38/69

SUPREME COURT OF VICTORIA

McDONOUGH v FULLARTON

Winneke CJ

19 March 1968

CRIMINAL LAW – ASSAULT – IN A HOTEL CAR PARK THE DEFENDANT DROVE HIS MOTOR VEHICLE AT A HIGH SPEED AT OR IN THE DIRECTION OF A POLICE OFFICER – THE OFFICER TOOK EVASIVE ACTION BUT WAS KNOCKED TO THE GROUND – WHEN INTERVIEWED THE DEFENDANT SAID THAT HE HAD DRIVEN THE VEHICLE TOO CLOSE TO THE OFFICER AND INTENDED NOT TO STRIKE HIM BUT TO SCARE HIM – DEFENDANT ALSO CHARGED WITH DANGEROUS DRIVING – BOTH CHARGES DISMISSED BY THE JUSTICES – WHETHER JUSTICES IN ERROR; *CRIMES ACT* 1958, S318; *SUMMARY OFFENCES ACT* 1966, S24(2).

HELD: In relation to the dangerous driving charge order nisi discharged. In relation to the assault charge, order nisi absolute, the dismissal set aside and remitted to the Court for re-hearing.
1. The information for dangerous driving under s318 of the *Crimes Act* was dismissed on the ground that the informant had failed to prove that the car park was a highway within the meaning of the Act, that is, that there was no evidence that it was a place open to or used by the public for passage with vehicles. As the ground of the order nisi was fatal to that information it followed that the order made by the Court of Petty Sessions in relation to it was upheld and the order nisi insofar as it related to the order of the Court dismissing that information was discharged.

2. In relation to ground 3 of the order nisi that the Justices had misdirected themselves in holding that an intent actually to strike the constable with the car was an essential ingredient in the charge of assault, it was argued by Counsel that an intent to strike fear into the prosecutor by a person who was in a position to strike him, and actually putting the prosecutor in fear of violence, was sufficient to support the charge of assault.

3. In confining themselves as they did on the issue of intent, the magistrates misdirected themselves as to the elements contained in the charge of assault. On the evidence that was before them the defendant's conduct was quite consistent with his having assaulted the informant, notwithstanding that he had no intention actually to strike him with the car as found by the magistrates.

4. In those circumstances the misdirection was a substantial one going as it did to an essential element of the crime charged. Accordingly, ground 3 of the order nisi was made out.

WINNEKE CJ: Return of an order nisi to review two orders of the Court of Petty Sessions at Dandenong made on the 29 August 1967, dismissing two informations laid against the defendant respondent. The first information laid under s318 of the *Crimes Act* 1958 charged the respondent that on the 29 July 1967, at Dandenong he did drive a motor car on a highway to wit the public car park of the Prince Mark Hotel in a manner which was dangerous to the public. The defendant assented to that charge being heard summarily and the Court consisting of two honorary justices proceeded to deal with it. The second information charged the respondent that on the 29 July 1967 at Dandenong, he did assault Anthony Stephen McDonough with a weapon to wit motor car registered number XZ-956. This charge was laid under s24(2) of the *Summary Offences Act* 1966.

The order nisi to review the orders so made by the Court of Petty Sessions was granted by Mr Justice Lush on the 29 September 1967, on five grounds of which it is necessary to refer only to three,

> (2) that the Justices erred in holding that the prosecution had failed to prove any intent by the defendant to assault the constable;
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> (3) that the Justices erred in holding that it was a necessary element of the charge of assault that the defendant intended actually to strike the constable;

(5) that the Justices erred in holding that the prosecution had failed to prove that the car park was a highway within the meaning of the *Crimes Act* 1958.

Evidence was given before the Justices that the incidents, the subject matter of the informations, occurred late at night on the 29 July 1967, in a car park at a hotel on the Princes Highway near Dandenong known as the Prince Mark Hotel. Police evidence was given to the effect that the respondent was in a car in the car park, that he drove that car at high speed at or in the direction of Constable McDonough and that Constable McDonough was in that result knocked to the ground after contact with the car notwithstanding evasive action on his part. The police also tendered in evidence a statement in the form of a record of interview signed by the respondent in which he admitted that he had seen the constable, had driven the car too close to him and that he intended to scare, but not to strike the constable with the car. Beyond the fact that it was a car park at the hotel at which these incidents occurred, no other evidence concerning the car park, its use by the public or the access of the public to it or of any other circumstances was given.

