NZLR 1979

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 1741/83

1139

IN THE MATTER of an Appeal from a determination of the District Court at Auckland

BETWEEN KENNETH NORMAN McKAY
Police Constable

Informant/Appellant

A N D JOHN BERNARD MINTO of Auckland

Defendant/Respondent

Hearing: 3 September 1984

Counsel: Miss Sim for Informant/Appellant
Mr Ring for Defendant/Respondent

Judgment: 13 September 1984

JUDGMENT OF THORP J

This is an appeal by way of Case Stated by the Crown pursuant to s 107 of the Summary Proceedings Act 1957 against the dismissal by His Honour Judge Callander in the District Court at Auckland on 19 September 1983, of the charge that Mr Minto, on 14 January 1983 at Auckland, intentionally obstructed a constable acting in the execution of his duty.

The Case notes, as facts proven at the hearing -

1. On 14 January 1983 Mr Minto was one of a group of persons who attended the Stanley Street Tennis Stadium to protest at the participation of a South African player in a tournament being conducted there;

2. "One of the primary tools" used in the protest was amplified sound produced by means of a loud hailer;

3. Earlier on 14 January the Senior Police Officer at the scene, an Inspector of Police, warned Mr Minto "that action would be taken for a breach of the peace or for a reasonable apprehension of that, if they persisted";

4. The hailer was used after that warning;

5. The Inspector considered there was a real likelihood of a breach of the peace;

6. He came from behind the protestors and endeavoured to seize the hailer from its possessor, Mr Minto;

7. A tug-of-war ensued between the Police and Mr Minto following which he was arrested on the charge which is the subject of this appeal.

The Case records that the Learned Judge decided that a breach of the peace was a real likelihood in the circumstances but that "since the Defendant had not been arrested the Inspector was not acting in the execution of his duty in seizing the loud hailer even when there was a real likelihood of a breach of the peace."

It then asks for this Court's opinion whether that opinion was erroneous in law and in particular:

> "'If -
> (i) the circumstances are such that there is a real likelihood of the breach occuring; and
> (ii) an item of personal property is a material contributing factor to those circumstances; and
> (iii)the person in possession is present but has not been arrested;
> is a Police Constable acting in the execution of his duty in seizing it? "

It was common ground at the hearing of the appeal that cases such as Duncan v Jones [1936] 1 KB 218 and Burton v Power [1940] NZLR 305, establish that, if the Police have reasonable grounds for apprehending a breach of the peace, they have not merely the right but the duty to take steps to endeavour to prevent such a breach occurring.

The principal question raised by the Case and the issue regarded by counsel as the central issue on the appeal, is the nature and extent of the action which may be taken by the Police in pursuance of that duty.

Miss Sim submitted that the only limits to such action were those indicated in Burton v Power, namely it must be reasonable in the circumstances and not immoderate or unfair.

Mr Ring submitted that the action available to the Police could only include seizure of personal property if that action followed and was a consequence of the arrest of the person possessing the property.

The learned trial Judge preferred the second construction. At page 3 of his reserved judgment he stated:

> " Under the law as it presently stands in New Zealand the arrest must precede the seizure. "

His judgment shows that he considered that finding a necessary consequence of the decisions of the Court of Appeal in Barnett and Grant v Campbell (1902) 21 NZLR 484 and McFarlane v Sharp [1972] NZLR 838. After noting those decisions he referred to two decisions, Piddington v Bates [1960] 3 All ER 660 and Humphries v Connor (1864) 17 ICLR 1, which had been cited by the Police Prosecutor in support of the view now urged by Miss Sim. He accepted that both appeared to support that view but concluded that they could not lie with the principles enunciated in Barnett and Grant v Campbell and McFarlane v Sharp, which he described as "contrary" decisions.

I do not so regard those decisions. Both were cases in which the Police had seized property of a type other than that for which a warrant had been obtained and prior to the arrest of the owner of the property, with the intention of using it as evidence. The issue in each case was whether the seizure was lawful. In Barnett and Grant v Campbell the Court of Appeal held that:

> " ... a constable who is legally authorised to arrest an accused person may, at the time of such arrest, and as incidental to it, seize and take possession of articles in the possession or under the control of the accused person, as evidence tending to show the guilt of such person. This is a power at common law, and exists as an incident to the arrest, and this whether the arrest is one which may be made without a warrant, or, as in the present case, one which can only be made under a warrant, and whether the offence is of the nature of felony or merely a misdemeanour. "

The Court emphasised that this power of seizure arises as an incident or consequence of arrest, and does not arise until and unless an arrest is made. Its decision was followed in McFarlane v Sharp.

On their face the two decisions are authorities on the extent of Police power to seize property for the purpose of retaining it as evidence of a crime or offence. If there were any doubt that this was their intended ambit, in my view it would be removed by the discussion which appears at page 844 of McFarlane v Sharp. At page 842 the Court noted that Barnett and Grant v Campbell had stood since the beginning of the century as the law "in circumstances like those in the present case," and said it was not an appropriate case for the Court to reconsider its previous decision. However, it did invite the legislature to consider whether the principle to be extracted from Barnett and Grant v Campbell should be reconsidered in the light of modern conditions. At page 844 it said:

> " It seems to us that the matter might well be examined. It is of course necessary to protect the citizen against the possibility that police officers, putting forward some plausible pretext for obtaining a search warrant, may use the opportunity thereby given to enter private premises and 'have a look' in the hope that some evidence may there be found of some crime of which as yet there is no suspicion against the occupants. But against this danger which is a real one, and which is clearly to be remembered by the Legislature throughout, there must be set the possibility of the kind of case in which, searching premises

> (for instance) on a charge of bookmaking bona fide put forward, the police discover cogent evidence of participation by the occupiers of the premises in some more serious crime, such as (for instance) armed robbery. Are they because the occupier or occupiers of the premises happen not to be personally present at the moment, and therefore cannot be arrested, to be prohibited from taking this material into their custody? The matter seems to be one which is worth some careful examination. "

I asked Mr Ring whether he could point to any passage in either decision which supported the proposition that they were intended to govern any other aspect of Police power than the power to seize property for evidence. He said that he could not, but submitted that the Court could give the decisions a wider application than their immediate authority. The facts that the affirmation of the authority of Barnett and Grant v Campbell in McFarlane v Sharp was expressly for reasons of stare decisis, and that the Court indicated some doubt about the current value of Barnett and Grant v Campbell, do not encourage me to extend its apparent authority.

