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SUPREME COURT OF VICTORIA

R v JUDGE HEWITT; ex parte JOHANSON

McGarvie J

1 November 1976

SUMMARY OFFENCE – VAGRANCY – CONSORTING – INNOCENCE OF – LAWFUL MEANS OF SUPPORT: *VAGRANCY ACT* 1966, S6(1)(b) .

Defendant had been persistently questioned by police as to consorting in the Fitzroy area particularly in the Renown Hotel. He agreed that he had been warned on many occasions, but rarely gave any reason for so doing. He was endeavouring to keep out of the way of the police, but that later he had been informed that the local police preferred persons with convictions to drink only at The Renown. It was virtually conceded that there were no sinister or illegal undertones attached to his meeting with reputed thieves. The defendant was convicted of the charge in the Magistrates' Court and on appeal, the judge was asked to state a case for the Supreme Court which he refused to do. Upon Order Nisi to review—

HELD: Order absolute.

1. A person proved to have consorted habitually with reputed thieves during the relevant period may be required by the court to give a good account of his lawful means of support and of the circumstances of the consorting. Unless the person satisfies the court of his lawful means of support as at the time of the hearing and of the innocent character of the consorting at the times at which it occurred, he is guilty of the offence. Evidence as to his lawful means of support at the times of consorting may be relevant in two ways. It may tend to cast light on whether the consorting was innocent or not. It may also be relevant as part of the evidence which bears on the question of whether the person, in reality, has lawful means of support at the time of the hearing.

2. The burden which lay on the applicant was to satisfy the judge of his means of support at the time of the hearing and that the consorting was innocent. It is not necessary to define the word "innocent". It is enough to say that if one of the purposes of consorting with reputed thieves is that of doing, or planning to do criminal, unlawful, or dishonest acts; or if any of these things are done during the consorting, the consorting would not be innocent. By "dishonest acts" is meant the type of dishonest acts which involve preying on the community. If a person consorts with friends who are reputed thieves solely for the purpose of having a drink together in the bar of a hotel, and if this is all that occurs, the consorting is innocent. Similarly, if a person consorts with friends in the street or in a motor vehicle solely for a lawful and honest social purpose, the consorting is innocent.

3. The material before the Supreme Court showed a probability that there were errors of law in His Honour's reasons for decision.

McGARVIE J: ... In submissions before me, Mr McDermott of counsel, who appeared for the applicant Johanson, submitted that the evidence showed that the consortings occurred on what were basically social occasions. The applicant's evidence, he contended, was that his association with the other persons on each occasion was an innocent association with friends. This evidence, he submitted, was reasonable and probable and uncontradicted. It had not been challenged in cross-examination by the suggestion that anything sinister, illicit or illegal was involved on any of these occasions. It should, therefore, he submitted, have been accepted by the learned judge. Mr McDermott submitted that I should apply the principles stated in *Mitchell v Wachter* [1961] VicRp 86; (1961) VR 537. He contended that a credible account of innocent association was a good account of the consorting within the meaning of s6(1)(c) of the *Vagrancy Act* 1968.

He referred me to *Lee Fan v Dempsey* [1907] HCA 54; (1907) 5 CLR 310 at p317; 14 ALR (CN) 14, and quoted that case in support of his submission that the expression "good account" means a reasonably credible account, and not what is commonly called a thin one. He argued that if associations are innocent, their continuation after police warnings does not deprive them of the quality of innocence. If an association was innocent, he submitted, no inference to detract from that quality of innocence should be drawn from the refusal on occasions to give to the police reasons for consorting. He also contended that the learned judge gave undue weight to the fact

that the applicant was supporting a wife and family on $98.00 per week and that in view of his income at the time the judge should not have found that he was under a strong temptation to break the law.

