicLawRp 46; [1916] VLR 350; 22 ALR 197. Nevertheless, Mr Henshall sought to uphold the magistrate's decision by relying on a closely analogous doctrine of the common law, which was enshrined in the Latin tag *nemo debet bis vexari pro una et eadem causa*.

An equally able and interesting argument has been advanced in reply by Mr Black, for the informant, why this doctrine, like s28, could not be invoked in the circumstances of the present case. The peculiar feature of this information arises from the particulars which it will be remembered read as follows: "The defendant assaulted the said Brian Clarke at 170 Kerr Street, Fitzroy." Doubtless in giving these particulars the informant very properly was carrying out the obligation imposed upon him in order to apprise the defendant "not only of the legal nature of the offence with which he was charged, but also the particular act, matter or thing alleged as the foundation of the charge". See per Dixon J in *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, at p489; [1938] ALR 104: "It is the very essence of the administration of criminal justice that the defendant should at the very outset of the trial know what is the specific offence being alleged against him." (See per Evatt J in the same case at CLR p497.)

In this case the particular act constituting the specific offence alleged in the information was in itself an offence for which, apparently, the defendant had already been punished. I deliberately use the word "apparently" because there was some informality on the presentation of the case before the magistrate, particularly in this aspect of the proceedings. In this Court in order to enable the matter to be properly ventilated certain concessions were made by Mr Black that the evidentiary facts relied upon by the informant in these proceedings were the same as those given in the earlier proceedings which led to conviction. But he would not concede that necessarily

the assault referred to under the particulars as set out in the information was the same assault as the earlier offence for which the defendant had been charged and convicted. Although this limitation seems on its face to be insubstantial, nevertheless, is it of sufficient weight to prevent my disposing of the information, if otherwise I accept Mr Henshall's argument? Before answering this question an investigation of the doctrine should be made to discover whether the doctrine can be applied to the circumstances of this case.

The preliminary comment should be made that since this was a summary prosecution before the Magistrates' Court the plea in bar of *autrefois convict* in the strict sense could not be made: see Lord Morris of Borth-y-Gest in *Connelly v DPP* [1964] AC 1254, at p1320; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145; *Flatman v Light* [1946] 1 KB 414, at p419; [1946] 2 All ER 368. Nevertheless, the Magistrates' Court could and should in appropriate circumstances apply the doctrine as properly defined and relied upon by Mr Henshall. And lack of procedural rules or mere technicalities of practice should not prevent a defendant from relying upon the doctrine if the facts justify the invocation of it.

The next comment should be made that on its face proof of interference with an inspector would ordinarily be quite different in character to a charge of, say, assault. To establish interference an informant is not bound to prove assault. If the informant had not given any particulars as he did in this case and had relied solely upon the conversations elicited by the defendant in the cross-examination of the victim, Clarke (as set out above), then it is probable the defendant could not have relied upon the doctrine. I repeat, to establish an interference with an inspector in the course of his duties does not require an informant to prove an assault. The foundational fact to establish the offence, to use the expression of Hodges J in *Cleary's Case* [1914] VicLawRp 83; [1914] VLR 571; 20 ALR 329, is quite different from the foundational fact to establish an assault. If the matter stopped there, then on the cases decided in this Court I would be constrained to uphold Mr Black's submissions. But, in my view, the informant having given the assault as the alleged interference, different considerations should apply.

At the outset, it should be accepted as well established that it would be wrong to suppose the maxim "means that the same incident or event or story may not be under investigation in more than one trial or that evidence once given at one trial may not again be given at a later trial": see per Lord Morris of Borth-y-Gest at (AC) p1326 in *Connelly's Case*; per Lord Hodson at p1333 and per Lord Devlin at p1358. See also *R v Morris* (1867) LR 1 CCR 90; [1861-73] All ER Rep 484; *R v Barron* [1914] 2 KB 570; *R v Cleary, supra*; *R v McNicol* [1916] VicLawRp 46; [1916] VLR 350; 22 ALR 197; *R v Ulyett and Coman* [1953] VicLawRp 43; [1953] VLR 301; [1953] ALR 330.

