53/69

SUPREME COURT OF VICTORIA

LYNCH v HARGRAVE

McInerney J

16 July, 19 August 1970 — [1971] VicRp 11; [1971] VR 99

MOTOR TRAFFIC – DRIVING A MOTOR CAR DURING THE PERIOD OF CANCELLATION – SERVICE OF THE INFORMATION EFFECTED BY POST – APPLICATION MADE FOR REHEARING OF THE INFORMATION – BEFORE THE APPLICATION WAS HEARD THE DRIVER WAS DETECTED DRIVING – THE APPLICATION FOR A REHEARING WAS GRANTED AND THE CONVICTION AND ORDER SET ASIDE – INFORMATION FOR DRIVING DURING A PERIOD OF CANCELLATION DISMISSED BY MAGISTRATE – EFFECT OF ARREST WITHOUT A WARRANT – WHETHER MAGISTRATE IN ERROR: *JUSTICES ACT* 1958, S25(1); *MOTOR CAR ACT* 1958, SS28(1), 69.

HELD: Orders nisi discharged.
1. The whole purpose of s69 of the *Justices Act* 1958 is to enable the person against whom a conviction or order has been made at a hearing at which he did not appear to apply to have it set aside and have the whole matter reheard. Irrespective of what happens on the rehearing, once the order setting aside the conviction and directing a rehearing of the information has been made, the defendant is entitled to be treated as a person against whom an information is pending, rather than as a person against whom a conviction has been recorded which is valid up to the date of the setting aside but not thereafter. If on the subsequent rehearing the information were dismissed, it would be altogether wrong to speak of the defendant as a person who had been convicted of the offence charged in that information. Pending the rehearing, the slate must be regarded as having been wiped clean – it is as though it had never been written upon. In short, the magistrate was perfectly correct in the interpretation he placed upon s69 of the *Justices Act*.

2. The general rule is that a person who arrests another without a warrant, purporting to act under the powers of the statute, must satisfy all the conditions that the statute imposes, otherwise he incurs liability to an action for false imprisonment, or he is deprived of the protection which he otherwise would have.

3. A constable effecting an arrest without warrant in purported pursuance of the power conferred by s28(2) of the *Motor Car Act* 1958 may justify that arrest if he honestly believed at the time of the arrest that the defendant's licence had been cancelled, even though it were subsequently established that no such cancellation had taken place.

McINERNEY J: This is the return of an order nisi granted 3 April 1970 by Master Bergere to review the decision of the Court of Petty Sessions Yarrawonga (now the Magistrates' Court) constituted by a Stipendiary Magistrate, on 5 March 1970 dismissing an information by Alan John Lynch against Peter John Hargrave. The information charged that the defendant on 23 December 1969 at Yarrawonga drove a motor car on a highway, to wit, Belmore Street, after his licence had been cancelled.

The information was laid under the provisions of s28(1) of the *Motor Car Act* 1958 which provides: –

> "Any person who drives a motor car during the period of any suspension of his licence to drive a motor car or after his licence has been cancelled or during any period of disqualification from obtaining a licence shall be guilty of an offence and liable to be imprisoned in the case of a first offence for a term of not more than three months and in the case of a second or any subsequent offence for a term of not less than one month and not more than six months."

The evidence disclosed that at the Court of Petty Sessions at Shepparton, on 27 November 1969, on the hearing of an information and summons dated 26 October 1969 charging the defendant with a breach of s81A of the *Motor Car Act* 1958, namely, with having driven a motor car while the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood

was more than .05 per cent, the defendant was convicted and fined $40, in default distress, and his probationary licence cancelled. On the same day and at the same court, pursuant to an information and a summons dated 28 October 1969 charging him with having driven a motor car at a speed exceeding 35 miles an hour – an information evidently charging a breach of r1001 of the *Road Traffic Regulations* 1962 made under the *Road Traffic Act* 1958 the defendant was convicted and fined $10 in default distress.