Mr Uren argued that the learned judge had to be satisfied that the account given by the accused was credible. He was entitled not to be satisfied that it was a credible account. As he was not so satisfied, the offence was made out. Mr Uren relied on *Willis v Burnes* [1921] HCA 43; (1921) 29 CLR 511 in support of his submission that if the learned judge was not satisfied that the evidence of the applicant gave a good account of his consorting, the appeals against conviction had to be dismissed. He submitted that there were two ways in which His Honour was entitled to conclude that he was not satisfied that a good account had been given. First, the judge may have accepted the applicant's evidence but have regarded it as not sufficient in law to constitute a good account within the meaning of the section; secondly, the judge may not have accepted the applicant's evidence.

Mr Uren submitted that if the judge accepted the applicant's evidence it did not follow that a good account of the consorting had been given. It was not enough for the applicant to show that the consorting had been for an innocent purpose. He argued that the learned judge had been correct in treating the applicant as having to satisfy him that at the time of the consorting his means of support were such that he was not under a temptation to resort to criminal acts. On the evidence as to the applicant's means of support at the times of consorting, Mr Uren put it that His Honour was entitled to conclude that he was not satisfied that the applicant was not exposed at those times to temptation to do criminal acts.

Mr Uren also argued that a good account of the consorting was not given where all that the applicant had shown was that he was with reputed thieves for a purpose such as drinking with friends in the bar of a hotel. It was submitted that something more by way of a positive justification for the consorting needed to be shown.

Mr Uren submitted that it was open to the learned judge not to accept the evidence of the applicant. He put it that because of the large number of acts of consorting, their growing frequency, the applicant's persistence in consorting despite warnings from the police and the fact that on occasions no excuse had been given to the police, His Honour was entitled to regard the evidence of the applicant as not credible. Mr Uren submitted that the learned judge may have formed an adverse view of the applicant's credit because he had not mentioned to the police when booked at the Renown Hotel during 1976 that he believed that the police preferred him to drink there. He argued that the case stated procedure was not open upon a question of the acceptance or rejection of evidence. For this, Mr Uren relied on *Hofstetter v Thomas* [1968] VicRp 20; [1968] VR 199 at pp200-201. The relevant portion of s6(1)(c) of the *Vagrancy Act* 1966 is set out above. The corresponding previous section was considered by the Full Court in *Byrne v Shearer* [1959] VicRp 80; [1959] VR 606; [1959] ALR 1142. It was not suggested by either counsel that the altered wording in the present section affects the application of that decision in this case. I do not think that it does. Nothing said in *Jolly v Salvitti* [1974] VicRp 59; [1974] VR 484 is inconsistent with that conclusion.

I consider that a number of principles relevant to this case flow from the Full Court decision. A person proved to have consorted habitually with reputed thieves during the relevant period may be required by the court to give a good account of his lawful means of support and of the circumstances of the consorting. Unless the person satisfies the court of his lawful means of support as at the time of the hearing and of the innocent character of the consorting at the times at which it occurred, he is guilty of the offence. Evidence as to his lawful means of support at the times of consorting may be relevant in two ways. It may tend to cast light on whether the consorting was innocent or not. It may also be relevant as part of the evidence which bears on the question of whether the person, in reality, has lawful means of support at the time of the hearing.

In this case the defendant was proved to have consorted habitually with reputed thieves. Although it is not expressly stated in the material before me, it is a clear inference that the defendant was called upon by His Honour to give, to the satisfaction of the court, a good account both of his lawful means of support and of his consorting. It was common ground before me that the burden which then lay upon the defendant was to satisfy the court to its reasonable

satisfaction and was not a burden of satisfying the court beyond reasonable doubt. In other words, it was the civil standard of proof and not the criminal standard which the defendant had to satisfy. The defendant satisfied the judge that he had lawful means of support at the appropriate time. The dismissal of the appeal could only be due to the fact that the learned judge took the view that the defendant did not give "to the satisfaction of the court a good account ... of his ... consorting".

