NZLR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M. No. 469/84

1329

Appeal upheld
[1987]

BETWEEN WAAKA

Appellant

A N D POLICE

Respondent

Hearing: 3 October 1984

Counsel: R.M. Lithgow for Appellant
J.B.M. Smith for Respondent

Judgment: 23 October 1984

JUDGMENT OF QUILLIAM J

This is an appeal against conviction on a charge under s 10 of the Summary Offences Act 1981, of assaulting a constable acting in the execution of his duty.

The prosecution case was that at about 4 a.m. on 6 April 1984 two constables in a patrol car drove north down Cuba Street in Wellington to the intersection of Ghuznee Street. They stopped at the intersection and saw the figure of a man emerge from a shop front in Ghuznee Street and walk towards the intersection. Being suspicious of what the man had been up to one of the policemen, Constable Alty, got out of the car and went over to speak to him. Constable Crawford, who was the driver, reversed the car to a position where he could park it and then went over to join Constable Alty. At this time the appellant, who had been walking up Cuba Street, was returning towards the intersection. As it happens, although this was unknown to the constables until later, the two men were brothers.

Constable Alty was questioning the appellant's brother on the footpath near the patrol car. When the appellant arrived Constable Crawford stood in his way and asked him his name but he received no reply. The appellant then called out to his brother not to speak to the constable and to leave the area. Constable Crawford told the appellant they wanted to speak to the brother concerning why he had been in the shop doorway but the appellant repeated his remark to his brother. Constable Crawford then told the appellant that for his own good he should move away as what he was doing could amount to obstruction. Still the appellant took no notice and walked past the constable in order to get to his brother. He took hold of his brother's arm and pulled him along the street. The brother's reaction to the appellant's attempts to get him away had been to say that he was all right and would answer any questions the Police may have had. When the appellant started to pull his brother away Constable Crawford took the brother's arm and said he was not going until the Police had a reason why he was in the shop doorway. As he did this the appellant pushed Constable Crawford in the chest with his open hand causing him to step back a pace. The constable warned him that if he did that again he would be arrested. Thereupon the appellant pushed him again in the same way. He was then arrested and handcuffed. As he was being put in the patrol car he resisted by putting his feet against the car and pushing himself away. He was finally put in the car and taken to the Police Station.

The prosecution evidence was that of the two constables and an independent onlooker, Mr Croft, who had been working in his butcher's shop and saw what was going on so went out to offer assistance to the Police. His account of what happened was not precisely the same as that of the constables but it agreed in most of the essentials.

The appellant and his brother both gave evidence. They said they had been walking through Cuba Mall and intending to go on up Cuba Street. They were looking for a taxi. The appellant's brother (and the appellant also, depending on which account was accepted) had diverted along Ghuznee Street to look in the window of a motor accessories shop. The appellant had gone on ahead and, he said, was about 100 metres up Cuba Street when he realised his brother was not with him. He returned and saw the Police speaking to his brother so he wanted to persuade his brother that he was not obliged to answer the Police's questions and should leave. He said he was being prevented from getting to his brother by Constable Crawford who is a big man and was blocking the pathway so as to stop him. He denied having pushed the constable deliberately at any stage.

A difficulty has arisen in reviewing the decision of the District Judge because of the absence of findings of fact on a number of matters. The District Judge has made a clear finding that the appellant pushed Constable Crawford but unfortunately he has regarded that as concluding the matter when there were other findings which would have been helpful.

The first matter argued on the appeal was that the District Judge has erred in basing his decision on the evidence of the by-stander, Mr Croft, because it was said Mr Croft's evidence was plainly in conflict with that of the two constables and so should have formed no basis for a conviction. There is, I think, no merit in this argument. It is true that the District Judge has attached particular importance to Mr Croft's evidence and it is also true that his evidence was in marked conflict on some aspects with that of the constables. It is necessary, however, to try and distil from the rather brief comments of the District Judge the basis upon which he was accepting Mr Croft's

evidence. It seems clear that he has turned his mind almost entirely to the question of whether the appellant did, as alleged, assault Constable Crawford by pushing him in the chest. This was what both constables said occurred and it is apparent that the District Judge has regarded Mr Croft's evidence as strong confirmation of that. Plainly he was entitled to do so because, whatever differences there were between the accounts of Mr Croft and the constables, on this they were consistent. Accordingly it does not seem to me that an analysis of the discrepancies can assist the appellant.

