24/88

SUPREME COURT OF VICTORIA

BOTTON v WINN

JH Phillips J

18 December 1987

SUMMARY OFFENCES – HINDERING/RESISTING POLICE OFFICER IN EXECUTION OF DUTY – OFFICER ARRESTING ANOTHER PERSON – VERBAL INTERJECTION BY OFFENDER TO PREVENT ARREST – WHETHER OFFICER'S DUTY MADE SUBSTANTIALLY MORE DIFFICULT OF PERFORMANCE – WHETHER "HINDERING" – OFFENDER'S REFUSAL TO HAND OVER WRIST WATCH AT POLICE STATION – WATCH REMOVED AFTER A STRUGGLE – WHETHER OFFICER ACTING IN EXECUTION OF DUTY – WHETHER "RESISTING" – OFFENDER IN DRUNKEN CONDITION – WHETHER DRUNK AND DISORDERLY": *SUMMARY OFFENCES ACT* 1966, SS14, 52, *VICTORIAN POLICE STANDING ORDERS* 1986, O9.9, 9.10.

Whilst a police officer was engaged in placing a person in a police divisional van, B., who was in a drunken condition, continually argued with the officer for the person's release from custody. The officer told B. to stop interfering and asked a female who was present to take B. away; she pulled at B., he refused to go, and was shortly thereafter arrested. As a result of B.'s interference, the execution of the officer's duty was delayed. When B. arrived at the Police Station, he handed over his belongings save for his wrist watch which he refused to remove. A struggle then took place during which the watch was removed and subsequently, B. was charged with resisting the officer in the execution of his duty. In respect of the earlier incident, B. was charged with hindering the officer in the execution of his duty and being found in a drunk and disorderly condition in a public place. Upon the return of the charges, B. was convicted and fined. Upon order nisi to review—

HELD: In respect of the charge of drunk and disorderly, order nisi discharged. In respect of the other two charges, orders nisi absolute, convictions quashed and penalties set aside.

(1) Disorderly behaviour involves any substantial breach of decorum which tends to disturb the peace or to interfere with the comfort of other people who may be in the public place.
***Barrington v Austin* (1939) SASR 130, applied.**

(2) In the present case, there was sufficient evidence to prove that the defendant was both drunk and disorderly.

(3) On a charge of hindering police, the court is required to consider whether the defendant's actions made the execution of the police officer's duty substantially more difficult of performance.
***Plunkett v Cromer* (1934) SASR 125, applied.**

(4) In the present case, the police officer, whilst placing the person in the divisional van, turned at least once and faced the defendant, and the execution of his duty was slightly delayed in warning the defendant about the possible consequences of his interference. In those circumstances, there was insufficient evidence to find that the defendant's conduct made the execution of the police officer's duty substantially more difficult of performance.

(5) A police officer may search a prisoner in lawful custody where it is reasonably suspected that the prisoner may possess any object with which an injury or damage may be inflicted or an escape effected.
***Lindley v Rutter* (1981) QB 128; (1980) 3 WLR 660; 72 Cr App R 1, applied.**

(6) In the present case, as the defendant had shown no tendency to violence upon arrest, there was no basis upon which to conclude that he might use his wrist watch as a weapon to inflict injury or cause damage, or that the watch could be used as an instrument to effect an escape from custody.

JH PHILLIPS J: *[After setting out the nature of the charges and the grounds of the orders nisi, His Honour referred to the affidavit made by one of the Police Officers. After indicating that the affidavit was in a fundamentally unsatisfactory form, His Honour declined to act on part of it, and continued]* … **[4]** In relation to the first charge, Constable Comitti's account is that, after the arrest of one Bell in a public place outside the Post Office in Sunbury, he was engaged **[5]** in placing Bell in the police divisional van when the applicant approached in a drunken condition and repeatedly said, "You cannot arrest him, let him go". Senior Constable Comitti told the applicant to stop interfering,

that he was drunk and disorderly, but the applicant continued to argue for Bell's release as Bell was forcefully placed in the van. Senior Constable Comitti told a young woman, who was also present, to take the applicant away after Bell was in the van. She pulled at the applicant but he refused to go and was then arrested.

Before me, it was accepted by counsel for the applicant that the Magistrate's finding that the applicant was drunk was one which was available to him on the evidence but, it was said, there was no evidence or certainly no sufficient evidence to support a finding that the applicant was both drunk and disorderly.

Section 14 of the *Summary Offences Act* 1966, under which the applicant was charged, reads –

> "Any person found drunk and disorderly in a public place shall be guilty of an offence."

