



BETWEEN

JAMES HAYWARD
of Peacemakers Club
Incorporated, 136 Symonds St
Auckland, Manager

Plaintiff

A N D

THE ATTORNEY GENERAL OF NEW ZEALAND sued on behalf of the
New Zealand Police Department

Defendant

Hearing: 6th, 7th, 8th, 9th, 10th November 1972

Judgment: 15th November 1972

Counsel: Ryan for plaintiff
Morris for defendant

(ORAL) JUDGMENT OF McMULLIN J.

On the evening of 5th June 1971 a serious disturbance occurred in Symonds Street, Auckland, between the members of a number of Auckland gangs and the members of the Peacemakers Club. By 11 p.m. that day between 150 and 200 gang members had formed up on the western side of Symonds Street opposite the Peacemakers Club Inc., of which the plaintiff is the founder and manager. Some of the gang members had armed themselves with wooden palings and some few had molotov cocktails and firearms. Plaintiff was aware of their presence. He had first learned that an attack might be made on the Peacemakers Club late that afternoon, and he had then telephoned the Police. At about 11 p.m. Plaintiff took up a position in Symonds Street outside the Club on the eastern side of the roadway. There were about 40 to 50 club members with him. He thought that the gangs planned to attack the Club premises and that the Police had not come to his aid. In fact no less than 20 Police cars were then in the vicinity and some 47 officers, some in cars some on foot, were in attendance. The Police hoped that the situation would defuse itself and the opinion was subsequently expressed

that but for certain actions of the plaintiff, possibly well motivated, fighting would not have broken out. In fact, when a molotov cocktail was thrown by a gang member towards those gathered below the club premises, other gang members and members of the Peacemakers Club joined in an exchange of bottle-throwing. At this point plaintiff (who was standing in front of the members of the Peacemakers Club, some of whom were carrying weapons) enjoined those present with him to show the gang members what they "were made of". With that, he led a charge by the Peacemakers across Symonds Street and battle between the club members and the gangs was joined. Fortunately it was relatively short-lived and the Police who were close at hand joined in breaking up the brawl. Most of the gang members fled from the scene, but some arrests were made. Inspector M.D. Cummings was not on duty at the time of the brawl but was in fact Duty Inspector for Sunday, 6th June, at the Central Police Station. He first learned of the disturbance of the previous evening on his car radio while he was on his way to work on the Sunday. On arrival there he perused the various files which had by that time been prepared in connection with the ten or so persons who had been arrested for their part in the disturbance. He also read a report by Detective-Sergeant Matthews on the incident as a whole. His consideration of the various reports caused him to think that the brawl had been quite the most serious one to have happened in New Zealand, and he was alarmed at the possession of rifles and molotov cocktails by gang members. He was also concerned that so many rival gangs had been persuaded to act in concert with each other. He was of the view that the whole matter should be investigated promptly and thoroughly and that there should be brought before the Court all persons who had been involved in breaches of the criminal law. For these reasons, he set up a special squad to investigate the incident and this squad in the course of the following weeks made extensive enquiries, interviewed

a number of persons and reported back to Inspector Cummings. On 7th June, Inspector Cummings became aware from the reports submitted to him by various Police officers that plaintiff had been involved in the fighting on the night of 5th June. By 11th June, as a result of his perusal of further reports and his discussions with two Police officers, Inspector Cummings was of the view that plaintiff had himself incited violence and disorder and that it was his actions and words to the members of the Peacemakers Club which had brought about the final brawl. He thought that he ought to be charged with the offence of inciting disorder under the Police Offences Act. However, one of the Police officers to whom plaintiff had spoken on 10th June had not given the plaintiff a prior warning that anything that he said would be taken down and might be used in evidence. The Inspector thought that plaintiff's admissions to that officer might not on that account be admissible in evidence. Accordingly, on the evening of 11th June, Inspector Cummings instructed another officer, Constable Scott, that the plaintiff was to be interviewed again, that he was first to be warned in the customary manner, and that if no new information came to light, plaintiff was to be arrested and charged with inciting disorder on the night of 5th June. Constable Scott saw plaintiff late on that same night and, having confirmed what he had previously told another Police officer, finally charged him. Plaintiff was thereupon locked in the cells for the rest of the night and the next morning was bailed after he had appeared in the Magistrates' Court. On 1st July 1971 plaintiff was tried in the Magistrates' Court, Auckland, on charges of inciting disorder and disorderly behaviour. Both charges were dismissed. Plaintiff thereupon issued the present proceedings, claiming \$25,000 for damages and alleging that there had been malice on the part of Inspector Cummings in giving instructions for his arrest. After four days of evidence at the trial, I ruled