Patently, there may be two offences which are quite different in character in which the ultimate facts to establish guilt would be quite different, and yet in which the evidentiary facts to prove guilt would be the same. A ready example of this is afforded by *McNicol's Case*. A prisoner was initially charged in a Court of Petty Sessions with having, without authority, interfered with goods in the control of Customs and was duly convicted. Subsequently he was charged with larceny of the same goods, and at the trial the same witnesses deposed to the same facts and described the same acts of the prisoner as they had given in the earlier proceedings in the Court of Petty Sessions. The Full Court was unanimously of opinion that the doctrine referred to above did not apply. The ratio of the decision was that the ultimate facts to found guilt in each case were quite different, albeit the evidentiary facts were the same. But where the ultimate fact alleged by and relied upon by an informant to establish guilt in one information is the same as in a subsequent information of a similar character, then, in my opinion, a different result follows, even though the actual offences charged are not the same. When the foundation of each charge is the same, then, in my view, the doctrine applies.

The authority I rely upon for this proposition is the case of *Wemyss v Hopkins* (1875) LR 10 QB 378; 39 JP 549. The headnote of that case reads:

> "The appellant was summarily convicted under s78 of 5 and 6 Wm. 4, c50, for that he being driver of a carriage on a highway by negligence and wilful misconduct, to wit, by striking a horse ridden by the respondent caused hurt and damage to the respondent. He was afterwards convicted, on the same facts under s42 of 24 and 25 Vict., c100, for unlawfully assaulting the respondent. Held that the first conviction was a bar to the second."

Since I rely so greatly upon this case, one should look at the statutory provisions under which each information was laid. 5 and 6 Wm. 4, c50, s78, provides:

> "If the driver of any carriage whatsoever on any part of any highway shall by negligence or wilful misbehaviour cause any hurt or damage to any person every person so offending for every such offence shall forfeit any sum not exceeding 5 pounds."

It will be seen from those statutory provisions that it would be unnecessary to prove an assault against a driver of a vehicle to bring him within those provisions. On the other hand, 24 and 25 Vict. c.100, s42 provides:

> "Where any person shall unlawfully assault or beat any other person two Justices of the Peace upon complaint by and on behalf of the party aggrieved may hear and determine such offence, and the offender shall upon conviction thereof either be committed to common gaol or house of correction, *etcetera*."

It will be seen that the penalties attached to a breach of the second section are much more dire than those in relation to a conviction under the *Highways Act*. Nevertheless the court held that a conviction under the *Highways Act* prevented or was a bar to a conviction under the Act making an assault punishable.

At LR 10 QB p381 Blackburn J (as he then was), sets out the reason or the fundamental reason for the court's decision:

> "I think the fact that the appellant had been convicted by a justice under one Act of Parliament for what amounted to an assault is a bar to a conviction under another Act of Parliament for the same assault. The defence does not arise on a plea of *autrefois convict*, but on the well-established rule of common law that when a person is being convicted and punished for an offence by a court of competent jurisdiction *transit in rem judicatam*, that is the conviction shall be a bar to all further proceedings for the same offence and he shall not be punished again for the same matter. Otherwise there might be two different punishments for the same offence. The only point raised is whether defence in the nature of plea *autrefois convict* would extend to conviction before two justices whose jurisdiction is created by statute. I think the fact that the jurisdiction of the justices is created by statute makes no difference. Where the conviction is by a court of competent jurisdiction it matters not whether the conviction is by a summary proceeding before justices or by trial before a jury. It is necessary in the present case to have it proved, just as in the case of defence upon a plea of *autrefois convict*, that on a former occasion the appellant was charged with the same assault although not in the same words, yet in terms the same, and he was then convicted and punished. That is the substantial averment in a plea of *autrefois convict*."

In the same case Lush J in giving judgment at p382 said:

> "I am also of opinion that the second conviction should be quashed upon the ground it violated a fundamental principle of law that no person shall be prosecuted twice for the same offence. The act charged against the appellant on the first occasion was assault upon the respondent while she was riding a horse on the highway and it therefore became an offence for which the appellant might be punished under either of two statutes. The appellant was prosecuted for assault and convicted under one of the statutes, 3 and 4 Wm.4 c.50, s78, and fined, and he therefore cannot be afterwards convicted again for the same act under the other statute."

