10/87

SUPREME COURT OF VICTORIA

ROY v BRIGGS

Crockett J

25 March, 2 April 1987

[1987] VicRp 76; [1987] VR 924; (1987) 4 MVR 497; (1987) 25 A Crim R 229

CRIMINAL LAW – SUMMARY OFFENCE – OBSTRUCTING A ROAD – TOW-TRUCK WINCH CABLE ACROSS ROAD – WHETHER UNREASONABLE USE OF ROAD – WHETHER OBSTRUCTION: *SUMMARY OFFENCES ACT* 1966, S4(e).

B., a licensed tow truck driver, was engaged in towing a bogged semi-trailer. The winch cable connecting the two vehicles passed over a roadway at a height of 4'6" approx. A motorist who failed to see the cable, struck it thereby causing damage. The incident was reported and a charge of obstructing the roadway was laid against B. At the hearing, the Magistrate upheld a submission of 'no case' on the ground that proof of *mens rea* had not been established. On order nisi to review—

HELD: Order absolute. Dismissal set aside. Remitted for further hearing.
(1) Where a person is charged with obstruction of a roadway, the question is whether there has been a lessening by that person in a substantial degree of the commodiousness of the use of the roadway for legitimate purposes by his having used it for purposes other than a highway.
***Schubert v Lee* [1946] HCA 28; (1945) 71 CLR 589, adopted.**

(2) A reasonable user of the highway is not an obstruction. Accordingly, the Magistrate was required to consider whether the placing of the cable across the roadway was reasonable. If it was established that the use of the roadway was unreasonable, then that use constituted obstruction.

CROCKETT J: **[1]** This is the return of an order nisi to review a Magistrate's order of dismissal of an information. The information charged the respondent that, in breach of **[2]** s4(e) of the *Summary Offences Act* 1966, he "did obstruct a road by placing across such road a cable to wit the winch cable of a tow truck." At the conclusion of the informant's case the Magistrate accepted the respondent's submission that the offence was one in which proof of *mens rea* was required and, as it had not been established, the prosecution must fail. The ground upon which the applicant obtained his order to review was in substance that *mens rea* was not an element of the offence and, if it were, there was evidence that the respondent did have the requisite intent to commit the offence.

The argument in this Court in support of the Magistrate's order was somewhat different from that upon which the respondent relied in the court below. What was said was that the prosecution evidence failed to establish that what the respondent did constituted an 'obstruction of a road' having regard to the manner in which that expression should be construed. This then is the question for determination and no issue as to the respondent's intent or belief at the time he did the acts complained of really arises.

The facts established by unchallenged evidence were these: The respondent, a licensed tow truck driver, had driven his vehicle, a licensed tow truck, to an access road in Camp Road, Broadmeadows in order to free a semi-trailer that had become bogged in a paddock fronting the road. The tow truck was positioned so as to allow a cable mounted on its rear section to be connected to the semi-trailer. The cable was in fact fixed and the slack taken **[3]** up so that for about one hundred feet it stretched across to the semi-trailer. Part of the cable passed over the roadway at a height of about four feet six inches. Vehicles travelling toward the off-side of the tow truck could and did continue along the road by moving onto the incorrect side of the road and passing around the front of the truck. If a vehicle travelling in that direction remained on its correct side and attempted to pass behind the tow truck it would strike the cable as the back of the tow truck was about level with the centre of the road. This in fact is what one motorist did.

Her car struck the cable which she had not seen causing the windscreen to break and the roof of her car to be damaged. Her reporting of the incident led to the charge of obstruction of the roadway's being laid.

The tow truck driver was unassisted in the operation he was carrying out. He had his flashing "indicator" or "hazard" lights operating. However, the dome light on his truck was not turned on nor was any other warning device operating or in position. The events in question occurred in daylight. There was no evidence to suggest that the tow truck had been positioned as it was on the roadway for an undue period of time.