I must first consider whether there was sufficient evidence to prove beyond reasonable doubt that the applicant was disorderly. In *Campbell v Adair* (1945) SC (J) 29, Lord Moncrieff described the word "disorderly" at p33 as –

> "...a word of very wide comprehension. It is, I think, a word which indicates less aggressive conduct than would be required to constitute a breach of the peace."

That was a case involving a charge of disorderly behaviour. In *Barrington v Austin* (1939) SASR 130, which also **[6]** involved a charge of disorderly behaviour, Napier J (as he then was), held that the words 'disorderly behaviour' referred to -

> "...any substantial breach of decorum which tends to disturb the peace or to interfere with the comfort of other people who may be in the public place."

This decision was followed in *Melser v Police* (1967) NZLR 437, a decision of the Court of Appeal. Again, this was a charge of disorderly behaviour, which North J held, at p43 -

> "...must at least be of a character which is likely to cause annoyance to others who are present."

Turner J found 'disorderly conduct' to be –

> "Conduct of a sort which would 'meet with the disapproval of well-conducted and reasonable men and women'."

and that it must furthermore –

> "tend to annoy or insult such persons as are faced with it and sufficiently deeply or seriously to warrant the interference of the criminal law."

Napier J's definition has been followed in South Australia in *Rice v Hudson* (1940) SASR 290, (expressly by Angas Parsons and Richards JJ), and in *Samuels v Hall* (1969) SASR 296; (1969) 22 LGRA 70 and *Kruger v Humphreys* [1968] SASR 75 (expressly by Mitchell J). These were all cases of charges of disorderly behaviour. I am content to apply the statements of principle set forth and, in my opinion, there was sufficient evidence in the instant case for the learned Magistrate to hold the applicant was both drunk and disorderly. The order nisi obtained with respect to that charge is discharged.

The second charge laid against the applicant was laid pursuant to s52 of the *Summary Offences Act*, which **[7]** section makes it an offence for any person to hinder a member of the police force in the execution of his duty. Before me it was accepted for the respondent that the evidence proffered by the prosecution on this charge was the same evidence led to establish that the applicant was "disorderly". Constable Comitti also gave evidence to the Magistrate to the effect that "because of the verbal interjection and Botton and Shaw physically being behind us, attention had to be taken away from Bell, as a result, and making it more difficult for me to perform my duty". The same witness described the placing of Bell in the van as "we forcefully placed Bell into the van". The inference was open from Constable Comitti's evidence that, while placing Bell in

the van, he turned at least once and possibly more than once and faced in the direction of the applicant and that Bell's confinement in the van was slightly delayed by reason of Constable Comitti addressing warnings to the applicant about the possible consequences of his conduct.

In considering this charge, a Court is required to consider whether it has been established that an act or acts of the defendant make the Constable's duty substantially more difficult of performance. This test arises from the authorities of *Plunkett v Cromer* (1934) SASR 125 and *Kerr-Taylor v Thomas* (1937) Victorian Supreme Court, Lowe J (unreported) where His Honour approved of the definition of Napier J in *Plunkett v Cromer* in these terms at p127 -

> "'Hinder' is not a word of art, or capable of precise definition, and it is a question of fact and of degree whether in the circumstances of the particular case the obstruction or interference was appreciable. If the Constable is frustrated in his attempts to perform **[8]** his duty, or retarded in the execution thereof, then, clearly, he has been 'hindered' but I think the fair and natural meaning of the word goes further than that. I think that a constable is 'hindered' by any obstruction or interference that makes his duty substantially more difficult of performance."

Applying those statements of principle to the instant case, in my opinion, there was insufficient evidence that the applicant's conduct made the Constable's duty in placing Bell in custody in the divisional van substantially more difficult of performance. By way of contrast to the instant case, in *Jones v Daire* (1983) 32 SASR 369, Zelling J upheld a conviction for hindering police where the defendant's proven conduct included positioning himself between a police officer and the driver of a motor vehicle, questioning the police officer's right to see her driver's licence and placing his hand on the driver's handbag and telling her not to show her licence to the police. The order nisi obtained with respect to this charge is made absolute, the conviction quashed and the penalty set aside.

I now turn to the third charge, which apparently related to events at a police station. According to the applicant, the police gave evidence that this incident occurred at the Broadmeadows Police Station. In his affidavit, portion of which I have rejected, Senior Constable Winn does not name the police station, nor does Senior Constable Comitti in his affidavit. The relevant information alleges an offence at Sunbury. Because of my previous findings with respect to Senior Constable Winn's affidavit and because Senior Constable Comitti does not **[9]** refer specifically to the evidence given in relation to this charge in his affidavit, I take the applicant's affidavit as the primary source of the evidence given below for the prosecution in relation to this matter.