The *dictum* of Lord Blackburn has been cited repeatedly in subsequent cases. But it is of extreme importance to this case, in my view, for the reason emphasized by Lord Pearce in *Connelly's Case* ([1967] AC), at p365, where he said:

> "Lord Blackburn in *Wemyss' Case* based *autrefois convict* on the principle *transit in rem judicatam*; the offence has passed into a conviction and the offence has ceased to exist. That may be a satisfactory explanation except for those cases where there is conviction for assault from which the victim subsequently dies and it has been held that a prosecution for murder can be maintained."

It should be noted that the essential ingredients to establish the various charges referred to in *Wemyss's Case, supra*, were quite different. A mere statement of the two offences is sufficiently indicative of their difference in character. Nevertheless, the court held that the assault was a common ultimate fact to be found in each prosecution, and, accordingly, the doctrine applied.

This case has never been overruled, and as I have stated, the *dictum* of Lord Blackburn has been consistently referred to through many subsequent decisions. In *R v Miles* (1890) 24 QBD 423, at pp430, 431; [1886-90] All ER Rep 715, Hawkins J said this of the statement by Lord Blackburn. After citing the *dictum* he continues:

> "This rule of law so stated has never been doubted or qualified in any one of the numerous authorities which are to be found in the books upon the subject, though it has not always been found easy to apply the rule to the facts of particular cases under discussion. In the case cited, *Wemyss v Hopkins* (1875) LR 10 QB 378; 39 JP 549 where the appellant had been summarily convicted by a justice under the *Highway Act*, 5 and 6 Wm.4 c.50, s78 for an offence which though charged as a mere offence against the *Highway Act* amounted also to an assault in law, it was held that he could not afterwards be convicted upon the same facts of an assault under s42 of 24 and 25 Vict. c.100. That was a case too clear to admit of a reasonable doubt, and is a good illustration of the general rule of law."

In *Welton v Taneborne* (1908) 99 LT 668, at p670, Jelf J had this to say:

> "My view does not conflict with the decision in *Wemyss v Hopkins, supra.* As to that case it is conceded by counsel for the respondent that to strike a man's horse when he is upon it is to assault the man, and therefore the assault upon the man is involved in the offence set forth in the first of the two convictions in that case. If the assault be the question at issue in the first offence and not merely one ingredient in that offence and if the man were convicted of that offence, then if another exactly similar offence were brought up against him he would say that he had been punished for the assault upon the man and could not be punished a second time."

In that case Jelf J was dissenting from his brethren whether where on a charge of dangerous driving a defendant has been convicted, he could then be charged with driving at a speed exceeding 20 miles an hour, contrary to the provisions of the *Motor Car Act*. The majority of the court held that he could not because the doctrine applied: Jelf J did not think the doctrine applied. Nevertheless, his explanation of *Wemyss's Case* is a very useful guide for the determination of this case, particularly his reference to "one ingredient".

In *Connelly's Case, supra, Wemyss's Case* has been discussed by several of the law lords, and it is rather significant to contrast what Lord Morris of Borth-y-Gest said about it to that stated by Lord Pearce. At (AC) p1319 Lord Morris said this:

> "In *Wemyss v Hopkins* there was a case stated by justices. There had been an assault which constituted an offence under each of two statutes." (If I might interpolate I respectfully disagree with his Lordship's statement.) "A complaint was referred under one statute, there was a conviction and fine. Some six weeks later a complaint was referred under the other statute, on conviction there was a further fine. The question that arose was whether the first conviction was a bar to the second. It was held that it was. As the cases had been in a court of summary jurisdiction the plea of *autrefois convict* could not as such be presented, but the principle applied. The case was decided 'on the well-established rule of common law that when a person had been convicted and punished for an offence by a court of competent jurisdiction *transit in rem judicatam*, that is, the conviction shall be a bar to all further proceedings for the same offence and he shall not be punished again for the same matter': (see per Blackburn J) Lush J pointed out that the offence of the appellant was one for which he might be punished under either of two statutes and referred to the fundamental principle that no person shall be prosecuted twice for the same offence."

At p1362 Lord Pearce had this to say:

> "In *Wemyss v Hopkins* the defendant was convicted under a statutory offence that being a driver of a carriage he had struck a horse ridden by the prosecutor causing hurt and damage to the prosecutor. He was then summoned again for what was apparently a different offence, namely, that, that he did unlawfully assault, strike and otherwise abuse the prosecutor. In spite of their apparent differences the two offences were in fact founded on one and the same incident. On a case stated the second conviction was quashed, Blackburn J said...".