The defendant being at that time the holder of a probationary licence under s22B(1), the cancellation of that licence was effected pursuant to s22B(3) of the *Motor Car Act* 1958 which provides: –

> "Where any person who is the holder of a licence issued on probation under this Part is convicted at any offence referred to in the Fourth Schedule to this Act in respect of a motor car or of an offence under subs(4B) of s11A of the *Road Traffic Act* 1958—
>
> (a) the licence shall be cancelled by the court by which the offender is convicted; and
>
> (b) in any such case—
>
> (i) the Chief Commissioner shall not issue another licence to the person who had been the holder of the licence issued on probation until that person has undergone another test and has satisfied the Chief Commissioner of his qualifications to hold the licence;
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> (ii) the Chief Commissioner shall not permit that person to undergo another test until any period of disqualification imposed by the court has expired, or, if no such disqualification was imposed, until three months after the licence was cancelled...".

An offence against s81A of the *Motor Car Act* is one of the offences referred to in the Fourth Schedule to that Act.

The certified copy of the register of convictions and orders made by the Court of Petty Sessions, Shepparton, on 27 November 1969 shows the surname of the defendant as Hargreaves, but it is not disputed that the person then convicted was identical with the defendant in the present case.

It appears that the defendant did not appear at the Court of Petty Sessions at Shepparton on 27 November 1969 on the occasion of the hearing of the informations against him to which reference has been made. When, on 5 February 1970, he applied to that court to have the convictions set aside and the informations reheard, the basis of his application was, it would appear, that those informations, service of which had been effected by post pursuant to the provisions of s25(1) of the *Justices Act* 1958 and the Fifth Schedule to that Act, had not in fact come to his knowledge.

The evidence before the Court of Petty Sessions at Yarrawonga on the hearing of the information the subject of the present review showed that at about 1:30 p.m. on 23 December 1969 the informant having observed the defendant seated behind the steering wheel of his car which was parked in the centre of the roadway opposite a dry-cleaning shop, informed the defendant that his driving licence had, on 27 November 1969 at the Court of Petty Sessions, Shepparton, been cancelled for a period of three months and that he was not permitted to drive a motor car in Victoria for that period, and that if he were detected driving he could be arrested and brought before the court. The evidence further disclosed that at 5:15 p.m. on the same day the informant saw the defendant driving a motor car in Belmore Street, Yarrawonga, and, having intercepted him, conveyed him to the Yarrawonga Police Station where he was charged under s28(1) of the *Motor Car Act* with having driven a car after his licence had been cancelled.

It was, however, established by evidence adduced before the Court of Petty Sessions at Yarrawonga on 5 March 1970 that by application (said by his solicitor in the court below to have been made and dated 2 February 1970) the defendant applied to the Court of Petty Sessions at Shepparton on 5 February 1970 pursuant to s69 of the *Justices Act* 1958 for a rehearing of the informations dated 26 October 1969 and 28 October 1969 respectively already referred to, and that, on the hearing of that application on 5 February 1970, the Court of Petty Sessions at Shepparton made an order setting aside the convictions recorded against the defendant on the hearing of those informations on 27 November 1969 and directing a rehearing of both informations on 19

February 1970. As already observed it appears that the basis of the defendant's application to have the convictions set aside and the informations reheard was that he had not appeared at the court on the hearing because the informations had not come to his knowledge.

On 19 February 1970 the informations were accordingly reheard at the Court of Petty Sessions, Shepparton. On the charge of having committed a breach of s81A of the Motor Car Act the defendant was convicted and fined $30 in default distress and he was disqualified from driving or obtaining a licence to drive a motor car for three months. On the charge of having driven at a speed exceeding 35 m.p.h., the defendant was convicted and fined $10 in default distress.

On the hearing of the present information at the Court of Petty Sessions at Yarrawonga on 5 March 1970 the magistrate, on the evidence above referred to being adduced before him, dismissed the information. His reasons for decision appear in para.17 of the affidavit upon which the application for an order nisi was made. Evidently addressing the defendant, he said: -

> "The situation here is that a proceeding commenced by summons was instituted against you; you were convicted and your licence was automatically cancelled and you later attempted to drive a motor car in disobedience of the court order. "It now rests with this court to decide whether there was a conviction recorded against you when you drove. There are certain reasons relating to the rehearing which you have availed yourself of legitimately under s69 of the Justices Act. In my opinion, the effect of the Justices Act when the application to set aside the original conviction is made and the conviction is set aside according to law, that the effect of such setting aside of the conviction is to remove the effect of the order disqualifying a person from driving a motor car ab initio as well as setting aside the original conviction. The effect, in my opinion, of the successful application for rehearing in this case is to exculpate the defendant. The information in this case is dismissed. It is my opinion that this type of anomaly in the absence of legislative enactment can only be overcome by the prosecution proceeding on warrant in this type of case in view of the provisions of the Act relating to the service of a summons by post and the present existing vagaries of our postal service making the delivery of such a summons in some cases problematical. "You are free to leave the court. "Had I found otherwise you would have left under escort for gaol. You are leaving with no credit upon yourself."

