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IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

M.No.60/83

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BETWEEN K RITCHIE

Appellant

A N D NEW ZEALAND POLICE

Respondent

Hearing: 23 March, 1984.

Counsel: Appellant in person.
R.P. Bates for Respondent.

Judgment: 23 March, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

K Ritchie was charged in the District Court at Queenstown on 21 February, 1983 of an offence in terms of s.9 of the Summary Offences Act 1981 that he did assault P Smith. The charge was defended but the Judge found it proved and entered a conviction. Although not imposing any fine he directed payment of witnesses expenses by Mr Ritchie totalling $1,224. The witnesses expenses were very high because of the fact that the complainant and his wife were brought from Auckland to Queenstown for the hearing. The Judge in the District Court was concerned with other informations including two private informations laid by Mr Ritchie himself against Mr Smith. There was also a further charge against Mr Ritchie to which he pleaded guilty. The other informations to which I referred were all dealt with together. I am concerned, however, solely with the appeal brought by Mr Ritchie against his conviction for assault. The incident out of which these charges

arose and in particular the charge of assault with which I am concerned, was one involving some rather unusual circumstances. Mr and Mrs Smith who reside in Australia had come to New Zealand for their honeymoon and in the course of touring in the South Island they made a visit to a scenic attraction known as Waterfall Park which is operated by the appellant Mr Ritchie. They were apparently under some misapprehension as to the fee that was payable for visiting this scenic attraction and it seems also uncertain as to whether they really wanted to make such a visit. It is unnecessary for me in this decision to go into all the facts save to say that the complainant, Mr Smith, obviously decided, having driven his vehicle actually on to the property and past the entry point, that he did not want to visit the park and wished to leave. The proprietor Mr Ritchie, however, took the stand that Mr Smith and his wife had entered the park and should accordingly pay the fee and it was because of some altercation that arose over this question that the charge of assault ultimately came to be made.

As to the facts with regard to the assault, it is sufficient for me to say here that Mr Ritchie's version of what occurred was that he, having got in front of the vehicle with the intention evidently of stopping the complainant and his wife from leaving the park without paying was confronted with a situation of the complainant continuing to drive out towards the mechanically actuated gate into the park and because of this took some step towards making a mark on the complainant's vehicle with a screwdriver and attempting to seize some portion of clothing or something of that kind from the complainant so that he could have some identification available in the event

of these persons succeeding in leaving the park without paying the proper fees which he considered they should have done.

The Judge in finding the charge of assault established, dealt with the facts in considerable detail and said that he was doing so as they "impinge on the matter of credibility which is the vital issue so far as this case is concerned". He went on to say:

> "Mr Ritchie does not deny that he stabbed the bonnet of the car. He did so, he said in evidence, because he thought he was facing a hit and run."

Later in his judgment the Judge said:

> "Now the evidence of both Mr and Mrs Smith was that at the time Mr Ritchie struck the bonnet of the car the car was stationary. It was also stationary at the time he came around the side window and it was only after that that it moved off, and it moved off at some speed."

He then proceeded to refer to the contrary evidence of the appellant as to these matters occurring when the car was moving. Later in his judgment the Judge said:

> "I find, as I have already indicated, that at all material times that motorcar was stationary. It was only after Mr Ritchie reached into the car and assaulted Mr Smith that Mr Smith moved off."

Now the situation is that the evidence of the witnesses Mr and Mrs Smith, they being the only other witnesses who could speak of these events and who were called to do so, does not support this finding at all and Mr Bates on behalf of the respondent has been unable to refer me to any part of the evidence which would support such a finding.

On p.8 of the transcript of the evidence of the witness Mr Peter Smith, it is recorded:

> "Did the bumper of your vehicle hit him at any time prior to him making that stabbing motion? ... No.
>
> You were stationary, were you? ... No, I was moving.
>
> You were still moving towards the man standing in the middle of the road? ... When he came to the car he was moving towards me.
>
> You weren't moving at all? ... Yes, I was still moving."