It is necessary to consider what is meant by the words "a good account ... of his ... consorting". In *Byrne v Shearer* [1959] VicRp 80; [1959] VR 606; [1959] ALR 1142 each member of the Full Court, in considering the operation of the equivalent section, treated these words as requiring a defendant to prove that the consorting was innocent. See; O'Bryan J (p608); Dean J (p611); and Smith J (pp612-3). It would follow, in my opinion, that if the defendant in this case satisfied the judge that he consorted with the reputed thieves only for innocent purposes, he would be entitled to have the information dismissed. Under this section it is enough for the defendant to prove that the consorting was entirely innocent. It is not necessary to go beyond proof of an innocent association and prove some affirmative, and innocent justification for the association, as it is, for example, under the Tasmanian *Police Offences* Act 1935, Section 6. Under that section a person proved to have consorted habitually with reputed thieves bears a burden of proving "to the satisfaction of the court that he has sufficient lawful means of support and that he had good and sufficient reasons for consorting with the persons with whom he is charged with having consorted". If he proves that, he is not to be convicted. In *Brown v Bryan* (1963) Tas SR 1 the Full Court of the Supreme Court of Tasmania held that under that section it was necessary to prove something more than that the association was innocent. Crisp J said:

> "I reject the argument that 'good and sufficient' means 'lawful'. The phrase 'good and sufficient reasons' requires as a necessary matter of construction something more than mere innocence". (Page 2.)

The other members of the court expressed agreement with the reasons of Crisp J. In reaching its decision the Full Court of the Supreme Court of Tasmania applied the reasoning of two decisions of single judges which were to the same effect: *Bryan v White* (1962) Tas SR 113, and *Young v Bryan* (1962) Tas SR 323. That reasoning is concisely summarised in the following passage from the judgment of Burbury CJ in *Young v Bryan* (1962) Tas SR 323, at 333.

> "The proposition that the words 'good and sufficient reasons' are synonymous with the words 'lawful purpose' needs only to be stated to exhibit its fallacy. The words are not synonymous. No doubt no reason which is unlawful can qualify as a good or sufficient reason but to say that every reason which is not unlawful is a good and sufficient reason is to depart from the clear words of the statute. The statute plainly says that a defendant must have a good and sufficient reason for consorting with the persons with whom he is charged with having consorted. Proof that there was nothing unlawful in a particular instance of association (i.e. that no criminal or dishonest purpose was furthered by it) does not establish that the defendant had good and sufficient reasons for the association."

In *Bryan v White* (1962) Tas SR 113 Gibson J referred to the provisions of the Victorian legislation. He said, having quoted the original Victorian section, which was s2 of the *Police Offences (Consorting) Act* 1931:

> "Whether or not 'giving a good account' of habitual consorting, is exactly equivalent to proving the possession of 'good and sufficient reasons' for consorting, it is at least a defence of a similar character; and it is of interest to see that it was not suggested in the Victorian case of *Brealy v Buckley* [1934] ALR 371) that the appellant had or might have had a good defence to his association with certain reputed thieves on the ground that his purpose in consorting was not an unlawful one. It was an order to review by Gavan Duffy J, and the present Barry J was counsel for the convicted defendant who had obtained an order nisi to review; and if the respondent's contention in the case before me is correct I should have thought it would have been raised in the Victorian case."

I do not consider that *Brealy v Buckley* [1934] ALR 371 gives any support for interpreting the Victorian provision in the same way as the Tasmanian provision. In that case no evidence had been given on behalf of the defendant, and the case is reported only in relation to one ground of the order nisi to review, which was "That there was no evidence to support a finding of habitual consorting". It does not appear that other legislation which makes consorting an offence enables a defendant to avoid a conviction by giving a good account of the consorting, as is the case in

Victoria – see, for example, *Bignold's Police Offences and Vagrancy Acts*, 9th Edition, 262; *Davis v Sampson* (1953) NZLR 909, 910-1, *Clark v Nelson, Ex Parte Nelson* (1936) QWN 17; 30 QJPR 31; *Beer v Toms, Ex parte Beer* (1952) St R Qd 116 at 126; 46 QJPR 102.

