03/70

SUPREME COURT OF VICTORIA

MILLER v HUNT

Gowans J

20 February 1968

SUMMARY OFFENCE – DEFENDANT A PASSENGER IN HIS MOTOR VEHICLE – VEHICLE INTERCEPTED BY POLICE – DRIVER REQUIRED TO LEAVE VEHICLE – DEFENDANT LEFT VEHICLE AND WAS LATER CHARGED WITH BEING FOUND DRUNK AND DISORDERLY IN A PUBLIC PLACE – MAGISTRATE DECIDED TO FIND THE DEFENDANT GUILTY OF BEING FOUND DRUNK – MAGISTRATE AMENDED THE INFORMATION – WHETHER THE DEFENDANT WAS FOUND IN A PUBLIC PLACE – WHETHER MAGISTRATE IN ERROR: *SUMMARY OFFENCES ACT* 1966, SS13, 14, 15.

HELD: Order nisi absolute. Conviction set aside.

1. In the *Summary Offences Act* 1966, there was no offence of drunkenness *simpliciter*. There were only the offences referred to in ss13 and 14, and it would seem clear that s15 was intended to refer indiscriminately to the offences in the two preceding sections. Then when one, therefore, saw that s15 referred to ss13 and 14 as being offences of drunkenness, and it was found that both those provisions were in a part of the Act which was headed "Offences relating to drunkenness", the conclusion must have been that there was a case of a substantial ingredient with circumstances of aggravation attached, and if the circumstances were not established, then there may have been a conviction of the lesser offence constituted by the substantial ingredient.

***McKenzie v Dabonde* [1952] VicLawRp 25; [1952] VLR 177, applied.**

2. Accordingly, the Magistrate was entitled to amend the information.

3. The word 'found' is to be met with in many Acts of Parliament, and such a construction has always been put upon it as to make it mean the same as 'discovered', and therefore if property is proved to have been 'Found', in other words, if it is discovered by anybody in possession of another, that is sufficient to bring it within the Act of Parliament.

4. A difficulty arises in a situation where a person having been come upon in the first instance in a location which is not a public place, has been compelled to go out into the street, which is clearly a public place, the difficulty being to decide whether in those circumstances it can be said that the defendant is "found" in the street, when the first encounter with him is in some location which is not a public place.

5. In relation to the question whether the defendant was "found" drunk, the Magistrate was required to consider the circumstance that the driver of the defendant's motor vehicle had been taken out of the car and placed in the divisional van. If the Magistrate had given proper consideration to that circumstance, he would necessarily have had to come to the conclusion that the defendant was forced by the circumstances of the police having taken away his driver, to fend for himself, and that it was the action of the police in taking the driver that put the defendant in the position where he had no alternative but to leave the car. That was supported by the fact that the police, according to their evidence, took the car of the driver, and drove it away to the police station. In those circumstances it was not open to the Magistrate to find that the defendant voluntarily put himself out in the street, in circumstances where he had the alternative of doing so or not doing so.

6. Accordingly, there was no evidence by reason of the defendant being on the roadway of his being found in a public place.

GOWANS J: This is the return of an order to review a conviction in the Court of Petty Sessions at South Melbourne for being found drunk in a public place.

The Certificate of the conviction which has been put in evidence says that the defendant was charged with committing a breach of Act No 7405, s14, but it adds the words "drunk in a public place". In actual fact, s14 does not concern itself with the offence of being found in a public place, but with the offence of being found drunk and disorderly in a public place. '

But it is clear from the evidence that the actual conviction was in respect of s13, as the words at the end of the description of the charge show, and I think I should regard the reference to s14 in the certificate as being a mis-description, and one which can be ignored.

The defendant was convicted and discharged. The original charge which was laid against him was in fact the charge referred to in s14 of the *Summary Offences Act*, that of being found drunk and disorderly in a public place. After all the evidence had been given, the Magistrate announced, without any application being made to him, that he would amend the information so that it charged the defendant with being drunk in a public place, to wit Albert Road, South Melbourne, and that he would convict the defendant of that offence.