Section 69 of the *Justices Act* is a provision for which – so I was told by counsel for the informant – there appears to be no counterpart either in the English legislation or in the legislation of any of the other Australian States. The section in force as at 5 March 1970 was introduced by Act No.6958, s5, but the substance of the power to set aside a conviction or order made when one party does not appear has been a feature of the *Justices Act* for many years, tracing back through s69 of the 1958 Act to s66 of the 1928 and 1915 consolidations to s89(4) of the *Justices Act* 1890 which derived from s91(4) of the *Justices Act* 1887 (Act No.953). As at 5 March 1970 s69 provided as follows: –

> "(1) Any conviction or order made when one party does not appear may upon application made as hereafter in this section provided be set aside on such terms as to costs or otherwise as the court to which the application is made thinks just.
>
> "(2) Notice in writing of intention to apply to the court to fix a day for the hearing of any such application shall be lodged with the Clerk of Petty Sessions and a copy thereof shall be served upon the other party either personally or by registered post a reasonable time before application is made to the court to fix such a date.
>
> "(3) Upon proof of service of notices aforesaid the court to which application is made may fix a time and place for the hearing and determination of the matter of the information or complaint in respect of which the conviction or order was made and shall direct such notices as the court thinks fit of the time and place so fixed to be given to any party in such manner as the court thinks fit."

It was the contention of counsel for the informant that the effect of an order under s69 setting aside the conviction directing a rehearing is that the conviction or order is to be deemed to have been set aside as from the date on which it is ordered to be set aside but that it is to be considered as having been in operation up to the date of the order setting aside such conviction or order. On this basis, it was said, the order made on 27 November 1969 cancelling the defendant's last probationary licence was a valid and effective order on 23 December 1969 when the defendant was apprehended driving his motor car on highway and although that conviction and the cancellation of the defendant's licence could not be regarded as effective from or after 5 February 1970 when it was set aside, nevertheless it was to be regarded as an effective order up

to that date and at the time when the defendant was apprehended on 23 December 1969 he was to be regarded as driving after his licence was cancelled.

It was suggested for the informant that if the view taken by the Stipendiary Magistrate were correct, grave difficulties would be experienced in relation to the legal consequences of acts done in execution of a warrant of distress or a warrant for the apprehension of the defendant issued after the conviction or order had been made and executed prior to the order under s69 setting aside the conviction or order. As to this, however, the common law doctrine was stated in the *Commissioner for Railways (NSW) v Cavanough* [1935] HCA 45; (1935) 53 CLR 220 at p225; [1935] ALR 304 at p305:

> "Acts done according to the exigency of a judicial order afterwards reversed are protected: they are 'acts done in the execution of justice which are compulsive' – *Dr Drury's Case* [1572] EngR 109; (1610) 8 Co Rep 143a; 77 ER 688 at p691. And proceedings which, although based on a judgment, are brought to completion before its reversal are not avoided. For 'collateral acts executory are barred, but not collateral acts executed' – *Dr Drury's Case, supra.* But 'upon the reversal of a judgment against any person convicted of any offence, the judgment, execution and all forms of proceedings become thereby absolutely null and void. If living, he (or, if dead, his heir or personal representative, as the case may be) will be entitled to be restored to all things which he may have lost by such erroneous judgment and proceedings, and shall stand in every respect as if he had never been charged with the offence in respect of which judgment was pronounced against him' – Archbold, *Criminal Practice* (21st ed.), pp226-7."

It is to be observed also that Pt VI of the *Justices Act* 1958 (s170 to s184) makes special provision for the protection of justices in respect of orders made or warrants issued by them: see especially s174 as to the protection of a justice who has issued a warrant of distress or of commitment. Section 183 provides for the protection of members of the police force for things done in obedience to a warrant under the hand of the justice of the peace or a clerk of petty sessions.

The problem now before me does not appear to have been the subject of any decision in any superior court but much guidance is to be derived from the decisions of the High Court in *Commissioner for Railways (NSW) v Cavanough* [1935] HCA 45; (1935) 53 CLR 220; [1935] ALR 304, and in *Grady v Commissioner for Railways (NSW)* [1935] HCA 44; (1935) 53 CLR 229.