I consider that the burden which lay on the applicant in these appeals was to satisfy the judge of his means of support at the time of the hearing and that the consorting was innocent. It is not necessary to define the word "innocent", and I do not attempt to do so. In my opinion, it is enough to say that if one of the purposes of consorting with reputed thieves is that of doing, or planning to do criminal, unlawful, or dishonest acts; or if any of these things are done during the consorting, the consorting would not be innocent. By "dishonest acts" I mean the type of dishonest acts which involve preying on the community, to use the term used by Smith J in *Byrne v Shearer* [1959] VicRp 80; [1959] VR 606 at 613; [1959] ALR 1142. If a person consorts with friends who are reputed thieves solely for the purpose of having a drink together in the bar of a hotel, and if this is all that occurs, the consorting is innocent. Similarly, if a person consorts with friends in the street or in a motor vehicle solely for a lawful and honest social purpose, the consorting is innocent. Some assistance on the question of what consorting is innocent and what is not may be gained from the distinction drawn in *Csomor v Haberman* [1960] VicRp 23; (1960) VR 153 and the cases there discussed, in the application of the legislation considered in those cases.

I consider that the material before me shows a probability that there were errors of law in His Honour's reasons for decision.

The first probable error is as to what amounts in law to a good account of the consorting. I have expressed the view that a good account is one which shows that the consorting was innocent. I consider that the material shows that this was not the test applied by the learned Judge. The cross-examination of the applicant indicates that the informants put their case on the basis that an account in which the applicant admitted that he had persisted in consorting with reputed thieves after warnings from the police could not amount to a good account. One of the arguments advanced by counsel for the informants in the proceedings before me was to a similar effect. His Honour's statement that if the applicant wished to avoid being booked he should have been drinking at another hotel, and that he had defied the police when booked at the Renown Hotel, whereupon he was booked again, indicates that His Honour acted on this basis. I consider this approach to be an erroneous one under the Victorian section. Insofar as the section looks to the position at the time of the consorting, it provides an exoneration for consorting shown to have been innocent. If the applicant can show that his consorting was entirely innocent, he can only be convicted of the offence if, upon the hearing of a charge relating to that consorting, he is unable to show that at the time of the hearing he had lawful means of support. Consorting of a character which can only lead to a conviction upon the occurrence of the contingency of his being unable to show that at a later time he had lawful means of support cannot, in my opinion, be regarded as of itself unlawful. It would be contrary to the principles which apply to the interpretation of a penal provision to construe it otherwise. Under our law a citizen is entitled to do anything which is not unlawful. In the absence of a specific power conferred on the police, which does not exist in this case, conduct which is not unlawful does not become unlawful where the police warn the person against continuing, or direct him not to continue, that conduct. Although it is an expression commonly used, it is not strictly correct to say that here the police warned the applicant against further consorting. Nor did they direct him not to consort. What they did was to interview him and to inform him that he would be booked for consorting. This they were entitled to do. If at the hearing of the charges based on the consortings the applicant had been unable to show that he had means of support at the time of the hearing, he would have been guilty of the offence even though all the consortings were innocent.

In my opinion, the position is similar in respect of the failure of the applicant on occasions to give any or any satisfactory explanation to the police of his reasons for consorting. If the consorting was innocent, the applicant was under no legal obligation to give the police reasons for it. The absence of reasons from the defendant does not of itself show that the consorting was not innocent.

Nothing which I have said affects the position that continuation of consorting after being booked for consorting or failure to give to the police reasons for consorting when asked could, together with other circumstances, be relied on as evidence tending to show that the consorting

was not innocent. The material before me indicates that His Honour was in error in acting on the basis that the account in which the applicant admitted that he had persisted in consorting with reputed thieves after warnings from the police, for that reason could not amount in law to a good account of his consorting.

I do not think that His Honour correctly applied the test in the sense of considering whether the consorting had been shown to be innocent in character. The only reference to the innocence of the consorting which appears in the account in the affidavit of the reasons for decision, is in paragraph 33 of the portion which I have quoted above. In the context and at the stage at which this reference appears, it is probably a reference to an element of the charge which the informants had to prove before the applicant was required to give a good account. This is the element of knowledge in the applicant that those with whom he consorted were reputed thieves. *Ex parte Finney; Re Miller* (1936) 53 WN (NSW) 190 at p191; *Dias v O'Sullivan* (1949) SASR 195 at p204; [1949] ALR 586. His Honour seems to have applied the test, which was advanced before i.e on behalf of the informants, that it was not enough for the applicant to show that he was with reputed thieves solely for a purpose such as drinking with friends in the bar of a hotel. While that is the position under other consorting legislation in Australia and New Zealand, it is not, in my opinion, the position in Victoria. If the applicant satisfied the learned judge that he consorted solely from a desire to have a drink with friends in the bar of a hotel, and that was all that occurred, the appeals should have been allowed. Of itself, there is nothing unlawful or reprehensible in drinking with others, in the bar of a hotel legally open for trade.