A little later, on p.9, the topic was dealt with again as regards the leaning through the window by the appellant and the evidence recorded is:-

> "Now you say he leaned through the vehicle and you moved over to the side? ... That's right.
>
> Was your vehicle still moving at this time? ... Well, I had taken my foot off the accelerator. It may have been slowly moving, yes."

Then, in the evidence of Mrs Valmai Smith, one finds recorded the evidence thus:-

> "When he stabbed the car and sort of ran around the side, he ran around the side of it, you know, we still hadn't accelerated or anything because it had taken sort of a moment to get over it, and we were sort of just going at a walking pace."

Mr Ritchie has conducted this appeal in person. He has referred to other aspects of the evidence to support his appeal but I do not find it necessary to refer to these. I should advert at this stage to the way in which this matter has come before the Court. The appellant on 3 March, 1983

gave notice of general appeal to this Court against conviction and sentence in respect of the charge of assault to which I have referred. It appears, however, that he wished to bring further evidence before the Court to support his contentions that findings which had been made against him in the District Court, both with regard to this assault charge and the other informations that were dealt with at the same time, were erroneous, and he accordingly made an application for a re-hearing. The Judge who dealt with this matter was unable to deal with the matter in the way that this appellant sought with regard to the informations brought by the appellant himself against Mr Smith because those had been dismissed and there is no power in the Summary Proceedings Act to entertain a re-hearing unless there has been a conviction or an order made. However, he did deal with the application for a re-hearing in respect of this particular assault charge and declined to grant it. That decision, of course, on the basis of the accepted authority of Tuohy v. The Police (1959) NZLR 865, is not able to made the subject of any appeal to this Court. The fact that there was an appeal to this Court still pending when the application for re-hearing was made was known to the District Court Judge who dealt with the application for a re-hearing. He concluded his judgment on that saying:-

> "That leaves you with your appeal which you are entitled to pursue if you decide to do so. That is the appeal which you have already lodged."

The situation as I understand it is that if an appeal is brought to this Court then the District Court cannot proceed with a re-hearing with that appeal standing. This has no doubt been why, on 23 September, 1983 this notice of appeal

was called in this Court and minuted by the Judge as "Appeal abandoned (without prejudice) to enable re-hearing application already filed to be dealt with". I have some doubt as to the validity of the matter being dealt with in this particular way. However, it appeared to me in the circumstances that justice clearly required that this appeal should be entertained and dealt with by this Court and Mr Bates on behalf of the respondent has not raised any objection to my granting an extension of the time for bringing an appeal and, if necessary, therefore, to overcome any technical problems I treat this as a new appeal brought pursuant to that extended time.

I have considered fully the record of the evidence in this case and what is said in the judgment in which the charge was found to be proved. It is quite clear, as I have indicated, that there has been made here a finding which was not justified by the evidence. Mr Bates has suggested that this was a finding that is not of such importance as to affect the validity of the decision. I find myself unable to agree. The matter of whether or not the car driven by the complainants was moving or stationary was clearly regarded by the Judge himself in the District Court as a matter of considerable importance. It obviously in my view was a matter which affected the question of the intentions of the appellant which in regard to the actions he took which are the basis for the charge of assault. It may be that the Judge, even if he had correctly interpreted the evidence and found that the vehicle was moving may have come to the same conclusion. I cannot be sure that he would. In these circumstances the decision is clearly one which must

be regarded as quite unsafe and the conviction must therefore be set aside.

There remains the question of whether or not I should remit the matter to the District Court for re-hearing. It is clear from what Mr Bates has told me that such a re-hearing would involve very great expense and in all probability the calling of the evidence of witnesses who now reside in Australia. Altogether it appears to me that the interests of justice are best served in this case by the conviction simply being quashed and it is quashed accordingly.

SOLICITORS:

Tonkinson Wood & Adams Bros., Dunedin for Respondent.