In the first-mentioned case, Cavanough, who was an officer employed by the Commissioner for Railways, New South Wales, was summarily convicted of larceny under s501 of the *Crimes Act* 1900-1929 (NSW). From that conviction he appealed to Quarter Sessions, which upheld his appeal and set aside the conviction. Section 125(1) of the *Justices Act* 1902-1931 (NSW) provided (so far as relevant):

> "The court hearing the appeal...may...quash, set aside...the conviction...appealed against."

Section 80 of the *Government Railways Act* 1912-1930 (NSW) provided: "If any officer is convicted of any felony…he shall be deemed to have vacated his office." Upon Cavanough being convicted summarily of larceny, he was suspended from duty, and during the period which elapsed from his conviction until the reversal thereof, he received no salary. He brought an action against the Commissioner for Railways for NSW for the wages due in respect of the period between the date when his office was deemed to have vacated by reason of his conviction and the date of his subsequent re-employment after the reversal of that conviction.

The Full Court of New South Wales, by a majority, held that a summary conviction for larceny was not a conviction for felony and unanimously held that if the plaintiff had been convicted of felony, notwithstanding the result of the appeal, his office would be deemed to have been vacated, since the conviction was valid until quashed and was not void *ab initio*. On appeal to the High Court, Starke J expressed his agreement with the views of the majority in the Full Court of New South Wales who had held that a summary conviction for larceny was not a conviction of felony but the other members of the court (Rich, Dixon, Evatt and McTiernan JJ) expressly indicated that they were not to be taken as assenting to that view. All members of the High Court, however, were of the view that when Cavanough's conviction was set aside on an appeal, it was as though the conviction had never been made and that Cavanough must be deemed to occupy the same position in contemplation of law as if he had never been convicted. (At CLR p225; ALR

p305) Rich, Dixon, Evatt and McTiernan JJ said:

> "But the power given to the Quarter Sessions includes the authority to quash and set aside convictions. These are familiar expressions, and describe a jurisdiction exercisable at common law by courts of error. The effect of the reversal of a conviction by proceedings in error has long been settled, and the same effect is produced by quashing it, or setting it aside upon a statutory appeal. The conviction is avoided *ab initio*. 'The judgment reversed is the same as no judgment' (per Coleridge J, *R v Drury* (1849) 3 Car and K 193, at p199; 175 ER 517, at p520; 3 Cox CC 544)".

(At CLR pp227-228; ALR p306) Starke J said:

> "Even if Cavanough were convicted of a felony, however, the allowance of his appeal and the setting aside of his conviction abrogated and obliterated it. It is true that anyone who acts in execution of a judgment may justify under it, notwithstanding its removal, reversal, or annulment, for it was good when given – *Alleyne v R* (1855) 5 E and B 399; [1855] EngR 606; 119 ER 529; *Smallcombe v Olivier* (1844) 13 M and W 77; [1844] EngR 646; 153 ER 32. But the consequences of the reversal of a judgment or conviction are that it is annulled and held for nothing, and the party is restored to all things which by reason of the judgment he has lost – see Archbold's *Criminal Pleadings*, 22nd ed., p261; *R v Drury* (1849) 3 Car and K 193; 175 ER 517. *R v O'Keefe* (1894) 15 LR (NSW) 1; 10 WN (NSW) 194; *R v Lee* (1895) 16 LR (NSW) 6; 11 WN (NSW) 121. The allegation in the plea that Cavanough's appeal was upheld and his conviction set aside is in substance an allegation, when the relevant statute (*Justices Act* 1902-1931) is examined, that the conviction was reversed and quashed. The consequence was that his conviction was obliterated, and to use the language of the old forms, 'altogether held for nothing'."