The more substantial argument concerned whether Constable Crawford had been acting in the execution of his duty when assaulted or whether he had acted in excess of or outside the scope of his duty. The contention for the appellant was that Constable Crawford had exceeded his authority by blocking the appellant's way when he was trying to reach his brother and so there was no basis upon which the constable could properly have regarded him as having obstructed the Police. It was contended further that in any event any assault committed by the appellant was a justifiable assault for which he should be excused.

Whether or not the constable blocked the appellant's way is one of the matters on which there is no finding of fact. To the extent that this would require determination of a matter of credibility I am unable myself to make any finding. If, however, it is a matter of inference from the facts then I am in as good a position as was the District Judge. On a consideration of the evidence as a whole it does not seem to me that any question of credibility arises. Constable Crawford, in cross-examination, acknowledged that he was a big man and that his presence on the scene could be quite impressive. He resisted, however, the suggestion that he had blocked the

footpath. The appellant's evidence was that the constable had stood in the middle of the footpath and stopped him getting any closer to his brother. He said the constable had blocked his path. There seems little doubt that the constable's intention was to dissuade the appellant from interfering with the attempts to question his brother. In this regard I consider the constable was acting within the scope of his authority.

The Police were entitled to question the brother. He had been seen emerging from a shop front and at 4 a.m. this was a matter which properly engaged the attention of the constables. Accordingly they were both acting within the scope of their duty in questioning the brother. He did not, of course, have to answer the questions, but it is plain from the evidence that he told the appellant he was all right and was prepared to answer the questions. While the appellant was entitled in his turn to tell his brother that he need not answer the questions, his persistence in trying to get to his brother in order to take him away was obstructive. The Police were not aware the two men were brothers and, even though it may have become apparent that they were known to each other, there is nothing in the evidence to suggest that the Police were made aware the appellant had any special responsibility to the other man. All he was doing was trying to prevent the Police from questioning someone who was willing to speak to them. He persisted in this notwithstanding his brother having twice said he was all right and notwithstanding that he was warned not to do so.

Accordingly the question of whether or not Constable Crawford blocked the appellant's path is of little relevance. If he did so it was because he was entitled to require the appellant not to interfere with the carrying out of a legitimate Police enquiry. The point may, however, be

academic because in the end the appellant, as he acknowledged in evidence, walked round the constable, went over to his brother and took him by the arm. It was at this stage that Constable Crawford said that the brother was not going anywhere until the Police had a reason why he was in the shop doorway. If that was an excess of authority, and it may have been, then it was directed against the brother and not against the appellant. I can see no basis in the evidence for any finding that if Constable Crawford did block the appellant's path this was in excess of his authority.

It is to be observed that the assault on Constable Crawford occurred at the next stage of the incident, that is, when the appellant had reached his brother and taken his arm. It is necessary then to consider whether at that stage the constable was exceeding his authority. So far as the appellant is concerned it seems clear he was not. Whatever view one may take as to the power of the constable to say that the appellant's brother was not leving until he had answered certain questions, this was not a matter which gave the appellant the right to interfere in the way he did. The fact that it may have been a case of an older brother trying to protect a younger brother was unknown to the constable. What he knew was that the Police wanted to question the brother, as they were entitled to, and in circumstances which justified an enquiry, and that the brother was consenting to being questioned and had made it clear to the appellant on two occasions that this was so. In that situation the appellant had no right to interfere and his attempt to do so by pulling his brother away was a wilful obstruction of the Police in the carrying out of their duties. It was in these circumstances that the appellant assaulted Constable Crawford by pushing him in the chest. It cannot be said that this was an action justified by an excess of authority on the part of the constable.