that the question of whether Inspector Cummings had reasonable and probable cause for issuing instructions for plaintiff's arrest was a question for me to decide, but that two questions of fact which were in dispute should be left to the jury to determine. These questions were contained in the following two issues :-

"Issue
No. 1

Did Inspector Cummings have in his possession by the evening of 11th June 1971, the reports listed as Nos. 129, 114, 81 and 82, and advance verbal reports as to the contents of Nos. 72 and 73?

Issue
No. 2

If Inspector Cummings did have the reports (written and verbal) referred to in Issue no.1, did he honestly believe the substance of those reports?"

The jury answered both in the affirmative.

It now falls to me to decide whether Inspector Cummings did have reasonable and probable cause on 11th June 1971 for instructing that plaintiff be arrested.

At the time that he gave the instruction Inspector Cummings had in his possession a report of Constable Goodwill made on 9th June 1971 (Reference 129). In this, Constable Goodwill, who had been present at the scene in Symonds Street said - "The fight had been apparently started by the so-called leader of the Peacemakers who yelled to the gang 'Come on Peacemakers - let's show them what we can do' or something similar to this." This had been said about the time that bottles had been thrown on the road when both the gangs

and the Peacemakers were armed with various forms of weapons ranging from fence battens to a large metal drum. He also had a report from Detective-Constable Tait (Reference 114) made on 10th June 1971 in which, inter alia, the Detective-Constable reported that that day plaintiff had said in the course of an interview "My fellows were all down this side and I didn't want them to start anything", (he then held his arms above his head demonstrating holding back his fellows) "Then before I did anything I wanted to see what the Police were going to do. Then a bomb landed on the left of me and right after that another on the right. So I did this" (he held his arms above his head and bent them forward) "A signal for my fellows to go across the road and sort it out". The Inspector had perused a statement made to Constable Isbister late on the afternoon of 11th June by one, Peter Horo. In this, Horo said "Everybody got stuck in when Jimmy Hayward said 'Go'. I saw lots of people holding wood but I didn't know what side they were on." He had discussed with Constable Watson what Constable Watson had observed of the proceedings that night. The Constable had told him that a man (whom the Inspector was entitled to accept was Hayward) was jumping up and down with his clenched fists held above his head, shouting "Come on, Peacemakers. Get into them", or something to that effect. Constable Goodwill, whose report of 9th June he had already read, later gave him a fuller account of his observations of the evening in which, referring to the stage where the bottles were thrown by the gangs and the Club members, he said "Hayward then was out at the front of the Peacemakers. He yelled to the Peacemakers something. I think it was 'Come on Peacemakers - let's show them what we are made of'. He then led the Peacemakers across Symonds Street and the brawl started."

The jury found by their answers to the issues that Inspector Cummings had all this information in his possession

and that he honestly believed in the substance of the reports. Having observed Inspector Cummings in the witness box for over two days I record that I share that view and, indeed, there was an entire absence of evidence to the contrary. It is true that there were other reports from other Police officers who had been present at the brawl but had not observed plaintiff's action. But while their evidence did not involve plaintiff, it did not exculpate him. I am not surprised that the other Police present did not observe plaintiff doing or saying the things recorded in the reports already referred to. The scene was a fluid one, it involved a large number of people and the Police were not all in one spot. Consequently, what was apparent to some would not be apparent to all.

