IN THE COURT OF APPEAL OF NEW ZEALAND C.A.290/90

THE QUEEN

v.

THOMAS

Coram: Cooke P
Casey J
Hardie Boys J

Hearing: 19 November 1990

Counsel: M O'Donoghue for Crown
J M Miller for Appellant

Judgment: 5 March 1991

JUDGMENT OF THE COURT DELIVERED BY CASEY J

This matter comes before the Court by way of appeal on questions of law under s 144 of the Summary Proceedings Act 1957 from a judgment of Neazor J in the High Court at Wellington of 10 August 1990. The appellant was convicted in the District Court at Porirua on 24 July 1989 after a defended hearing on two charges, one of obstructing a police constable acting in the execution of his duty, and the other of obstructing a person aiding him (ss 23(a) and (b) Summary Offences Act 1981).

The facts are that at 4am on a Sunday morning, police cars chasing a stolen vehicle forced it to stop in a Porirua street not far from a house where the appellant and a number of others were drinking. They were attracted by the noise and witnessed several policemen struggling with the driver, described by the District Court Judge as a fit young man who took some handling and was trying to escape. The appellant said she thought the police were using undue force and beating him up and intervened, along with a male associate.

The District Court Judge found that she tried to pull one of the policemen away and was restrained and told to go; but that she persevered and intentionally tried to interfere with the arrest. He had no doubt it amounted to obstruction, and he found the police were acting legally in the exercise of their duty. After observing that the driver was struggling and had to be restrained, he said - "It is the restraining and the fact that he fell on the ground, in the eyes of people who have been drinking to excess that seemed to amount to them to be a police 'beating up'". This finding in effect forms the basis of the appellant's submission that she was acting in the honest but mistaken belief that the police were exceeding their duty and that she was entitled to intervene. The District Court Judge did not refer to this possibility in finding the charges proved.

In the High Court Neazor J rejected a submission that the Judge was wrong in finding that the police had not used

excessive force, and then went on to deal with the other matters raised by the appellant - first, that she lacked the necessary intention or mens rea in the light of her honest belief that the police were using excessive force; and secondly, that she could rely on the provisions of s 48 of the Crimes Act, entitling her to use in the defence of the driver such force as, in the circumstances as she believed them to be, it was reasonable to use.

As to the first matter (mens rea), he dealt with the case on the footing that the appellant may have had an honest belief that the police were using excessive force; but he concluded that the justification of honest mistake was not available to the appellant, his conclusion being expressed in these terms :

> "The line must be drawn in my view between such cases, which involve questions about knowledge of whether the person obstructed is a police officer or whether the officer is exercising a legitimate police power, and those where the issue relates to how an officer is exercising an admitted police power. It may be that at a later stage the officer will be held to have exceeded the needs of the occasion in his use of force and so to have gone beyond the limits of his duty, but that question is not one upon which an officious bystander at the scene is entitled to make a judgment and thereafter justify obstructive conduct on the basis that if that judgment was wrong it involved a genuinely mistaken belief in a matter of fact."

With respect, this is a conclusion with which we cannot agree, and at the outset we observe that <u>how</u> an officer exercises an admitted police power may indicate that he is going beyond its legitimate bounds, so as to be no longer

acting in the execution of his duty. One has only to ask what would be the position if a bystander saw an outraged constable continuing to beat an unconscious suspect over the head.

In Waaka v Police [1987] 1 NZLR 754 this Court discussed the mental requirements under s 10 of the Summary Proceedings Act (assault on a police officer) in terms which are equally applicable to offences under s 23, saying at p 759 :

> "Accordingly we think that mens rea must go to all the ingredients of the offence. The prosecution must prove that the defendant knew that the person assaulted was a police officer and knew that he was acting in the execution of his duty; or that the defendant wilfully shut his eyes to these possibilities or was indifferent to whether or not they were the truth. Knowledge or its equivalent may be assumed, however, unless there is a foundation in the evidence for a contrary view. Further it can be no defence that the defendant, while aware that the person was a police constable, entertained an incorrect understanding of the law regarding the extent of a constable's powers. Section 25 of the Crimes Act 1961 expressly enacts that the fact that an offender is ignorant of the law is not an excuse for any offence committed by him. The defence of total absence of fault cannot extend to pure mistakes of law."

In the present case the apparent finding of the Judge that these people believed the driver was being beaten up disposes of any suggestion of a wilful shutting of the eyes or indifference. The appellant's evidence obviously provided a sufficient foundation to rebut any assumption that she knew the police were acting in the execution of their duties. She knew they were policemen and that they were legally entitled to use necessary force in making an

arrest, so that there could be no suggestion she was under a mistake of law.

