37/89

SUPREME COURT OF VICTORIA

LEWIS v HOLLOWOOD

Ormiston, J

3 October 1988

CRIMINAL LAW – SUMMARY OFFENCE – WILFUL TRESPASS – REFUSAL TO LEAVE AFTER WARNING – WARNING GIVEN BY PERSON AUTHORIZED BY CONSTRUCTION COMPANY – NO EVIDENCE THAT SUCH COMPANY OWNER OF PLACE WHERE TRESPASS OCCURRED – NO EVIDENCE AS TO OWNERSHIP OF PLACE – WHETHER CHARGE PROVED: *SUMMARY OFFENCES ACT* 1966, S9(1)(d).

L. pleaded not guilty to a charge laid pursuant to s9(1)(d) of the *Summary Offences Act* 1966 of wilfully trespassing and refusing to leave a place after being warned to do so by a person authorized by or on behalf of the owner. At the hearing L. admitted a number of relevant facts but made no admission as to who was the owner of the place and whether the person who gave the relevant warning to L. was a person authorized by or on behalf of the owner of the place. The Magistrate found the charge proved and fined L. the sum of $500. Upon order nisi to review—

HELD: Order absolute. Conviction and fine quashed.
One of the elements required to be proved was that the defendant had been warned by a person authorized by or on behalf of the owner of the place on which the defendant was alleged to have wilfully trespassed. As there was no evidence of this fact, it was not open to the Magistrate to have found the charge proved.

ORMISTON J: *[After setting out the facts, the admissions of facts and the result, His Honour continued]* ... **[8]** The issue in the present case raised by some nine grounds of appeal is essentially whether the prosecution had made out its case under section 9(1)(d) of the *Summary Offences Act*. The difficulties which arose, not only so far as the Magistrate was concerned, but also in this court, was as to precisely what was being conceded and what was being asserted on each side. Nevertheless, Mr Lewis had pleaded not guilty and at no stage **[9]** does it appear that he conceded that he had committed the offence alleged against him.

His admissions, therefore, must be looked at with some care and I would add, with greater care in light of the fact that at that time his counsel had left and that there was only an articled clerk present who might have been able to give him some advice as to deciding what course he would take. The substance of the primary admission for present purposes was that Mr Lewis admitted that Mr Taylor was a person authorised to speak on behalf of the company and had the authority to make such requests to the applicant to leave the site. It was not clear on the affidavit material what was the company to which he was referring, unless it be the company referred to in Mr O'Dowd's evidence, being apparently the company there described, I believe inaccurately, as Wingad Webb Construction Company Pty Ltd.

It will be seen that the admission was only that Mr Taylor was authorised to speak on behalf of the company. He did not say that he was authorised to speak on behalf of the owner of the place on which Mr Lewis was alleged to have trespassed; nor was it an admission that he was authorised to speak on behalf of the occupier of the place at which the trespass was alleged to have occurred.

The charge, as I have said, is a charge which was directed to a trespass in circumstances where the applicant has been warned not to do so by a person authorised by or on behalf of the owner. The question arises whether there is any evidence as to who was the owner of this site at the corner of Liardet and Bay Street, Port Melbourne.

[10] The evidence before me shows that there was no such evidence in the Magistrates' Court as to who was the owner of the site. The evidence that I have referred to appears in the affidavit of Mr Lewis and is not in any significant way controverted by affidavits on behalf of the respondent. In addition, there are some handwritten notes which were taken at the time by the

articled clerk to whom I have referred and that again appears to confirm, so far as it is practicable, that there was no reference as to who the owner was of this site in Port Melbourne. There was therefore at the time the prosecution case closed evidence only that Mr Taylor was a person who had warned the applicant to leave the site and that he was authorised to speak on behalf of a then unnamed company and had the authority, presumably of that company, although it is not so stated, to make that request to the applicant.

[11] Such evidence as appears in Mr Hollowood's evidence before the Magistrate was the hearsay statement that Mr Taylor was authorised to speak on behalf of the construction company. By that I would assume that the construction company was the same company as the one referred to in the third admission. As I have said, at the end of the prosecution case Mr Lewis was said to have agreed that the facts in the police case were not going to be contested.

The question arises as to what were the actual facts in the police case, for indeed there was no contest as to so much evidence as had been thus far proved. The first ground of the order nisi, which really encapsulates the whole of it, is that there was no evidence or no sufficient evidence that the applicant had been warned to leave the place specified in the information by the owner or any person authorised by or on behalf of the owner.

At the stage that the concession was made that the facts in the police case were not going to be contested there was no proof of ownership. Although it was suggested in argument that really the whole of the essential elements to the charge brought under section 9(1)(d) had therefore been conceded, I am not prepared to act on that basis, for the applicant had pleaded not guilty and in his own somewhat muddle-headed way had never conceded that matter, although he had pursued a large number of red herrings in the evidence which he called and which he gave before the magistrate.

Thus the evidence that exists is that Mr Taylor was authorised to speak on behalf of a construction company and that Mr Lewis had refused to leave the site after being warned **[12]** to do so by Mr Taylor. I should have been concerned as to the sufficiency of the proofs in all the circumstances if the charge brought against Mr Taylor was that he wilfully trespassed after being warned to do so by a person authorised by or on behalf of the occupier of the site. Of course the evidence, both in the prosecution and in the defence case and in the admissions, said nothing precisely of the rights of the construction company as to possession or occupation of the site. There was no evidence to the effect that the construction company was the owner of the site and that indeed would be an unlikely event.