The first three grounds of the order nisi relate to this action of the Magistrate in making this amendment. They read as follows:

> "(1) That the Stipendiary Magistrate was wrong in law in making an amendment of the information to charge the defendant with the offence of being found drunk in a public place, to wit Albert Road;
>
> (2) That the Stipendiary Magistrate had no power to make the amendment to the said information;
>
> (3) That the Stipendiary Magistrate, if he had power, in the exercise in the exercise of a discretion to make the said amendment, failed to exercise such discretion properly or at all, and misdirected himself in considering that he was under a duty to make such amendment."

These grounds may be considered apart from the evidence which was given in the case. The Magistrate, no doubt, had resort to the power of amendment contained in the *Justices Act* 1958, s200, a power which enables him to remedy defects or variants. That power, it has been held, may be used to amend informations in order to substitute cognate offences created by the same section as the offence set out in the original charge, especially in the case where the section sets out a number of different words, and it is proposed by the amendment to substitute one or other of those sets of words for those originally used.

That it is proper to make an amendment of that kind has been made clear in many cases, of which examples were cited to me; *Stait v Colenso* [1903] VicLawRp 43; (1903) 28 VLR 286; *O'Donnell v Chambers* [1905] VicLawRp 9; [1905] VLR 43; 10 ALR 224; 26 ALT 73; *Thomson v Lee* [1935] VicLawRp 65; [1935] VLR 360; [1935] ALR 458. But the offences that the Magistrate was concerned with in the course of making the amendment are not contained in the same section and it may be that those authorities are not immediately applicable.

However, it is, I think, clear that if there is an offence stated in a number of ways, and with circumstances of aggravation attached in some of the cases, but it can be discerned that there is one substantial ingredient running through all the offences, then it is open for the Court, whether it be a jury or magistrate or judge, to convict in respect of an offence specifying the substantial ingredient where the circumstances of aggravation which are averred have not been made out.

That is made clear by the case to which I have been referred, in which the former Chief Justice, Sir Edmund Herring, held that it was permissible for a magistrate to amend an information which related to an assault with an instrument, to allege an offence of common assault. That decision was *McKenzie v Dabonde* [1952] VicLawRp 25; [1952] VLR 177. In the course of his reasons, the learned Chief Justice pointed out that in a case of that kind, it is not really necessary to make any amendment at all, the principle being that the larger offence, if I may so describe it, the offence which is described with circumstances of aggravation, embodies an allegation that the offence, shorn of those circumstances of aggravation, is levelled against the defendant, and so it is permissible if the circumstances of aggravation are not made out, to convict of the substantive offence. If this were a case of that kind, then I would think that the Magistrate could have proceeded to convict the defendant without amending the information – that is to say, convict him of being found drunk in a public place, and the making of the amendment itself would be a mere formality.

The point, therefore, that I have to concern myself with, is whether these provisions, ss13 and 14 of the *Summary Offences Act*, exhibit a common substantial ingredient of the kind that I have referred to, and whether the offence created by s14 of being drunk and disorderly in a public

place, is really only a variation of the offence in s13 of being found drunk in a public place, with the additional element of disorderliness.

The view that was put to the contrary was that s14 is a substantially different offence. In a sense that is so. But that is so, of course, in every case in which an offence is alleged with circumstances of aggravation. What is put here is that the words "found drunk and disorderly" imply a finding of the defendant in a composite situation or circumstance, described by the words "drunk and disorderly", and it does not permit of a dissection which treats drunkenness as being the main element, and disorderliness as being merely something which is added. I think that it meets with great difficulty because of the provisions of s15. That section reads:

> "Any person having been thrice convicted of drunkenness within the preceding 12 months who is again convicted of drunkenness shall be liable for imprisonment for 12 months."