It is now settled law in New Zealand that in the ordinary class of case where the prosecution must prove mens rea "an honest belief in a state of affairs or as to the existence of a fact, which if true would make the act innocent, will provide a defence itself. It is not then incumbent on an accused to establish reasonable grounds for such belief although such may be relevant in testing the honesty of the belief in the first place" - per McMullin J in Millar v MOT [1986] 1 NZLR 660, 673. It is for the prosecution to prove that the accused had no such belief once an evidentiary basis for it had been established, and the finding of the District Court Judge to which we have adverted - that in the eyes of the appellant's party what was happening seemed to amount to a police beating up - clearly left the case in a state of reasonable doubt, if it did not entirely exonerate her. She may have been lucky to get such a finding in her favour, having regard to the way she and her associates jumped so quickly to their conclusion about a police beating-up. But on an appeal confined to questions of law this Court must accept the finding on which the judgments in the two Courts below proceeded.

Crown counsel echoed the concern apparent in a number of cases cited to us about the acceptance of a defence of honest belief in prosecutions of this nature. We agree that

there could be problems, but to adopt any other approach would mean fettering the ability of genuinely concerned citizens to step in and prevent what they believe to be a real and unjustified risk of serious danger to a victim as a result of excessive police conduct. In cases involving assault on and obstruction of police officers and others in the course of their duty, considerations of reasonableness as a test of honesty should provide an adequate safeguard against resort to glib assertions of belief.

Having reached this conclusion on mens rea, we turn to the alternative claim that the appellant was acting in justified defence of another and is therefore protected by s 48 of the Crimes Act. This defence was also rejected by Neazor J. Mr O'Donoghue submitted (but without much confidence) that this section did not apply to offences under s 23 of the Summary Proceedings Act, by analogy with the reasoning of Somers J in delivering the judgment of this Court in Van Gaalen v Police [1979] 2 NZLR 204, 207. It was there held that s 53 of the Crimes Act (defence of moveable property) was not a defence to a charge of assaulting a traffic officer, because s 53, a general enactment, was overridden by s 63(1) of the Transport Act 1962, which conferred specific powers in a specialised statute. The Court left open the question of whether s 53 would apply to a charge of assaulting a police officer in the execution of his duty.

We can see no reason for carrying forward this reasoning to the more general provisions of the Summary Offences Act so as to exclude the very fundamental right of self-defence expressed in s 48 of the Crimes Act, which states - "everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use". In the present situation we are concerned with the use by the appellant of reasonable force in the defence of another in circumstances which she believed involved the use of excessive force by the police in making an arrest, so that in her eyes they were no longer acting in the execution of their duty. Subjective honest belief of the type apparently found to exist by the District Court Judge is sufficient. It seems from the evidence that the appellant was only briefly involved in the use of force when she attempted to pull a policeman away. The rest of her conduct was physical and verbal interference amounting only to obstruction.

We were referred to the decision of Hardie Boys J in Williams v Police [1981] 1 NZLR 108, in which he discussed at some length issues of defence in the case of unlawful arrest. In the course of his judgment he referred to a number of English authorities dealing with the use of force in defence of another. That case was decided before the present s 48 of the Crimes Act came into force, with its clear provisions for the use of force on another's behalf,

rendering authorities on the common law position cited in his judgment of little current relevance.

In the end Mr O'Donoghue was driven to rely on public policy reasons for withholding a s 48 defence in those situations where there has been a lawful arrest. In the light of this Court's view in Waaka that the Crown must prove the accused knew that the police officer was acting in the execution of his or her duty before there can be a conviction for assault, it is difficult to see any cogent reason why self-defence or defence of another should not justify the use of force if the accused did not know the officer was so acting, or honestly believed in the existence of facts indicating he or she could not have been.

We allow the appeal and answer the questions posed in the case as follows :

"1. Whether the defence given by s 48 of the Crimes Act 1961 is available to a defendant who obstructs police officers in their arrest of another person, the defendant having no prior association with the arrested person but having an honest belief that the police officers are causing bodily injury to the arrested person by the excessive use of force and honestly believing that the police officers are not acting in the execution of their duty whereas in fact the force being used by the police officers is not excessive in the circumstances and they are in fact acting lawfully in the execution of their duty?

Answer: Yes

2. Whether with a charge of obstructing a police officer under s 23 of the Summary Offences Act 1981 the mens rea requirement that the defendant knows that the police officer is acting in the execution of his duty is met by only proving knowledge on the part of the defendant that the police officer is exercising a prima facie legitimate type of police power such as arrest?

   Answer: No

The convictions and fines imposed on the appellant are quashed and as she in receipt of offenders legal aid there will be no order for costs.

Mr. Casey J

Solicitors: J M Miller, Wellington, for Appellant
Crown Solicitor, Wellington, for Respondent