The second probable error is that His Honour appears to have treated it as essential to the giving of a good account by the applicant, that he should show that, at the time of the consorting, his means of support were sufficient to ensure that he was not under a temptation to break the law. It was put to me on behalf of the informants His Honour was correct in this approach. It was argued that the learned judge should, as he did, have concentrated on the existence of temptation to the applicant rather than on his honesty of purpose.

I consider that this is the wrong approach. For reasons which I have set out, it is innocence in the character of the consorting which the applicant has to show. If the character of innocence is shown, then it does not matter whether the innocence is due to there being no temptation to act otherwise or whether it exists despite temptation. These submissions that the absence of temptation at the time of consorting is an element in what a defendant has to show are likely to have originated from a passage in the reasons for judgment of Smith J in *Byrne v Shearer* [1959] VicRp 80; [1959] VR 606 at p613; [1959] ALR 1142. In his reference to temptation, Smith J was discussing the policy which had led the legislature to cast the section in the form which made it necessary to consider the defendant's lawful means of support as at the time of the hearing of the charge. He was not treating absence of temptation as in any way a constituent element of the offence. Of course, as was recognised by the Full Court in *Byrne v Shearer* (*supra*), if the defendant has insufficient means of support at the time of consorting, this, and the temptation which would arise from it, may cast light on whether the consorting was innocent or not. It may tend to show that the consorting was not of the innocent character indicated by the defendant's evidence, but had some purpose which was not innocent.

In this case, the material before me does not suggest that His Honour relied on the low income of the applicant as leading him to a position where he was not satisfied that the only purpose of the applicant in his consorting was the purpose of drinking with friends or associating with friends. This is in line with the fact that neither the evidence nor the cross-examination on behalf of the informants had suggested any sinister, illicit or illegal purpose in the consortings. His Honour seems to have approached this question in the way which the informants submitted before me to be the correct way. He took it that if the applicant did not show that his income was such as to leave him free from temptation to break the law, he did not give a good account within the section.

I doubt whether the material indicates that there was the third error as put on behalf of the applicant. It was submitted that His Honour was not entitled to reject the evidence of the applicant which was inherently probable, credible and reasonable, was uncontradicted, and was unchallenged in cross-examination. If the learned judge had rejected the applicant's evidence in that situation, there would be substance in the submission. See *Hardy v Gillette* [1976] VicRp

36; [1976] VR 392 and the cases there discussed. The affidavit material does not indicate to me that the applicant's evidence was rejected. It indicates to me that the applicant's evidence was accepted, but was held, for the reasons which I have discussed, not to amount in law to a good account. If the evidence was rejected, the question whether as a matter of law the learned judge was entitled to reject it, may well be a question which could be determined on a case stated. See *Hofstetter v Thomas* [1968] VicRp 20; [1968] VR 199 at p201.

I do not accept the submissions for the applicant that the learned judge gave undue weight to the fact that the applicant was supporting a wife and family on $98.00 per week and that in view of his income at the time of his consorting the judge should not have found that he was under a strong temptation to break the law. If, contrary to my opinion, the applicant could not in law give a good account of his consorting, unless he showed that his income at the time was such as to remove temptation to break the law, I consider that His Honour was entitled, on the evidence to take the position that he was not satisfied that such temptation did not exist. That would be an issue of fact and, on the evidence, His Honour was entitled to be satisfied or not to be satisfied that such temptation did not exist.

The result is that I am satisfied that there were probably substantial errors of law in His Honour's decision which support grounds 1, 2 and 3 of the order nisi ...