There is no offence of drunkenness *simpliciter*. There are only the offences which I have referred to in ss13 and 14, and it would seem clear that s15 is intended to refer indiscriminately to the offences in the two preceding sections. Then when one, therefore, sees that s15 refers to ss13 and 14 as being offences of drunkenness, and you find that both those provisions are in a part of the Act which is headed "Offences relating to drunkenness". I think the conclusion must be the same conclusion as was arrived at by Herring CJ in *McKenzie v Dabonde*, namely that there is here a case of a substantial ingredient with circumstances of aggravation attached, and if the circumstances are not established, then there may be a conviction of the lesser offence constituted by the substantial ingredient.

In those circumstances, I think that the Magistrate here was entitled to make the amendment. It may be that he should have given the defendant greater opportunity of objecting to the amendment, or of meeting the simplified charge that was made out by the amendment. In the case that I have referred to, the Chief Justice referred to the desirability of some such course. But when I look at the facts as related in the affidavit of the defendant's solicitors, it appears to me that the magistrate merely indicated his intention to make the amendment and his intention to convict the defendant of the amended offence, but did not finally announce his order until Counsel for the defendant had an opportunity of challenging the Magistrate's right to take the course of action. In those circumstances, I think that it is not a case where it can be said that the defendant had no opportunity of meeting the proposed order before it was in fact made.

The affidavit in answer in fact says that it was not until the whole discussion referred to in the defendant's affidavit had taken place, that the magistrate said, "I am satisfied with the police evidence that the defendant was drunk in a public place, and having regard to the fact that the defendant has no previous convictions, and that he has spent some time in the cells, he will be convicted and discharged."

For those reasons I would not make this order nisi absolute in respect of the first three grounds. The remaining grounds are set out in this way:

> "(4) that there was no evidence before the Magistrate upon which he could find that the defendant was found drunk in a public place;
>
> (5) that the Stipendiary Magistrate was wrong in law in holding that a privately owned motor car was a public place for the purpose of s14 of the *Summary Offences Act* 1966;
>
> (6) that the Stipendiary Magistrate misdirected himself in holding that the evidence by or on behalf of the informant to the effect that the defendant was out on the roadway of Albert Road, constituted evidence that the defendant was found in a public place."

The last ground which is No 7, merely sets out a matter which is ancillary, as I understand it to the first three grounds, and need not be read.

In these three grounds, numbered 4, 5 and 6, it is grounds 5 and 6 that it is necessary to direct attention to. In order to understand them, it is necessary to say something of the evidence which was placed before the magistrate.

That evidence was that two police constables, the informant, Constable James Henry Miller, and Senior Constable Trounsen, were on 1 July 1967 driving a divisional van in Albert Road, South Melbourne, Trounsen being the driver and Miller being the passenger. They intercepted a car which was being driven by a man named Peter Dowdle; it was night-time, around 10.15pm. The defendant, James David Hunt, was seated in the passenger seat of the car. One or other of the police questioned Dowdle and took him to the divisional van. The defendant Hunt at some stage got out of the car in which he had been a passenger. At that point there was an extraordinary divergence of evidence between that given by the informant Miller and indeed in some respects Trounsen and the evidence given for the defence, because according to the police, the defendant was told to go home, or was allowed to go home and he departed in a passing taxi, and then about a quarter of an hour later arrived at the police station at St. Kilda Road, where his driver had been taken; in consequence of his conduct there he was arrested and charged not with conduct at the police station, but with the offence of having been found drunk and disorderly in a public place, to wit Albert Road, South Melbourne.

On the other hand, the defendant gave evidence to the effect that he never was in a taxi, that he was in fact driven by the police in the car, from which he had never got out, to the St. Kilda Road Police Station. However, I do not have to concern myself with the whole of this discrepancy in the evidence.

The informant, Miller, said in his evidence that the defendant, Hunt, had got out of the car. According to the affidavit filed on behalf of the informant, what happened was this – and I will use the words which the informant attributes to himself in his account of the evidence.