The information under s318 of the *Crimes Act* was dismissed on the ground that the informant had failed to prove that the car park was a highway within the meaning of the Act, that is, that there was no evidence that it was a place open to or used by the public for passage with vehicles. It is to this that ground of the order nisi relates. It was, however, in the course of argument before me conceded by Mr Nettlefold who appeared for the informant and I agree with his concession, that he could not sustain that ground. As the ground was fatal to that information it follows that the order made by the Court of Petty Sessions in relation to it must be upheld and that the order nisi insofar as it relates to the order of the Court dismissing that information must be discharged.

The dismissal of the other information charging the respondent under s24(2) of the *Summary Offences Act* 1966 was attacked by Mr Nettlefold on two main grounds. First, he contended in support of ground 3 of the order nisi that the Justices had misdirected themselves in holding that an intent actually to strike the constable with the car was an essential ingredient in the charge of assault. Mr Nettlefold argued that an intent to strike fear into the prosecutor by a person who was in a position to strike him, and actually putting the prosecutor in fear of violence, was sufficient to support the charge of assault. He relied upon the statement in *Archbold* 36th edn at p975, that an intention to use violence against the person of another was sufficient to support each charge. He also relied upon the decision of the Full Court of Victoria in *R v McNamara* [1954] VicLawRp 22; [1954] VLR 137 at p138; [1954] ALR 291 in support of his submission.

In my opinion, and indeed Mr Dunphy, in the course of his argument so conceded, the charge of assault was not confined as a matter of intent to an intention actually to strike the prosecutor with the car, but also included an intent of the kind referred to by Mr Nettlefold. It follows that if the justices in considering this charge did confine their consideration to an intent actually to strike the constable with the car, then they committed a serious misdirection in the course of the consideration of the charge.

The problem is, therefore, as to what the finding of the Justices amounted to. Mr Dunphy contended that the finding read in the light of the way in which the proceedings were conducted, and particularly in the light of his submission to the Justices, as related in paragraph 4 of the affidavit of Ethel May Fullarton filed in opposition to the order nisi was not, when properly interpreted, confined to a finding of intention actually to strike the constable with the car, but was a finding which also covered an intent to strike fear into the constable. Mr Nettlefold, on the other hand, contended that the finding of the Justices was plainly confined to an intention only actually to strike the constable with the car.

In this conflict I must ascertain what the actual finding was. On the material before me there are three versions relating to the finding; first, in the affidavit of Norman Lewis Baker filed in support of the order nisi, it is stated in paragraph 15 (1) that the chairman of the Bench said the court intended to uphold the submission of defence counsel on the ground that the prosecution had failed to prove any intent by the defendant to assault the constable. Even though in the opinion of the court the defendant had actually struck the constable with the defendant's car, the prosecution had failed to prove that this was the defendant's intention. Second, in the affidavit of the above-mentioned Ethel May Fullarton filed in opposition to the order nisi, the finding is set

out in paragraph 7 in the following terms:

> "In relation to the charge of assault with a weapon on the question of intent, there is nothing to show any intent to strike, nothing we have before us shows this. Therefore, the charge of assault must fail."

Third, it is said in an affidavit filed by him that:

> "Upon the submission that intent to assault had not been proved, there was considerable discussion by the defence counsel and the prosecutor as to the necessary proof of intent. The court ruled that having heard all the evidence and having read the record of interview of the defendant, there was a doubt as to the defendant's intention to strike the constable with the car. Therefore, the assault charge would be dismissed."

The presiding chairman was, of course, entitled to file an affidavit as to the course the proceedings took before the court, and as to the finding actually made by the court. Mr Kelly's affidavit appears to me to provide a reasonable account of what occurred and to be a non-party affidavit, and I am of opinion that I should accept the finding of the court to be so stated by the magistrate. In *Larkin v Penfold* [1906] VicLawRp 90; [1906] VLR 535 at pp541-2; 12 ALR 337; 28 ALT 42 Cussen J in relation to the weight to be given to an affidavit of Justices, said:–

> "What I have said so far applies only to what may be called party affidavits. Somewhat different considerations would have weight if an affidavit of Justices be filed under the provisions of s149. Assuming – as should always be the case – that the Justices have not identified themselves with either of the litigants, so as to make their affidavit a party document, the statements in it of the grounds of the decision, or of facts having, in their opinion, a material bearing upon the questions at issue, which, I suppose, refer to the grounds of the order nisi, should in most, if not all, cases, be accepted as conclusive, whether or not they support the decision below."