It is to be observed that the statute under consideration in *Cavanough's Case*, used the words "quash, set aside". The word "quash" is commonly used to signify an obliteration of the thing which is quashed: see *Hunter v Sherwin* (1869) 6 WW and a'B (L) 32, per Stawell CJ. In *Galloway v Watson* [1928] VicLawRp 47; [1928] VLR 308; [1928] ALR 201, an order for maintenance had been made in the Court of Petty Sessions, Melbourne, on 12 November 1923 against Watson directing him to pay £1 pound a week for the maintenance of the complainant (his alleged wife) and 9s. per week for the maintenance of his two children. On 30 November 1927 an information was sworn charging that Watson had disobeyed the order in respect of the two children and stating that the amount of the arrears was £183 10s. That information came on for hearing at the Court of Petty Sessions, Melbourne, on 5 December 1927, when Watson gave evidence that he was not the husband of the informant, and the hearing was then adjourned to enable Watson to appeal to the Court of General Sessions against the order for maintenance. Watson, accordingly, gave notice of appeal to the Court of General Sessions on the grounds, *inter alia*, that the respondent was not his lawful wife and that he was not the father of the two children, and on the further ground that the order was obtained on the basis that the children were legitimate whereas in fact they were illegitimate. The appeal came on for hearing before the Court of General Sessions, Melbourne, when the respondent did not appear and the maintenance order was quashed. Subsequently, on 1 May 1928, the information came on for further hearing before the Court of Petty Sessions and it was objected that the order for maintenance having been quashed there was no power to deal with the information. The police magistrate made an order directing that Watson be imprisoned until the maintenance order was obeyed. An order nisi to review was granted on the ground that the order for maintenance having been quashed, there were no arrears due and the Court of Petty Sessions had no jurisdiction to enforce the order. On the return of the order nisi, Irvine CJ made the order absolute with costs. The order of the Court of General Sessions, Melbourne, quashing the appeal had been made pursuant to s93 of the *Marriage Act* 1915 which empowered the Court of General Sessions to "quash, confirm or vary" the maintenance order. It was contended before Irvine CJ, that inasmuch as when the information on which the order objected to was made was laid the original order had not been quashed, and was still valid and subsisting, the informant's rights then attached could not be displaced by a subsequent quashing of the order. Irvine CJ described this argument as "clearly untenable on the view I have expressed as to the meaning of the word 'quash'."

Section 69(1) does not use the word "quash", but merely "set aside". In this respect it may be contrasted with the language of s142(7) which deals with the powers of the County Court in hearing appeals and provides that on the hearing of the appeal of the County Court may "confirm reverse or mitigate the decision of the Court of Petty Sessions". On the other hand, s148 empowers a County Court in certain circumstances to "quash" the conviction order or judgment

under appeal. By way of contrast, on the return of an order to review this Court is empowered (by s160) to "confirm vary amend rescind set aside or quash the conviction order or warrant". This collocation of powers gives rise to interesting speculation as to the precise difference between rescinding, setting aside or quashing a conviction.

It is also to be observed that there are occasions when the word "quash" signifies something other than the complete obliteration of the matter which is quashed, as for instance, rendering the act or sentence in question null and ineffective from that time forward but not retrospectively *ab initio*: see for instance *Hancock v Prison Commissioners* [1960] 1 QB 117; [1959] 3 All ER 513.

The phrase "to set aside" is a phrase which occurs in a great variety of legal contexts, e.g. setting aside awards of arbitrators, setting aside bankruptcy notices, setting aside conveyances or other transactions proved to have been induced by misrepresentation and so on. It is a phrase also used in connexion with setting aside judgments given in default of appearance or pleading or given in excess of jurisdiction. Although in some instances the transaction ultimately set aside is in the eyes of the law valid, though defeasible, until set aside, it is, when set aside, of no effect whatever.

The informant's argument that the conviction must be deemed to stand in respect of the period which elapses until it is set aside under s69 would appear to give rise to difficulties as to whether it could be treated as a previous conviction in respect of some informations, such as the present one in respect to an offence committed during that period. It has always been accepted that if a conviction is quashed on appeal, it is to be treated as no conviction at all, and in *R v Lapuse* [1964] VicRp 7; [1964] VR 43, it was held that an accused whose only "conviction" had been quashed on appeal was entitled to an unqualified direction that he was a person without any prior convictions and, accordingly, that it was wrong for the trial judge to have directed the jury that there was no evidence of the accused's good character and that in truth and in fact the accused had a prior conviction which had been quashed on appeal.