> "Subsequent to the vehicle being checked, I had a conversation with the driver and a short time later, I placed him in the rear of the police divisional van. I was walking back to this car after placing the man in the back of the divisional van when I saw that the defendant Hunt, who had been a passenger in the front seat of this vehicle, had got out of the vehicle and was walking towards the rear of it."

He then described the condition which he said justified the charge which was levelled against him.

The other police witness, according to the defendant's affidavit, said that the defendant was seated in the passenger seat of the car, that he, the witness, had a short conversation with him and spoke to the driver, and that he, the witness, that is Trounsen – then went back to the divisional van where he was busy with the radio and saw nothing more of the defendant for some time. He says he did not see the defendant again until he came to the police station in St. Kilda Road. Now in these circumstances it is apparent that there are two alternative approaches to the situation that existed at the time. One is that the defendant was come upon in the first instance, when he was seated in the motor car, and that was the only occasion in which it might be said that he was "found" drunk. The other is that later on he got out of the motor car and came on to the street, and that was an occasion upon which he was "found" drunk.

What the Magistrate found is not very clear. According to the evidence, at the conclusion of the evidence being given, counsel for the defence, indicated that that was his case and the Magistrate then intimated that he was going to make the amendment that I have referred to. After some discussion about that, counsel for the defence said that he wished to submit that a person sitting in a private car was not found in a "public place". According to this affidavit, the magistrate replied, "There is an amount of authority to say that a car is a public place". Then on counsel persisting with his submission that a private car was not a public place, and saying that he was prepared to argue that, according to the affidavit the Magistrate said that he was accepting the evidence that the defendant was out on the roadway. That raises a difficulty, because I do not think it is proper to regard the Magistrate as making a finding that the defendant was both found drunk in the motor car and found drunk in the street. I think it was his responsibility to make it clear which of those alternatives he was in fact adapting. And I think that the proper interpretation of the evidence is that the magistrate did not persist with the finding that the defendant had been found drunk in the motor car and preferred to found his decision a finding that the defendant had been found drunk in the street.

On the view that the Magistrate had taken the first alternative stand, that is that he found that the defendant had been found drunk in a motor car, arguments have been presented to me

both ways on the question as to whether a private motor car can be regarded as a public place for the purposes of these provisions of the *Summary Offences Act*.

I have given consideration to the observation in *Ward v Marsh* [1959] VicRp 5; [1959] VR 26; [1959] ALR 233 and particularly to the remarks of Sholl J at VR p36; and I am disposed to think that the proper view is that there cannot be a public place in the ordinary signification, or the Common Law meaning, of the term "public place" unless the public have a right to resort to the place, or do in fact resort to the place in numbers, and that that would not be the position in the case of a private car. In *Milne v Mutch* [1927] VicLawRp 28; [1927] VLR 190; 33 ALR 172; 48 ALT 180, McArthur J held that a tramcar was a public place, but he did so because the public had a right to, and did in fact, resort to it. If it had been sufficient to say that the mere fact of the tramcar being on the rails in a public street made it a public place, then all that reasoning would have been unnecessary. However, that is not conclusive, and Mr Tadgell has referred me to a New Zealand case of *Walker v Crawshaw* (1924) NZLR 93, where it was held by Sim J that a person could be convicted of an obscene offence in a public place when the act in fact took place in a motor car. Whether it was a private car or whether it has some of the characteristics of a hire car about it, is not entirely clear, nor is it clear whether that possible circumstance influenced the learned judge. However, I do not find it necessary to determine this question, which is an important one, and I do not propose to decide it.

I take the view that the proper interpretation of the evidence, as I have said, is that the Magistrate rested himself ultimately upon the fact that there was evidence of the defendant being in the street; and on that evidence he found that the defendant was found drunk in a public place.