That statement was quoted with approval by Sir Edmund Herring in *Scott v L'Anson* [1958] VicRp 34; [1958] VR 204 at pp205-6; [1958] ALR 627.

The statement of the finding contained in the magistrate's affidavit is in terms confined to an intention to strike the constable with the car. Mr Dunphy, of course, accepts this, but says that the finding nonetheless should be read, in order to ascertain its true meaning, in the light of defence counsel's submission to the court before the finding was made, and in particular to the submission as recounted in paragraph 4 of Mrs Fullarton's affidavit. In that paragraph Mrs Fullarton swore that after the evidence for the prosecution had been completed, Mr Dunphy submitted in relation to the charge of assault that there was no evidence of any intent on the part of the defendant to assault McDonough, and that accordingly the prosecution should fail; that Mr Dunphy expanded this argument by pointing out the inconsistencies in McDonough's evidence and submitted that it ought not to be accepted except insofar as it established that the defendant's vehicle was travelling towards the exit at the time it proceeded past Constable McDonough; that Mr Dunphy argued that if the court rejected "admissions" contained in the record of interview, there was no other evidence by which it could be suggested that the defendant was even aware of the presence of Constable McDonough in the car park, let alone that the defendant intended either to strike him or to put him in fear; and that the court accepted this submission and dismissed the information.

Mr Dunphy's argument before me was that in the course of his submission as so deposed to by Mrs Fullarton, he had expressly stated that the requisite intent in relation to the charge of assault was either an intent actually to strike the constable or an intent to put him in fear, and that the finding of the magistrates based upon that submission should be read in relation to both aspects of the intent. He contended, therefore, that when the Chairman stated in his affidavit that the court had a doubt as to the defendant's intention to strike the constable with the car that finding included as well as an intent actually to strike the constable, an intent to put the constable in fear.

It does not, however, necessarily follow from the fact that Mr Dunphy's submission conceded that an intent to put in fear was sufficient, that the finding of the magistrates was made on that basis, Had the finding been expressed in the wider terms of intent to assault, then great force would have attached to Mr Dunphy's contention. The finding, however, as expressed by the Chairman was expressed in terms of doubt as to the intention to strike the constable with the car. Such doubt could well be entertained in the light of the statements contained in the defendant's

record of interview which, in my opinion, were well open to the view that he intended not to strike the constable with the car but to scare him with it.

If such a view was taken of the evidence by the magistrates one could well understand the finding being expressed in the very terms which are set out in the Chairman's affidavit. In these circumstances, and particularly where the finding is stated by the magistrate in such precise terms as has happened in this case, I think I should take the finding to be as stated, and that I would not be justified in treating it as covering a wider area than that which was actually stated.

I am accordingly of opinion that in confining themselves as they did on the issue of intent, the magistrates misdirected themselves as to the elements contained in the charge of assault. On the evidence that was before them the defendant's conduct was quite consistent with him having assaulted the informant, notwithstanding that he had no intention actually to strike him with the car as found by the magistrates.

In these circumstances I am of opinion that the misdirection was a substantial one going as it did to an essential element of the crime charged. For these reasons I am of opinion that ground 3 of the order nisi has been made out. It, therefore, becomes necessary for me to consider the second main submission made by Mr Nettlefold, namely, that in any event the finding made by the magistrates was unreasonable and against the evidence.

For the reasons I have given the order nisi insofar as it relates to the charge under s318 of the *Crimes Act* 1958 is discharged. The order nisi insofar as it relates to the order made in relation to the charge under s24(2) of the *Summary Offences Act* 1966 is made absolute. There will be an order that the order of the Court of Petty Sessions dismissing that information be set aside and that the information be remitted to the Court of Petty Sessions at Dandenong for re-hearing in accordance with this ruling.