It was argued next that, even if there had been a technical assault, it ought not to result in a conviction because it was justified in the light of the surrounding circumstances. This argument was said to find support in the decision of Hardie Boys J in Williams v Police [1981] 1 NZLR 108, which it was contended bore a striking similarity to the present case. In Williams v Police two constables stopped a car in the course of investigating a complaint of assault. The occupants got out and denied any suggestion of assault by them. They then wished to get back in the car but were told by the constables that they must wait until the complainant arrived to see if he could identify them. When one of the appellants, Williams, moved to get into the car he was told, "You aren't going anywhere yet", and stepped between Williams and the car. Williams pushed him forcibly away and was arrested. Hardie Boys J held that there had been no power to detain Williams and that although there had been a technical assault it was not an assault committed while the constables were acting in the execution of their duty because they had exceeded their duty. Some reliance was placed on an observation of Hardie Boys J at pp 112-113:

> " The next question to be considered is whether these assaults were justified in law. When the constables stood between Williams and his car, was Williams entitled to push them out of the way? As, for the reasons I have given, the constables were not then acting in the course of their duty, they were in no different position from anyone else who places himself in front of a citizen to prevent him going where he wishes to go. If that person makes it clear that he will not move, then in my opinion the citizen whose way is impeded may be entitled to apply such reasonable degree of force as is required to move him. His right to do so will of course depend on the circumstances. At one end of the scale the actions of the obstructor may

> themselves amount to an assault and the justification of self-defence may be available. At the other, they may amount to no more than an obstacle to one of many paths which the citizen may take. "

The main distinction between Williams's case and the present one is, of course, as I have already held, that in the present case the constable was not acting in excess of his authority. It was argued further, however, that the appellant was entitled, by way of assistance to his younger brother, to advise him of his rights and that if he was acting in that way then what he did was justified. It is clear, however, that at no stage did he tell the Police that he was acting in that role and they were unaware of the nature of the relationship between them. I am accordingly unable to see any basis for holding that the assault was a justified one.

The final ground of appeal was that it was a defence available to the appellant that he had a reasonable and honestly held belief that he was entitled to do as he did, that is, to approach his brother and therefore to get past the Police officer who was preventing him. This was a defence raised and argued in the District Court and it was said that no consideration was given to that defence and no finding made on it. It is true that nowhere in the judgment delivered is there any reference to this defence and it must be accepted that the defence has remained undecided. It is acknowledged, on behalf of the respondent, that such a defence was available to the appellant. The question then is what course I should now follow. If the matter is one which can now be resolved by a consideration of the transcript of evidence and the drawing of inferences then it is desirable that I should endeavour to resolve it. If, of course, there is any issue of credibility involved then I should be obliged to remit the case to the District Judge.

The defence which was available to the appellant was referred to by the High Court of Australia in R v Reynhoudt (1962) 107 CLR 381. That was the case of a charge of assaulting a member of the Police force in the due execution of his duty. The statutory provision was one which combined the elements of ss 10 and 23 of the Summary Offences Act, and so forms a proper basis of comparison for present purposes. The principal matter for determination in Reynhoudt's case was different from that with which I am concerned but the defence I have referred to was acknowledged to have been available. It was expressed by Menzies J at p 399 in this way:

> " ... if a prima facie case has been made by the prosecution it is a defence, the onus of proof of which is upon the accused - at least initially - to establish an honest belief upon reasonable grounds in the existence of a state of affairs which had it existed would have made his acts innocent. "

The way in which that defence was raised in this case was that the appellant honestly believed on reasonable grounds that he had a right, in the interests of his younger brother, to go to him, advise him that he need not submit to questioning, and lead him away from the scene, and accordingly that the Police had no right to prevent him from doing so. On behalf of the respondent it was argued that, upon the facts given in evidence, there could not have been any such honest belief on the part of the appellant, and that there were no reasonable grounds for such a belief. More particularly, however, it was argued that this defence depended on a belief by the appellant that the constable was not acting in the course of his duty. If he was mistaken in that belief then it was a mistake of law and so not available as a defence: (Pounder v Police [1971] NZLR 1080 at p 1085).

I think this argument is sound. Any belief on the part of the appellant that he had the right to interfere must have been based on his belief that the constable had no right to prevent him from doing so. In that, as a matter of law, he was mistaken. The defence was therefore not available to him. In these circumstances there is no need for the case to be remitted to the District Court.

Although by a somewhat different route I have arrived at the same conclusion as the District Judge and the appeal against conviction is accordingly dismissed. As the matter is a relatively minor one there will be no order as to costs.

Solicitors: Buddle Findlay, WELLINGTON, for Appellant

Crown Solicitor, WELLINGTON, for Respondent