In my view, the whole purpose of s69 of the *Justices Act* is to enable the person against whom a conviction or order has been made at a hearing at which he did not appear to apply to have it set aside and have the whole matter reheard. Irrespective of what happens on the rehearing, once the order setting aside the conviction and directing a rehearing of the information has been made, the defendant is entitled to be treated as a person against whom an information is pending, rather than as a person against whom a conviction has been recorded which is valid up to the date of the setting aside but not thereafter. If on the subsequent rehearing the information were dismissed, it would be altogether wrong to speak of the defendant as a person who had been convicted of the offence charged in that information. Pending the rehearing, the slate must be regarded as having been wiped clean – it is as though it had never been written upon. In short, the magistrate was perfectly correct in the interpretation he placed upon s69 of the *Justices Act*.

That does not necessarily determine the matter of this order to review: it is still necessary to consider the proper interpretation of s28(1) of the *Motor Car Act*. It may be argued that the words "during the period of any suspension of his licence to drive a motor car" fit, quite literally, the case of a person who is apprehended driving a car during the period covered by a suspension of his licence even though the order directing that suspension is subsequently set aside and even if on the rehearing of the information on which the order for suspension was made that information should ultimately be dismissed. So also it may be argued that if at any period subsequent in point of time to the time when the defendant's licence has been cancelled by the court the defendant is apprehended driving a motor car, the offence is complete even though the cancellation of the licence may subsequently be set aside by the Magistrates' Court in the exercise of its powers under s69. The same argument may, of course, be advanced in relation to the period which elapses between the date of the conviction and suspension or cancellation (as the case may be) of the licence and the hearing of an appeal from that order. If on the hearing of the appeal, it is dismissed and the order appealed from is affirmed, no problem arises, but, if on the hearing of the appeal the conviction is quashed and with it the cancellation of the licence is also quashed, it would seem somewhat surprising if the defendant should be held to have driven the car during the period of suspension pursuant to the cancellation which is ultimately quashed on appeal, and to be subjected to the consequences attaching under s28(1) of the *Motor Car Act*.

It may also be urged that the view taken by the magistrate in the present case creates difficulties in relation to s28(2) which provides that "any member of the police force may without warrant apprehend any person whom he finds offending against subs(1) of this section". Would the informant in the present case be liable to an action for false arrest? Section 183 of the *Justices Act* which protects a policeman from the consequences of his having acted in obedience to any warrant under the hand of the justice of peace or clerk of petty sessions would not operate to protect a policeman exercising a power of arrest conferred by s28 of the *Motor Car Act*.

Nor will s124 of the *Police Regulations Act* 1958 be applicable, since it deals only with actions brought against any member of the force for any act done in obedience to a warrant. The position of the arresting constable would, accordingly, fail to be determined according to whether the principle of the common law as to actions of false imprisonment are superseded or modified by the provisions of s28 of the *Motor Car Act*.

The phrase "finds offending" which occurs in s28(2) of the *Motor Car Act* 1958 is one of a number of related phrases – e.g. "found offending"; "found trespassing"; "found committing an offence"; "found drunk" (*Sheehan v Piddington; Ex parte Piddington* [1955] St R Qd 574 at p581; 50 QJPR 16); "found on the premises" – which occur in statutes creating offences or authorizing arrest without warrant. There are to be found in the reports a great many cases in which the meaning of such phrases has been considered. See, e.g., *Thomas v Powell* (1893) 57 JP 329; *Moran v Jones* (1911) 104 LT 921 at pp922, 923; *R v Goodwin* [1944] KB 518 at pp522, 523; [1944] 1 All ER 506; *R v Lumsden* [1951] 2 KB 513 at p515; [1951] 1 All ER 1101; *Simmons v Millingen* (1846) 15 LJ (CB) 102; [1846] EngR 275; (1846) 2 CB 524; *Horley v Rogers* (1860) 2 E and E 674; 29 LJ (MC) 140; [1843-60] All ER Rep 481. See also *Griffiths v Taylor* (1876) 2 CPD 194; *Downing v Capel* (1867) LR 2 CP 401, and compare (in Australian courts) *Sheehan v Piddington; Ex parte Piddington*, *supra*, at p581, and see also *Stackpool v Hillhouse* (1950) 67 WN (NSW) 62, and *Ex parte Hill; Re Green* (1950) 67 WN (NSW) 161.