According to the applicant, the evidence was as follows - "Constable Winn gave evidence that, after arrival at Broadmeadows Police Station, I was asked for my belongings before I was placed in the cells. He said I handed everything over but refused to remove my wristwatch. Constable Winn said that I grabbed the watchhouse counter. Constable Winn said he took hold of me firmly and a struggle occurred and, while Constable Comitti grabbed my other arm, Constable Winn removed my wristwatch. Constable Winn said I struggled violently. He said my hand made contact with his body. Under cross-examination, he did not disagree that this contact could have been accidental and I was not charged with assault. Under cross-examination, Senior Constable Winn agreed that I did not resist arrest at the time of arrest and that I caused no trouble until the police attempted to remove my wristwatch. Senior Constable Winn gave no reason why he thought it was necessary to remove my watch. No reference was made to *Police Standing Orders*. Senior Constable Winn said that I was charged with resisting him in the execution of his duty because I refused to hand over my wristwatch. Senior Constable Comitti also said that I refused to hand over my watch and there was a struggle as the police forcibly removed it. He also agreed that I caused no trouble until the police demanded my wristwatch. Under cross-examination, Constable Comitti was asked why the police wished to remove my wristwatch **[10]** and why it was necessary. He said that he was unaware of any reason which occurred to the police at the time. After some thought, Constable Comitti said that, in general terms, a person could use a wristwatch to effect an escape or as a weapon. My counsel asked Constable Comitti whether he was being serious and he replied, "Yes." Constable Comitti was then asked what kind of watch it was and Constable Comitti said he did not take any particular notice of it but it was just an ordinary wristwatch. Constable Comitti was asked what kind of a weapon a wristwatch could be used for and he said he thought it could be used as a knuckleduster."

Commenting on this account, Constable Comitti deposed, "I gave evidence in reply to

a question under cross-examination that it was common practice to remove all property from prisoners and you could use a watch as a weapon, in particular as a knuckleduster. Defence counsel said, 'Are you joking?' I said, "I have been a prison warder at Pentridge for two years and a watch can certainly be used as a weapon." I say my evidence was that the watch had an expanding metal band." Senior Constable Winn deposed that the basis of this charge was the struggle involved in removing the watch and getting the applicant into the cells.

[His Honour referred to the following cases dealing with searches of prisoners:
Lindley v Rutter (1981) QB 128; [1980] 3 WLR 660: 72 Cr App R 1;
Bessell v Wilson (1853) 17 JP 52;
R v Naylor (1979) Crim LR 532;
R v William Kinsey [1836] EngR 848; 173 ER 198;
Brazil v Chief Constable of Surrey [1983] 3 All ER 537; [1983] 1 WLR 1155; [1983] Crim LR 483; (1983) 77 Cr App R 237; (1983) 148 JP 22; and
Halsbury's Laws of England, 4th ed. Vol 11 (1976) para. 121, *and continued]:*

[14] These authorities appear to establish the following **[15]** matters of principle -

(1) that a police officer has a right to search a prisoner in lawful custody and take possession of property in circumstances where he or she reasonably suspects the property may be connected with a crime committed by the prisoner (and arguably any other crime) or where part of the property is an object which might be used to do injury to the prisoner or others or to effect an escape or cause damage;

(2) a police officer purporting to exercise this right must have regard to all the circumstances of the particular case to ensure its valid exercise;

(3) at least some searches should be preceded by the police officer informing the person to be searched of the reason or reasons for the search.

In the instant case, it was encumbent upon the prosecution to prove that Senior Constable Winn, in removing the applicant's watch, was acting "in the execution of his duty". Proof of this matter directly raised the justification in law for the removal of the watch. I was referred to the *Police Standing Orders* by counsel, namely, the *Victoria Police Standing Orders* 1986, which were issued under the authority of Chief Commissioner SI Miller. With respect, I consider that they appropriately reflect the need, referred to by Donaldson LJ in *Lindley v Rutter* for the circumstances of the particular case to be adverted to by the police officer concerned. The relevant orders read-

"9.9 (1) Any search of the person of another conducted without authority and without the consent of the person being searched, is unlawful **[16]** and could result in legal action being taken against the member conducting the search.