But that raises a question as to the ambit of the word "found". It has been considered in a number of different connexions and as long ago as 1819, in *Attorney-General v Delano* [1819] EngR 270; (1819) 6 Price 383. Wood B, at Price pp400-401 said that:

> "The word 'found' is to be met with in many former Acts of Parliament, and such a construction has always been put upon it as to make it mean the same as 'discovered', and therefore if it (the property) is proved to have been 'Found', in other words, if it is discovered by anybody in possession of another, that is sufficient to bring it within the Act of Parliament."

And later, similar meanings have been attached to the word. I refer in particular to the judgment of Bray J in *Moran v Jones* (1911) 104 LT 921, a judgment which has been approved of by the Court of Criminal appeal in *R v Goodwin* (1944) KB 518; [1944] 1 All ER 506.

A difficulty arises in a situation where a person having been come upon in the first instance in a location which is not a public place, has been compelled to go out into the street, which is clearly a public place, the difficulty being to decide whether in those circumstances it can be said that the defendant is "found" in the street, when the first encounter with him is in some location which is not a public place. That kind of situation arose in *Sheehan v Piddington* [1955] St RQd 574; 50 QJPR 16, where the defendant was found drunk initially in the room of a lodger in a house, and was put out in the street by a police constable, and failed to take the opportunity which the police constable gave to him of going home while the policeman was attending to the closing of the gate, and was charged with being found drunk in a public place.

The Full Court of Queensland upheld the conviction which followed, but as I understand the case and the reasons given, they came to the conclusion that there was a gap between the incident when the defendant was found on the lodging house premises, and the incident when, being given the opportunity to so. Now in theory it is possible to visualise a situation in which a person was found in one circumstance not amounting to an offence, and then shortly afterwards found again in a circumstance that did amount to an offence, and I think that the decision must be treated, in substance, as based upon a finding of fact; namely, that there was a second finding after the first finding.

Now in the present case there is some evidence upon which it might be thought the Magistrate was entitled to take the view that the defendant had, of his own volition, made his way onto a street. Certainly the Magistrate could not have taken the view that the defendant did not take the opportunity of going away in the taxi cab, because if he believed the police evidence, then he would necessarily have had to believe that the defendant did take the opportunity of going

away, because according to the police evidence the defendant did go off in the taxi and turned up afterwards at the police station at St Kilda Road. So that the magistrate must have made his finding merely upon the fact that the defendant alighted on the roadway out of the car, having in the first instance been discovered by the police sitting in the passenger seat of the car.

Now that circumstance cannot, in my view, and could not properly have been regarded by the Magistrate, in isolation, and without regard to the evidence which was given by the police, that they had taken the driver of the defendant's car out of the car that he was driving, and had placed him in the divisional van. If the Magistrate had given proper consideration to that circumstance, I think that he would necessarily have had to come to the conclusion that the defendant was forced by the circumstances of the police having taken away his driver, to fend for himself, and that it was the action of the police in taking the driver that put the defendant in the position where he had no alternative but to leave the car. That, I think, is supported by the fact that the police, according to their evidence, did take the car of the driver, and drive it away to the police station.

In these circumstances I think it was not open to the Magistrate to find that the defendant voluntarily put himself out in the street, in circumstances where he had the alternative of doing so or not doing so, and that consequently there is a distinction to be drawn between this situation and the situation which the Full Court of Queensland found justified a second finding of being drunk in a public place.

For those reasons, I propose to uphold the ground which is numbered 6, on the basis that there was no evidence, by reason of the defendant being on the roadway, of his being found in a public place. Ground 4 is made out for that reason also. The order nisi will therefore be made absolute. The conviction will be set aside and in lieu thereof the information will be dismissed. The informant must pay the costs of the order to review. I will grant a certificate under s13 of the *Appeal Costs Fund Act*.

APPEARANCES: For the applicant Miller: Mr RC Tadgell, counsel. State Crown Solicitor. For the respondent Hunt: Mr T Neesham, counsel. Russell, Kennedy & Cook, solicitors.