On the present appeal it was contended for the respondent that the evidence made it plain that in conducting the salvage action he was merely carrying out what he was authorised to do as the operator of a tow truck and that in doing so he inevitably had to place some obstruction on the road to enable the task to be performed. Such obstruction was as much that of the truck parked at a **[4]** right-angle across the carriageway as it was the cable. It was only by deploying the truck and the cable as he did that his task could be accomplished. Yet he had not been charged in respect of the positioning of the truck. It was not to the point that he may have conducted the operation so as to breach a duty of care owed to other road users. Any question of negligence was a matter solely for the civil courts. The respondent did not, of course, have a belief in a state of facts other than those which, indeed, were the true facts. Nor did he intend that what he did should constitute an obstruction as such. He intended only to carry out in the manner he considered to be proper the salvage of the disabled vehicle. The question is whether, nevertheless, in placing the cable across the road as he did and intended to do, he thereby obstructed the road in breach of s4(e). The expression "obstruct", it was said, must be read down from its full and natural meaning. A restrictive interpretation would seem to be required if one has Regard to the terms of the section. They are:

> "Any person who ...
> (e) obstructs a footpath or road whether by allowing a vehicle to remain across such footpath or road or by placing goods thereon or otherwise ...
> shall be guilty of an offence."

In a sense to allow a vehicle to remain on the road by parking it at the kerb must constitute some form of obstruction inasmuch as by so leaving it in such a position **[5]** there is that much less roadway available for the use of other road users. Similarly, to park a motor car at the kerb in conformity with parking Regulations so that what is done is not to be described as an obstruction may become just that without the vehicle's being moved if during its stay at the kerb that area becomes an additional carriageway in obedience to a "Clearway" timetable.

Nor would I have thought (although, of course, the matter does not arise in the present case) that the word "across" ought to be construed as requiring a vehicle to be placed at a right-angle or other than longitudinally to the roadway. However, this view is opposed to that expressed by Madden CJ in *Scanlan v Convey* [1913] VicLawRp 88; (1913) VLR 354; 19 ALR 303; 35 ALT 39 where it was held not to be an offence under the then equivalent section to obstruct a road by allowing a vehicle and horses to remain longitudinally along such road close to the kerb. The learned Chief Justice in that case referred to the origin of the legislation and the nature of the mischief which it was designed to meet. The section contained the words "any cart or animal" where the words "a vehicle" now appear. Changed traffic patterns in the past seventy-five years might be thought to justify a different view of the section's operation's being taken.

In *Ord v Flohm* [1916] VicLawRp 18; (1916) VLR 148; 22 ALR 40; 37 ALT 154; 53 ALJR the Full Court took a less restrictive view of the amplitude of the meaning and operation of the word "otherwise" than that taken by Madden CJ in *Scanlan's case*. And see *O'Toole v Bennett* [1917] VicLawRp 57; (1917) VLR 351; 23 ALR 145; 39 ALT 5 per Cussen J. It did not deal with the expression "across" but could, I think, be taken to have affirmed the view that a reasonable user of **[6]** the highway is not an obstruction.

The determination of whether a vehicle or goods or some other object with a capacity by reason of its positioning for obstructing the roadway has in fact obstructed the road is a question of fact to be decided in each case. The question must be decided in the light of the mischief which the section was concerned to prevent. This was the question which the Magistrate was required, but failed, to address.

So a fire-fighting vehicle called to a fire and placed across the road because that is considered the best position from which to tackle the fire, does not obstruct the roadway so that its driver breaches s4(e). But if, upon the completion of the fire-fighting task so that the vehicle is no longer required for such a duty, the driver elects to leave it so positioned whilst he goes to a nearby cafe for lunch thereby creating substantial traffic disruption, the vehicle might then be said to "obstruct" the roadway within the meaning of the section. So, too, with police vehicles, ambulances and other emergency service vehicles of which a tow truck might be described as one.

To block or partially block a road in the course of the necessary discharge of authorised duties is one thing. But it may be another if those duties have ceased. So, too, if there were alternative positions in which the vehicle might be left from which the tasks associated with its use might be equally well discharged and yet one position would cause a disruption of use of the road and the other would not. The former might attract the operation of the section. The latter would not.

Again, **[7]** the positioning of a vehicle on the road in daylight which, because it is a normal parking position or being used in some emergency task, is not to be held to "obstruct" the roadway although it may (but not necessarily) do precisely that if it is the same position at night without lights or other warning devices in place.

In the present case two questions would seem to have required attention as bearing on whether the placing of the cable across the roadway was reasonable. They were the nature of the warning given as to presence of the cable across the road and whether or not the respondent's task could have been performed no less effectively had he positioned his truck so far off the road that the cable was not stretched across any part of it. Although the respondent had not gone into evidence it would appear that the evidence on the first matter was complete.

