

01/71

SUPREME COURT OF VICTORIA

BURKE v KNIGHT

Smith J

12 February 1971

CRIMINAL LAW – ASSAULT WITH A WEAPON TO WIT A RIFLE – DEFENDANT HELD GUN AND REFUSED TO HAND IT OVER TO TWO POLICE OFFICERS – ESSENTIAL ELEMENTS OF ASSAULT – FINDING BY MAGISTRATE THAT CHARGES PROVED – WHETHER MAGISTRATE IN ERROR: SUMMARY OFFENCES ACT 1966, S24(2).

HELD: Order nisi absolute. Convictions set aside. Matters not remitted for rehearing.

1. The essential elements of an assault in those cases in which there is no actual battery and no attempt to commit a battery, there must, in order to constitute the offence of assault, be some overt act on the part of the defendant intended to put the victim in fear of imminent battery.

2. In the present case, there was no finding by the Magistrate of any overt act on the part of the defendant. The mere continued holding of the gun, accompanied by a refusal to hand it over, was not a sufficient act to satisfy the requirements of the law in this regard. Also, there was no finding and no justification for finding, that the holding of the gun, accompanied by the refusal to hand it over was intended to put the police officers in fear of imminent battery.

3. Accordingly, the Magistrate proceeded upon a wrong view as to what constituted assault and that error on his part vitiated the convictions.

SMITH J: On the 13 May 1970 one Gerry James Knight was convicted in the Magistrates' Court at Horsham on two charges of having contravened s24(2) of the *Summary Offences Act* 1966. One of the charges was that he assaulted one Louisa Hunt with a weapon, to wit a .303 rifle. The other was that he assaulted one John Burke with a weapon, to wit a .303 rifle.

The two persons held to have been assaulted were officers of police, and the evidence given before the Magistrate indicated that following upon the firing of a shot, in circumstances not detailed, the police were summoned to premises where the defendant was. When they got there they found him in possession of a .303 rifle, and a man named Treloar was endeavouring to persuade him to hand over the rifle. The evidence also indicated that the defendant was in an agitated condition and declined to hand the rifle over to the police officers.

One of the police officers, the informant Burke, gave evidence which, if believed, would have afforded proof of a number of assaults by the pointing of the gun at the police officers. The other officer however, the policewoman Louisa Hunt, gave an account which did not confirm the witness Burke's account and which, if accepted involved that there was no pointing of the gun at either of the police officers.

The Magistrate, in giving his reasons for convicting the defendant on both charges, said this:

"Even if I was not prepared to accept the evidence of Senior Constable Burke that the defendant threatened him with a gun on any occasion, and even though the defendant did not threaten Miss Hunt or Senior Constable Burke verbally that he would use the gun against them, I find that both Police witnesses were reasonably apprehensive of their own safety. They reasonably believed that the gun was loaded and that they were in a situation of danger in that the defendant had the gun, which they reasonably believed was loaded, and that he the defendant refused to hand it over, and that he was in an agitated condition. I think that this in itself is sufficient to give rise to an assault. An element of the assault is the fact that both police and the defendant were in a confined space but by that I do not mean that the Police were held prisoners by the defendant, but that the space in which they were all gathered was not very great. And with the defendant showing reluctance to hand

the rifle over this was sufficient to put each of them in a situation warranting a finding of assault by the defendant against each of the police."

That statement by the Magistrate of his reasons for convicting shows, I consider, not only that he made no finding that the witness Burke's evidence was correct, but that he deliberately refrained from making findings about the accuracy of that evidence.

It also indicated, I think, that the Magistrate was satisfied that the defendant made no verbal threats to either of the police officers that he would use the gun against them. The Magistrate therefore would seem to have proceeded upon the view that without any verbal threats and without any pointing of the gun at the police officers, and indeed without anything beyond the holding of the gun in the defendant's hands coupled with refusing to hand it over, there was an assault with the gun.

It follows, as it appears to me, that the Magistrate must have misdirected himself as to the essential elements of an assault. In those cases in which there is no actual battery and no attempt to commit a battery, there must, in my view in order to constitute the offence of assault, be some overt act on the part of the accused intended to put the victim in fear of imminent battery.

On the Magistrate's statement of his reasons there is no finding of any overt act on the part of the defendant, in the present case, for the mere continued holding of the gun, accompanied by a refusal to hand it over, is not, in my view, a sufficient act to satisfy the requirements of the law in this regard. Even if a different view were taken on that point there is no finding here and, as it seems to me, no justification for finding, that the holding of the gun, accompanied by the refusal to hand it over was intended to put the police officers in fear of imminent battery. The Magistrate, as it seems to me, proceeded upon a wrong view as to what constituted assault and that error on his part vitiates the convictions.

It might be urged that, as the Magistrate did not say specifically that he rejected the evidence of Constable Burke, the matter should go back to him to consider and come to a conclusion about the reliability of that witness' evidence. On the whole, however, I do not think that it would be appropriate to send the matter back for that purpose. There was an extremely striking conflict of evidence between the two police witnesses and it seems difficult to suppose that the Magistrate would have expressed himself as he did in relation to the evidence of the witness Burke, unless he felt at least a reasonable doubt as to whether it was proper to accept it.

I think therefore that the proper course is to set aside the convictions and not send the matter back. Each of the orders nisi is made absolute with costs to be taxed and the convictions are set aside. I will reserve liberty to apply under the *Appeal Costs Fund Act*.

APPEARANCES: For the informant/respondent Burke: Mr J Larkins, counsel. State Crown Solicitor. For the defendant/applicant Knight: Mr BJ Cooney, counsel. BJ McGrath, solicitor.