56/91

SUPREME COURT OF VICTORIA

DPP v PERRY

Nathan J

5 December 1991

CRIMINAL LAW – UNLAWFULLY ON PREMISES – ELEMENTS OF OFFENCE – WHETHER PROSECUTION REQUIRED TO PROVE SEXUAL IMPROPRIETY ON THE PART OF THE DEFENDANT: *VAGRANCY ACT* 1966, S7(1)(i).

1. The offence of unlawfully on premises under s7(1)(i) of the *Vagrancy Act* 1966 involves the invasion by a person of the curtilage of a householder's home without a lawful excuse. The prosecution is not required to prove any sexual impropriety on the part of the intruder.

2. Accordingly, a magistrate fell into error in dismissing a charge on the basis that the prosecution failed to prove that the defendant was on premises for an indecent, prurient or obscene purpose.
***Haisman v Smelcher* [1953] VicLawRp 83; [1953] VLR 625; [1953] ALR 1019, referred to.**

NATHAN J: [1] John Perry tapped at the window of Mr and Mrs Parker's daughter's bedroom early on the morning of 31st January 1990. In respect of this event he was charged under the *Vagrancy Act* 1966, No.7393, s7(1)(i) with being unlawfully on premises. The magistrate at Oakleigh dismissed Perry's alibi defence, found that he was on the premises alleged in the information and had not discharged the evidential onus upon him to show lawful excuse or produce a lawful explanation as to why he was there. The magistrate went on to find that, in his view, the prosecution had not proved that Perry was in the garden for an indecent, prurient or obscene purpose and, accordingly, dismissed the information.

An order to review was obtained which poses the following question. Is the prosecution required to prove as an element of an offence pursuant to s7(1)(i) of the *Vagrancy Act* that the defendant had an indecent, prurient or obscene purpose? The answer is no. There is no statutory requirement to do so. I turn to the section. It reads, as appropriately edited:

> "Any person who is found without lawful excuse (the proof of which excuse shall be on such person) in a garden or enclosure— shall be guilty of an offence."

The section finds itself in a pot-pourri of offences relating to the unlawful solicitation of alms, obscene exposure, illegal gambling and card tricks, carrying house-breaking implements, or disguise, and counterfeiting offences. There is no common thread to the omnibus of offences listed in the section. The ordinary rules of statutory interpretation apply. There is no ambiguity or **[2]** opacity in relation to s7(1)(i) and that is to make it an offence to invade the curtilage of a householder's home without a lawful excuse. Any uninvited person without such an excuse could be guilty of the offence. There is no importation into the section that the Crown establish any sexual impropriety on behalf of the intruder. Although the section may be used to deal with "peeping Toms" – voyeurs – it is not restricted to that class of persons.

Some confusion appears to have crept into the magistrate's finding regarding the binding over provisions and the notion that once an intruder established he was not there for some sexual purpose, then a lawful excuse had itself arisen. In my view, the law as stated in *Haisman v Smelcher* [1953] VicLawRp 83; [1953] VLR 625; [1953] ALR 1019 is still applicable, although the binding over provisions have since been statutorily superseded. In that judgment their Honours said (at p628) after examining the Statute of 1360 (34 Edward III, c.l) (the precursor of s7(1)(i)) as follows.

> "... those cases recognize that the jurisdiction of the justices to bind over to keep the peace by way of preventive justice may be exercised where behaviour is shown such as is in question here. That kind of behaviour proceeds from prurient and indecent curiosity, and common experience shows that if it

> occurs once, it is very likely to be repeated. Moreover, if the person who exhibits it is discovered in the act by the occupants of the dwelling, the discovery is likely to produce fear and apprehension, and commonly a display of impulsive violence by any male occupant."

I consider a mis-application of the comments there made to be the source of the magistrate's error. **[3]** My view of the section is supported by an article appearing in the *Australian Law Journal*, Vol 47, July 1973 by A Dickey, *Being on Premises without Lawful Excuse: A study in Judicial Interpretation*, and the cases referred to therein. I shall order that the case be remitted to the Magistrates' Court at Oakleigh for re-hearing by a magistrate other than the one who heard the case at first instance in accordance with law.

APPEARANCES: For the applicant DPP: Mr D Just, counsel. JM Buckley, Solicitor to the DPP. The respondent Perry was not represented.