(2) Power to search the person of another without warrant is vested in common law only under the following circumstances:
(a) Following a lawful arrest, a member may search a prisoner if he behaves with such violence or language or conduct that the member may reasonably think it prudent to search him to ensure he does not possess any weapons, instruments or articles with which he may do mischief; and

(b) On the lawful arrest of a person, the member may take and detail property found in the prisoner's possession, if such property is likely to afford material evidence for the prosecution in respect of the offence of which the prisoner has been charged or any other criminal offence and then only by the use of such force as is reasonably necessary (see also Standing Order 4.15).

9.10 (1) It is responsibility of both the Watchhouse Keeper and the arresting member of the Force to see that no prisoner retains in his possession anything with which he might effect an escape from the watchhouse or any weapon, implement, poison, matches or other article with which he might cause mischief or injury to himself, harm to others or damage to property. For this purpose, every prisoner, whether held for criminal or civil matters, shall be searched.

(2) Immediately after a charge is entered against **[17]** a prisoner, it shall be the duty of the arresting member of the Force to carefully search such prisoner and to remove all property from him for safe keeping and to note and compile such items of identification of the prisoner and his property as are necessary. Discretion is to be exercised in relation to the removal of certain property, for example, property of a sentimental or religious nature such as wedding ring, prayer book, *et cetera*. In cases where the prisoner objects to the removal of property of this nature, providing the requirements of sub-para. (1) are observed and having regard to para. 9.9, the prisoner shall be allowed to retain it."

It will be observed that these *Standing Orders* have a number of points of similarity with the instructions of the Chief Constable, to which the Court in *Lindley v Rutter* was referred although, in the Victorian *Standing Orders*, the description of what might be termed personal items is expanded and includes such objects as prayer brooks, although I should have thought that the number of prisoners who actually have their prayer books in their possession upon arrest would not be substantial.

In the court below, the two police officers sought to justify the removal of the watch on apparently different grounds. Senior Constable Comitti asserted in effect that it represented a potential weapon and Senior Constable Winn referred to *Standing Orders*.

With respect, I agree entirely with what was said by Donaldson LJ about *Standing Orders* in *Lindley v Rutter* **[18]** namely, that they instance measures which are *prima facie* reasonable and necessary in particular categories of case but the statements of principle to which I have earlier referred make it clear that regard must be had by police officers to all the circumstances of the particular case and, indeed, the *Victorian Standing Orders* plainly acknowledge this. In my opinion, the only clear evidence justifying the removal of the watch was that given by Senior Constable Comitti. He regarded it as a potential weapon. But to the point of its attempted removal the applicant had exhibited no violence or tendency to violence whatsoever. The worst that could be said of him, to that point, was that he was in a drunken condition and had previously made a nuisance of himself. If regard had in fact been had to the particular circumstances of his case, there was simply no basis for the conclusion that he might use the watch as a weapon.

I now turn to the justification referred to by Senior Constable Winn, in para. 10 of his affidavit, "I gave evidence that it was a requirement provided in the *Police Standing Orders* that all property be removed from a prisoner for their own safety." I ask myself, what does that mean? This paragraph is a further reflection of the highly unsatisfactory drafting of this document. Is the safety referred to the safe keeping of the watch or the safety of the prisoner? The reference to *Standing Orders* suggests it is the safe keeping of the object.

At first sight, it would appear that the two **[19]** justifications cannot be related but this is not so, for Standing Order 9.10(2), while apparently incorporating a blanket instruction, then expressly makes provision for objection to removal of property which might be compendiously described as property of a personal nature. A wristwatch could plainly come within this description. The Standing Order provides that, upon objection being made, which is the case here on the evidence, then the prisoner shall be allowed to retain the property, providing it does not come within a description of a weapon or implement or other article with which he might cause mischief or injury to himself, harm to others or damage to property. The police officer is also required to have regard to Standing Order 9.9, which reference I take to relate to prisoners who have behaved violently on arrest or prisoners who have in their possession property likely to afford material evidence with respect to a criminal charge. Neither of these circumstances are relevant here.

In this way, therefore, the *Standing Orders*, as they were intended to do, reflect the common law as it emerges from the authorities to which I have already made reference and, at the end of the day, proof that Senior Constable Winn was acting in the execution of his duty in terms of this information required evidence that in the particular circumstances of this case the watch answered the description of any of the objects referred to in Standing Order 9.10(1). In my opinion, such evidence was lacking and it was not open in law for the learned Magistrate to convict the applicant on this charge. **[20]** The order nisi obtained with respect to this charge is made absolute, the conviction quashed and the penalty set aside. I will now hear counsel on the question of the costs of this proceeding.

APPEARANCES: For the applicant Botton: Mr L Thompson, counsel. McNab & McNab, solicitors. For the respondent Winn: Mr J Harrison, counsel. Victorian Government Solicitor.