From these and other authorities may be deduced a rule stated in *Halsbury*, 3rd ed., vol.10, pp351, 352, para. 643 as follows:

> "Where power is conferred by statute to arrest a person found or seen committing an offence or doing some specific act, the arrest must in most cases be made whilst the offence is actually being committed or the act is being done, or on fresh pursuit. – See *Downing v Capel* (1867) LR 2 CP 461; *Griffiths v Taylor* (1876) 2 CPD 194 (CA); *R v Curran* (1828) 3 C and P 397; *Simmons v Millingen* [1846] EngR 275; (1846) 2 CB 524; *Mathews v Biddulph* (1841) 3 Man and G 390."

The general rule is that a person who arrests another without a warrant, purporting to act under the powers of the statute, must satisfy all the conditions that the statute imposes, otherwise he incurs liability to an action for false imprisonment, or he is deprived of the protection which he otherwise would have: see *Simmons v Millingen* [1846] EngR 275; (1846) 2 CB 524; *Bowditch v Balchin* [1850] EngR 599; (1850) 5 Exch 378; [1843-60] All ER Rep 674; *R v Curran* (1828) 3 C and P 397; *Poulton v London South-West Railway Co* (1867) LR 2 QB 534. See also *Dumbell v Roberts* [1944] 1 All ER 326, approved in *Christie v Leachinsky* [1947] UKHL 2; [1946] 1 KB 124; [1947] AC 573; (1947) 1 All ER 567; (1947) 111 JP 224; 63 TLR 231.

A person is entitled to the protection of an Act of Parliament if he honestly and *bona fide* believes that he is acting in pursuance of that Act, whether there be reasonable ground for the belief or not: see *Hermann v Seneschal* [1862] EngR 720; (1862) 13 CB (NS) 392; *Roberts v Orchard* (1863) 2 H and C 769 (Exch); *Chamberlain v King* (1871) LR 6 CP 474 (explaining *Leete v Hart* (1868) LR 3 CP 322), and see *Nathan v Cohen* [1812] EngR 399; (1812) 3 Camp 257. See also *Hamilton v Halesworth* [1937] HCA 69; (1937) 58 CLR 369; [1938] ALR 75 where Dixon and McTiernan JJ, said (at CLR p380):

> "If the defendant honestly intended to put the law in motion and he really believed in the state of facts which, if it existed, would have justified his act, or he intended to act according to the duties of his office as a special constable, then it would be a thing done in pursuance of the statute, although it turned out that the plaintiff was not, in fact, guilty – see *Hermann v Seneschal* [1862] EngR 720; (1862) 13 CB (NS) 392, at pp402-404; [1862] EngR 720; 143 ER 156 at pp160-161; *Selmes v Judge* (1871) LR 6 QB 724 at p728. When the defendant is found purporting thus to execute what is actually a statutory power, the burden rests upon the plaintiff of proving that he was not actuated by an honest desire to do his duty; that he was not acting in the intended but in the pretended, execution of his functions (cf *G Scammel and Nephew Ltd v Hurley* [1929] 1 KB 419 at pp427-429)."

These cases suggest that a constable effecting an arrest without warrant in purported pursuance of the power conferred by s28(2) may justify that arrest if he honestly believed at the time of the arrest that the defendant's licence had been cancelled, even though it were subsequently established that no such cancellation had taken place.

In at least one statute, namely, s51 of the *Summary offences Act* 1966 – formerly, s202 of the *Police Offences Act* 1958 – the point now under discussion is expressly resolved. Section 51(1) authorizes the arrest without warrant of any person found offending against any of the provisions of Act. Subs(3) gives what Adam J in *Lunt v Bramley* [1959] VicRp 53; [1959] VR 313, at p319; [1959] ALR 764 at p770 called "an extended meaning" to the phrases "found offending" and "finds offending" – those phrases extend "to the case of a person found doing any act or so behaving or conducting himself or in such circumstances that the person finding him believes on reasonable grounds that the person so found is guilty of an offence against the Act". No such extended definition occurs in s28(2) of the *Motor Car Act* 1958, but I am of the view that it is to be given a similar effect. This conclusion seems to me to derive considerable support from the judgments in the Court of Appeal in *Trebeck v Croudace* [1918] 1 KB 158; [1916-17] All ER Rep 441, where it was held that s12 of the *Licensing Act* 1872 whereby "every person who is drunk while in charge on any highway...of any carriage may be apprehended" should be construed as authorizing the apprehension of a person honestly and upon reasonable grounds believed to be committing the offence at the time he was arrested. The court there rejected (see per Swinfen Eady LJ at p165) the argument that since the statutory power was not expressed to be a power to arrest any person "reasonably suspected of having committed that offence", the arresting officer acted at his peril and was not protected by the statute if it should be decided that the offence had not in fact been committed.