Plaintiff may feel somewhat aggrieved that he was charged with an offence when he had done nothing to encourage the gangs to be present in Symonds Street in the first place. He may feel somewhat prickly that he was arrested^{and}/for a short time imprisoned, only to be acquitted when the charges were heard against him in the Magistrates' Court. It was said in evidence that at the hearing of the charges, Detective-Constable Tait was not called to give evidence because no caution had been administered to the plaintiff before this interview took place. Nor was Constable Goodwill called to give evidence because he had not apparently received a message sent to him while he was off duty. The fact that Constable Goodwill was not called may have had a material bearing on the result of the prosecution. But I do not know what impression the learned Magistrate formed of the witnesses or of the evidence, and I do not on that account wish to say anything which would detract from plaintiff's acquittal which, he would claim, was on the merits. But it is quite one thing to secure an

acquittal on a criminal charge and another to maintain a successful action for damages for wrongful arrest.

An action for wrongful arrest illustrates the concern of the Court to maintain a balance between the liberty of the subject and the maintenance of law and order in the community.

In McArdle v. Egan and others (1934) 150 L.T.R. 412, Lord Wright, at 413, said :-

"It is, no doubt, very important that the liberty of the subject should be preserved from undue interference, and in this case the charge has been withdrawn from the man and it is not now suggested that he was guilty of the offence. On the other hand, it has got to be remembered that, in the public interest, it is very important that police officers should be protected in the reasonable and proper execution of their duty; they should not be hampered or terrified by being unfairly criticised if they act on a reasonable suspicion. . . . It has to be remembered that police officers, in determining whether or not to arrest, are not finally to decide the guilt or innocence of the man. Their functions are not judicial, but ministerial,"

That statement of principle applies to the present case where it was not for Inspector Cummings to determine the ultimate verdict in the case. That was a judicial function. His function was administrative, namely, to determine whether there was enough evidence to warrant putting plaintiff on trial. Nor was he to be deterred from that arrest because there were reports before him which did not incriminate plaintiff. I have already said that the officers who made these reports could not see every event which was taking place. But even if some of the reports had

expressly exculpated plaintiff (which was not the case) the Inspector would have been entitled to order his arrest if sufficient other evidence pointed to his guilt. As Diplock L.J. said in Dallison v. Caffery (1964) 2 All E.R. 610 at 622 :-

"It is not the prosecutor's duty to resolve a conflict of evidence from apparently credible sources: that is the function of the jury at the trial." (or the Magistrate, in appropriate cases). "The prosecutor's knowledge that there is such a conflict does not of itself constitute lack of reasonable and probable cause for the prosecution, nor is it inconsistent with the prosecutor's honest belief that there is a case against the accused fit to go to a jury." (or Magistrate).

In the circumstances of this case, I hold that defendant has discharged the burden of proof resting upon him of proving that the arrest was made with reasonable and probable cause.

It was part of the plaintiff's case that the Inspector had decided to arrest the plaintiff for the sole reason that by doing so he could stop the publication in a certain Sunday newspaper on the 13th November of an article reflecting adversely on the Police handling of the disturbance on the night of 5th June. I reject entirely any suggestion of that kind. I accept the evidence of the Inspector that, when visited by a reporter from that newspaper, he expressed the view that it would be unwise for the reporter to publish a series of articles on the events of the night in question if the purpose of that series was to set out in succeeding issues the views of one gang and then the other.

Such a form of publication was not, in the Inspector's view, a responsible way of dealing with the matter and was only likely to prolong animosity between the various factions. It is my view that far from being motivated by malice Inspector Cummings acted in a cool and detached way in the conduct of the Police enquiries. He showed no preferences in favour of one^p faction over another as is demonstrated by the fact that of thirty-six persons arrested over a period of 23 days for their part in the brawl, 9 were Peacemakers, 18 were from the other gangs, and 9 were unattached.

There will be judgment for defendant with costs, disbursements and witnesses expenses to be fixed by the Registrar. The Defendant is entitled to an allowance in the sum of \$63.00 per day for four extra days.

Solicitors:

K. Ryan, Esq., Auckland, for plaintiff

Crown Solicitor, Auckland, for defendant