With regard to the second it may have been open to the Magistrate to have inferred that the cable was needlessly placed across the trafficable portion of the roadway. But, of course, the respondent might, if giving evidence, have demonstrated that to have placed his tow truck in any other position would have prevented or have unreasonably impeded the completion of his task. I was referred to a number of authorities Do they provide any support for the observations I have made as to the manner in which it appears to me the section is to be construed? The principal case is *Schubert v Lee* [1946] HCA 28; (1945) 71 CLR 589. The two respondents in that case had occupied for some time positions, one in a laneway and the other on **[8]** a roadway, where they accepted bets. Each was charged under a Western Australian Regulation which provided that "No person shall ... stand on any roadway so as to obstruct the free passage of traffic along ... the same." Their contention was that neither caused an obstruction as there was no evidence of actual interference with other persons who required to use the lane or roadway. In dealing with this argument the Court (Latham CJ, Rich and Dixon JJ) in a joint judgment said (pp594-5):

> "Where the alleged obstruction consists in the physical presence of the defendant upon the highway it becomes necessary to reconcile the prohibition of obstruction of a highway with the reasonable user of the highway by members of the public: See *Adams v Horan* (1906) 26 NZLR 169. Every user of a highway for the purpose for which a highway is intended may theoretically at least lessen its commodiousness for the use of other members of the public. But that arises from the nature of things. What is not permitted is the lessening in a substantial degree of the commodiousness of the use of the highway for legitimate purposes by using it for purposes other than a highway. It is only because the conduct of betting is not a use for which a highway is intended that the fact that the defendant was betting is relevant.
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> The extent of the unauthorized use of a highway or other place, its duration, the nature and the occasion of its use and the time must all be taken into consideration, and so too must the character of the place. But, if the conclusion is that a substantial detraction takes place from the commodious use of the place by the members of the public who may reasonably be expected to make use of it, it is unimportant that upon a particular occasion none is in fact impeded. The question which is involved, however, is always one of degree, and therefore of fact.
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> In *Dunn v Holt* (1904) 73 LJ KB 341, it was held that whether or not a person wilfully causes an obstruction in a thoroughfare is in each case a question of degree depending upon the particular facts. It is there pointed out in the reasons for judgment of the court that reasonable user of a highway is

not obstruction, but that all **[9]** the circumstances of time and place must be taken into account in determining whether the acts charged against the defendant do constitute such a reasonable user."

The observations seem to me not only to be consistent with but to afford considerable support for the correctness of the conclusion to which I had come without reference to authority. By reason of them I think it can be said that the matter to be considered can be postulated as being whether there has been a "lessening by the respondent in a substantial degree of the commodiousness of the use of the highway for legitimate purposes by his having used it for purposes other than a highway." A use for a purpose other than a highway is a use that may be unreasonable. If having regard to all the facts it is established that the use of a roadway by placing on it a vehicle (or other object) is unreasonable in the circumstances then that use constitutes an obstruction. The existence or absence of authorisation for the use is a factor that will bear on the question of reasonableness.

Having regard to the decision in *Schubert v Lee* it may be that *Campbell v Hannaford* [1934] VicLawRp 44; (1934) VLR 246; [1934] ALR 312 can no longer be considered to have been correctly decided. The other cases to which I was referred, both Victorian and English, do not, I think, call for mention. None is opposed to the construction of the section which appears to me to be correct and some afford examples of the application of such a construction. However, as the opinion of the High Court is binding upon me it is that which, of course, I adopt. This seems to me to preclude the need for reference to any other authority save to **[10]** mention the earlier High Court decision of *Haywood v Mumford* [1908] HCA 62; (1908) 7 CLR 133.

The conclusion to which I have come concerning the meaning of "obstruct" leads to the result that the order nisi should be made absolute and the matter remitted to allow the Magistrate to continue the hearing of the information. Accordingly the Court's order will be that the order nisi will be made absolute. The order of dismissal of the information is set aside. The matter is remitted to the Magistrates' Court at Moonee Ponds for further hearing according to law. The applicant's costs including reserved costs are to be taxed and paid by the respondent. Grant respondent a certificate under s13 of the *Appeal Costs Fund Act* 1964.