Then he repeats what I have already cited. His Lordship after citing Blackburn J said this:

> "Lush J there pointed out that the defendant's conduct became an act for which he could be punished under two statutes and that he could not be convicted again for the same act under the other statute."

In England, therefore, it may be stated that the authority of *Wemyss's Case* has not been

in any way diminished by judicial comment. On the contrary, the *dictum* of Lord Blackburn has been consistently referred to as a succinct statement of doctrine.

Mr Black, however, contended that the authority of this case could not stand with the decisions of the Full Court in this state in *Clancy's Case* and *McNicol's Case*. But in *R v Weeding* [1959] VicRp 50; [1959] VR 298, at pp300, 301; [1959] ALR 749, the Full Court apparently accepted the statement by Hawkins J where he is quoting Blackburn J. At the bottom of (VR) p300 the Full Court said this:

> "For the accused it is said therefore if he had been presented on separate indictments for counts 4 and 5 and been first convicted of the crime charged in count 4 he would on subsequent presentment for assault occasioning actual bodily harm have had a plea of *autrefois convict* or a plea not strictly a plea of *autrefois convict*, in bar on the well-established rule of common law that when a person has been convicted and punished for an offence by a court of competent jurisdiction *transit in rem judicatam* — that is, the conviction shall be a bar to all further proceedings for the same offence and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence: see *R v Miles* (1890) 24 QBD 423, at pp430, 431; [1886-90] All ER Rep 715; 54 JP 549, per Hawkins J quoting from Blackburn J in *Wemyss v Hopkins*. If this is so, the accused should not be penalised because as a matter of convenience he was presented on the one indictment for two counts. The question is would he have had a good plea in bar of a second indictment for assault occasioning actual bodily harm by pleading a conviction under s17 of the same assault?"

The Court then deals with that question, and in the course of doing so stated:

> "The principle of law in relation to this plea is that a person cannot more than once be put in peril of the same character (see per Cussen J in *R v Cleary* [1914] VicLawRp 83; [1914] VLR 571, at p578; 20 ALR 329)."

In that case, the Court was concerned with two counts on a presentment, and the question arose whether if conviction on one count would afford the accused person a plea in bar in further proceedings on the other count, and what course should a judge take at the trial – as happened there – where the jury found the accused guilty of the two counts on the presentment. At p302 the Court, having discussed at some length the doctrine, stated this:

> "Indeed the principle of the criminal law seems to be carried even a stage further by the Court of Criminal Appeal in England in the well-known case of *R v Barron* [1914] 2 KB 570; 78 JP 311, where Lord Reading CJ, in delivering the judgment of the Court, consisting of himself and AT Lawrence, and Lush JJ said, at p575 in explaining the earlier decision of *R v King* [1897] 1 QB 214; 66 LJQB 87, 'It seems reasonably clear from the report that the learned Judge was really expressing the view that having regard to the conviction of the defendant on the first indictment of obtaining credit for the same goods by false pretences and also by fraud, the Judge should not, as a matter of fairness and in the exercise of a proper judicial discretion have allowed the second trial to take place which is of course a very different proposition...It would appear that the decision of the Court was given either because in the exercise of his discretion the Judge should not have permitted the trial for larceny or because the verdict in the first trial was based upon a view of the facts which was inconsistent with that necessary to support the further indictment. At the first trial the conviction implied that the property in the goods passed to the defendant with the consent of the owner, who was induced thereto by false pretences, whereas conviction of the trial for larceny implied that the defendant feloniously took the goods without the consent of the owner.' We are not prepared to say that the offence under s17 of causing grievous bodily harm with the necessary intent necessarily imports an assault. There may be cases in which a person can be convicted of unlawfully and maliciously causing grievous bodily harm under that section in which the element of assault is not present."

The Court then cites examples.

> "But in this particular case assault was the basis of the charge against the accused. And in our opinion it would be contrary to the principle of the common law and very unfair to the accused to have recorded against him a verdict of guilty in respect of the same assault, both for assault occasioning actual bodily harm and for unlawfully and maliciously causing grievous bodily harm under s17."

This view of the law goes a long way in supporting the view which I have formed and which is based upon the exposition of the doctrine by Lord Blackburn in *Wemyss's Case*. The emphasis by the Full Court was that the basis charge against the accused, even though the elements necessary

to prove the charge did not require an assault, was in fact an assault, and, accordingly, they held that it would be unfair to the accused and contrary to the principles of the common law to allow a conviction on that count to stand.