The charge, however, is one which relates to a trespass in circumstances where a person authorised on behalf of the owner gave the relevant warning. There was and is simply no evidence before this Court, nor before the Magistrates Court, that Mr Taylor was a person authorised by or on behalf of the owner of the site. Indeed, there is not any evidence whatsoever as to who was the owner of the site.

Mr Danos, on behalf of the respondent, suggested that these were only matters of detail and that the information should be amended pursuant to powers which are given to me pursuant to the *Magistrates' Courts* and *Magistrates (Summary Proceedings) Acts*.

There is, naturally, a discretion which resides in the judge as to whether he will permit an amendment, even if that be the appropriate course, and in particular if that had been the appropriate course before the Magistrate. It is one thing to permit an amendment in proceedings at first instance, in this case before the Magistrate. In those circumstances the **[13]** amendment made can be made upon conditions that the evidence, whether for the prosecution or for the defence, may be reopened upon such terms as seem fair and appropriate to the circumstances of the case. Before this court, however, the power to permit amendment is one which should be carefully exercised in case it may involve a breach of the rights of the person against whom the proceedings are brought.

It is not appropriate in this court to reopen the whole of the relevant evidence. Even at present I do not know for certain who is the owner of this site. It was suggested – and although I have ruled against it I refer to it again – that I had the power to admit additional evidence. Such

evidence as was put before me was not such as would satisfy the section and in particular subs. (1A) of s9, since it was hearsay from another police witness. I was urged, on the authority of *Francis v Carmichael* [1976] VicRp 20; [1976] VR 259, that I should exercise the power to admit further evidence. I did not do so and, having had that case referred to me later, I still do not do so, for Dunn J there said: (at p262)

> "That has been a power which has been by judicial decision kept within narrow limits."

[14] It is one thing to permit the production of a document which has been improperly proved or a set of regulations which technically should have been put before the Court below; it is another thing to permit the calling of evidence as to a critical matter in relation to the prosecution case. As I have said, the attempt to cure this in the form of an affidavit by Mr Hollowood sworn on 1 August 1988 was on the face of it based on hearsay material which I would not have accepted in the light of the strict requirements for proof of ownership of land.

Nor do I think it appropriate to allow the Prosecution to mend its hand by remitting the matter to the court below. No doubt it was placed in a somewhat difficult position because Mr Lewis was in custody and there was a question of whether the case would proceed. If the prosecution wished to complete the case upon the basis of relevant admissions, it should have obtained complete and relevant admissions. I must say, however, that in the circumstances there was a real problem in the sense that the applicant was then technically unrepresented and I am by no means confident that the articled clerk had sufficient knowledge to advise him as to what he should do. Certainly where admissions are made for the purpose of criminal proceedings, I believe a Magistrate should in ordinary circumstances indicate very clearly the significance of making admissions, although in the present case I would not choose to criticise the Magistrate since he was placed in a somewhat difficult position by virtue of the circumstances on that day.

[15] The fact is that there is no evidence that the owner of the site authorised Mr Taylor or anybody else to warn Mr Lewis to leave the site at the corner of Liardet and Bay Streets, Port Melbourne on 15 October last year. The case therefore in my opinion was not made out and should have been dismissed. I am not persuaded by the arguments put to me that the circumstances of the case were that the prosecution was led into a belief that a concession was made that the whole of the prosecution case had been made out.

In the particular circumstances of this case and in the light of the explicit plea of not guilty, I consider that the prosecution should not have assumed that anything more than that which was explicitly conceded had been conceded. Those concessions or admissions were clearly not sufficient in the present case to constitute proof of all the necessary elements of the case against the applicant. It should be remembered that even if this material had been put forward in a proper form, it would be adduced pursuant to an averment section, subsection (1A), which says that:

> "In any proceedings for an offence against subsection (1) the statement on oath of any person that he is or was at any stated time the owner or occupier of any place or a person authorized by or on behalf of the owner or occupier thereof shall be evidence until the contrary is proved by or on behalf of the defendant that such person is or was the owner or occupier of that place or a person authorized by or on behalf of the owner or occupier thereof (as the case requires)."

No such evidence was given and no such material before me constitutes or could constitute, if I admitted it, evidence of the kind which would satisfy that averment subsection. It would require Mr Taylor directly to give evidence **[16]** that he was authorised by or on behalf of the owner of the site. That material is not before me and I am not satisfied that any person could give that. Indeed, such evidence as exists suggests that Mr Taylor had authority, if he had any authority, to speak only on behalf of the construction company which may or may not, depending on the terms of its contract, have been the occupier of the site. Again, no evidence was led, since of course it was not relevant to the present charge, as to whether the building company or construction company was indeed the occupier by virtue of the contract which it had entered into for the construction of the works on that site.

It can be seen sufficiently from this description that there were many defects in the proof of the prosecution case. None of the material put to me is such as would justify me in the exercise

of my discretion, either allowing in evidence which would be of sufficient relevance to justify the discharging of the order nisi, nor is the material so strong or so cogent as to justify me in reaching the conclusion that the information should be amended. The charge relating to the ownership of the land, based on a demand made on the authority of the owner, was not made out and I do not think it appropriate to allow an amendment to enable that matter to be relitigated in the court below in the circumstances of this case.