At pp166, 167, Bankes LJ, said:

> "The single point therefore remains whether the language of the statute authorizes the arrest of a person upon suspicion of having committed the offence where the suspicion is honestly entertained on reasonable grounds by the person making the apprehension. That the defendant would have had no defence to the action at common law is quite clear. Not only has a constable no power at common law of arresting a person without warrant on suspicion of having committed a misdemeanour but he has no power of arresting without warrant in any case of misdemeanour except when a breach of the peace has been committed in his presence, or when there was reasonable ground for supposing that a breach of the peace was about to be committed or received in his presence. It was in aid of the common law on this point, and to supplement the powers of constables and others that the legislature has from time to time given authority to arrest without warrant in a number of cases of misdemeanour. Though the language in which this authority has been conferred varies greatly in different statutes, and in different sections of the same statute, the object of the Legislature must have been the same, namely, to provide for cases where, in the interests of public safety, or where danger to life or limb or property is threatened, prompt action is called for, and action which must of necessity be founded on the circumstances of the moment, and fairly probably on such circumstances as the senses of a police constable, his sight and hearing, convey to him. This authority to arrest without warrant which is conferred by statute is in all cases practically the initial step to some form of judicial or quasi-judicial proceeding...".

He continues, a little later (at pp167, 168):

> "Under these circumstances the question which has to be decided is whether a constable who arrests a person without warrant must prove in order to justify his action that the person arrested was actually guilty of the offence, or whether it is sufficient, as in an action for malicious prosecution, to show that he acted without malice and with reasonable and probable cause. Who is it that the Legislature intends to be the judge of whether the circumstances are such as to justify or call for an arrest? Surely it must be the person who is called upon to act upon such information as is available to him at the moment, and not some judge or jury at some later time upon materials of which the person making the arrest had not only no knowledge but no means of knowledge. In many instances in which the power of arrest is given to constables by statute, the language used gives an indication as to the intention of the Legislature. In many cases the expression used in relation to the offender is 'found offending' or 'who shall commit in view of the constable'.
>
> "Language such as this appears to indicate pretty plainly that the person intended by the Legislature to be the judge of whether the occasion warrants the arrest is the constable. If that is so, the honest belief of a constable on reasonable grounds is a sufficient justification for his action. "These observations accorded with what was said by Cockburn CJ (arguendo), in *Horley v Rogers* (1860) 2 E and E 674,

at p677; 29 LJ (MC) 140, at p141; ER 253, at p254; [1843-60] All ER Rep 481. The offence charged against the man (one James Whistler) was not one obvious to the eye and senses of the constable at the time the charge was made, and it cannot be said that the man then found committing it."

Accordingly, I am of the view the power of arrest of a person "found offending" is to be regarded as exercisable according to the facts as then known to the member of the police force. Whether or not the person arrested was in fact and in law offending in the relevant time is a matter for subsequent determination of the court.

Whatever interpretation be placed on the provisions of s28(1) when taken in conjunction with the effect of an order made under s69(1) of the *Justices Act* will entail difficulties, and the situation may warrant the attention of the legislature. In the meantime, the observations of the learned magistrate as to the desirability of effecting personal service rather than relying on service by post are worthy of careful consideration. It is obvious that s28(1) is not applicable to the period which elapses between the laying of an information and the hearing and determination of that information. If in fact the order made on the hearing and determination of that information is subsequently set aside under s69, it is to be observed that under the section in force on 5 March 1970 the court was empowered then to "fix a time and place for the hearing and determination of the matter of the information" "...in respect of which the conviction was made". These words suggest the information is to be treated as still not having been heard, and determined, and the orders made on the original hearing as not having been made. Once the order setting aside the conviction is made under s69(1) in those circumstances the effect is that the order or suspension of the licence or cancellation of the licence or disqualification of obtaining a licence (as the case may be) is to be regarded as never having been made. I think, therefore, that s28(1) cannot be regarded as applicable to the facts of this case.

The consequence is that the magistrate was right in dismissing this information and the order nisi must be discharged with the usual order as to costs.

Solicitor for the informant: John Downey, Crown Solicitor.
Solicitors for the defendant: Hargrave and Hargrave.