Finally, in *R v Worland* [1964] VicRp 75; [1964] VR 607, Monahan J adopted *Wemyss's Case* as an authority for the proposition that whenever a person has been convicted and punished for an offence by a court of competent jurisdiction, that conviction shall be a bar to all further proceedings for the same offence and he should not be again punished for the same matter. Accordingly, Monahan J held that a conviction for common assault was a bar to a charge of assault with intent to commit rape when both charges arose out of the same incident, but was not a bar to a charge of attempted rape.

From the foregoing discussion of authority there emerged, in my opinion, the general proposition that where the ultimate fact established the proof of two offences of a similar character, then it was the doctrine of the common law that the offender could not be convicted of the two offences. The conviction on the first was a bar to the second.

A further suggestion also emerged from this discussion of the authorities and particularly from *Weeding's Case* [1959] VicRp 50; [1959] VR 298; [1959] ALR 749 the citation at (VR) p302 that I have just made, that having regard to an earlier conviction, as a matter of fairness and in the exercise of proper judicial discretion, the Court should not allow a second prosecution to proceed on the same essential facts, particularly if the offences were of a similar character. It appears from the addresses of the majority of the House of Lords in *Connelly's Case* that they also would accept that there was such a discretion residing in the Court to prevent oppression or unfairness to an accused person to bar a second prosecution being instituted on the same or similar ultimate facts: see per Lord Reid ([1964] AC) at p1296; per Lord Devlin at p1347; per Lord Pearce at p1364. The precise nature of this discretion, however, was ill-defined. The discussion thereon does demonstrate nevertheless that the earlier decisions which might have been given to delimit the common law doctrine will have to be considered or reconsidered in the light of recent development on this subject.

For the purposes of this case, however, I adopt the reasoning of Lord Blackburn in *Wemyss's Case*, *supra*. On his view of the doctrine, when the defendant here had been convicted of assault the offence had passed into conviction. Prior to the present information the defendant had already been placed once in jeopardy by the ultimate fact that he had committed an assault. To adopt the same assault as the basis for a second charge, as the informant did here, was to place the defendant again in jeopardy in relation to that assault, and, in my view, constituted a negation of the very principle stated by Lord Blackburn. In the way the informant adopted the assault as the basis for prosecution here, the offence for which he had been convicted had not passed into the conviction.

Perhaps I should add that if the particulars had not been given in the information, then a different conclusion as to the elements necessary to constitute the offence may have been open. But by giving the particulars the informant deliberately limited himself to the ultimate fact which was to constitute the offence and this already had been the subject of conviction.

Accordingly, in my view, Mr Henshall was quite entitled to invoke this common law doctrine in this Court to justify the magistrate's decision. What should be done? Initially because of Mr Black's qualified concessions, and since the stated reasons for the magistrate's decision were wrong, my inclination was to make the order absolute and return the proceedings to the Magistrates' Court for rehearing on the basis of views here expressed. Having had the opportunity to read more carefully the affidavits setting out the proceedings in the court below, and particularly the evidence of Clarke, I am of the opinion that the magistrate was justified in finding as he did, that the defendant had already been placed in jeopardy for one and the same matter. It was on this basis that he dismissed the information and, in my view, he was entitled to do so. In effect, what he did was to rely upon the doctrine here discussed. It may be that by his reference to the *Acts Interpretation Act* he adopted the wrong authority for his decision. Nevertheless, looking at it more closely and analysing the reasons he has given, he has in effect found that the assault, for which the defendant was charged on the second occasion to establish interference, was the same assault for which he had been charged and convicted at an earlier period, and the magistrate

held, accordingly, that the first conviction was a defence to the second information.

For these reasons, it seems to me that it would be inappropriate to return the proceedings to the court, since the defendant has in his favour sufficient findings of fact together with the concessions made by Mr Black to justify this Court in discharging the order nisi. Accordingly, the formal order of the Court is the order nisi be discharged with costs.

APPEARANCES: For the informant/applicant Falkner: Mr EJ Black, counsel. Messrs Slater & Gordon, solicitors. For the defendant/respondent Barba: Mr DG Henshall, counsel. Messrs LM Schetzer & Associates, solicitors.