Once Barnett and Grant v Campbell is recognised as an authority on Police powers to seize evidence and not on the extent of any other Police power such as the power to take steps to prevent a breach of the peace, Piddington v Bates and Hamphries v Connor are authorities available in support of Miss Sim's argument.

While Humphries v Connor is the only reported decision which considers the seizure of property in the absence of any interference with the liberty of its possessor, many decisions have upheld Police actions affecting both personal and property rights.

In Johnson v Phillips [1975] 3 All ER 682, the Police not only required Mr Johnson to move out of the way of the ambulance, but also to take his car with him, even though that involved driving it down a one way street in breach of the traffic regulations.

In Police v Amos [1977] 2 NZLR 564 it was not only Mr Amos but his yacht which was held to have been properly removed from the path of the USS Longbeach.

Amos's case also makes clear that the duty of the Police to take steps to prevent a breach of the peace must include the power to take steps which would otherwise be unlawful. This indeed must be the case, or the so-called "power" of the Police to take steps for such purpose would be limited to a right to endeavour to persuade people to desist from their actions.

That of course does not mean that the right of the Police to interfere with private rights, whether of personal liberty or of personal property, is unlimited. In Burton v Power at page 307, this topic was considered by Myers CJ in the following passage:

> " The Police are charged with the preservation of order and peace within the country, and it is their duty to carry out that charge with moderation, fairness, and discretion, and within the law. So long as they do that, they are entitled to and should receive the support of the Courts and of every good citizen. If they carry out their duties unfairly and immoderately, the Court would not hesitate to express its condemnation of their action and would see that no person suffered by reason thereof. "

In Amos's case, at page 569, Speight J considering the same topic, said:

> " As has already been said, it is beyond argument that the police must interfere to stop or prevent unlawful conduct, actual or apprehended. In addition circumstances may arise where there is a common law duty on a policeman to take steps which would otherwise be unlawful if he has apprehension on reasonable grounds of danger to life or property, but the limits to which he may go will be measured in relation to the degree of seriousness and the magnitude of the consequences apprehended. There could be less justification for taking what would be prima facie unlawful interference with private rights for the protection of property than there would be in the case of

On several occasions during her submissions to the Court Miss Sim made submissions to the effect that once it was determined that there were reasonable grounds for the Police believing that there was a likelihood of a breach of the peace "they must be left to take such steps as on the evidence before them they think to be proper".

In my view that is stating the position too widely. Certainly it needs to be kept in mind that the Court is being asked to assess the reasonableness of action taken in circumstances of urgency and danger, and that criteria suitable to occasions when the action to be taken can be considered at leisure may not be appropriate. But ultimately it must be for the Court to assess, from the whole of the evidence, whether the action taken was reasonable in all the circumstances of the particular case.

That assessment does not require any distinction to be made between interference with rights of personal liberty and interference with rights in personal property.

Mr Ring on several occasions urged me to avoid the unnecessary extension of Police powers. He accepted that the Police power in these cases must permit interference with personal liberty, but said it should not and need not extend to interference with personal property. At the time I expressed some concern at this proposition, as it seemed to me to give less protection to personal liberty than to property rights and in that way to run contrary to the general principle that personal liberty should be given primary importance in our legal system. It still appears to me that a finding which reversed that normal priority is one which should only be reached if existing authorities require that result. I do not see any such authorities.

Nor do I accept Mr Ring's contention that the power to interfere with property rights is one which the Police need not have in order to carry out their duty. It is not too difficult to imagine circumstances where a requirement to defer action in

respect of property until its owner is located and arrested could prevent appropriate action. In circumstances where the Police were seeking to prevent physical conflict between groups holding strongly opposing views, the discovery of a placard or banner erected in some public place and likely to inflame an already difficult situation might well call for immediate action to remove it. To delay such action until its owner had been located and arrested might be as undesirable as it would undoubtedly seem unrealistic to the officer in charge.

Acceptance of the proposition that the limits of Police action, once they have on reasonable grounds formed the opinion that there is a likelihood of a breach of the peace unless appropriate steps are taken to prevent that result, are simply that they must be "reasonable in the circumstances", does not enable either of the questions contained in the Case Stated to be answered with a simple affirmative or negative.

On the first question, whether the Court's decision was erroneous in point of law, the appropriate answer seems to be:

> " To the extent that the decision proceeds on the assumption that interference with property rights by a Police officer cannot be action taken in the course of his duty unless that action was authorised by warrant or taken following an arrest, it is based on an erroneous view of the law, and requires reconsideration. "

The second and more detailed question would be answered, and is answered:

> " The Constable may or may not be acting in the execution of his duty in those circumstances. Whether he is acting in the course of his duty will depend upon whether or not, in all the circumstances of the case as found by the Court, that action was a reasonable step for him to take for the purpose of attempting to avert the anticipated breach of the peace.

As the Case is to be remitted back it seems desirable to note a second matter which arose during the argument of the appeal.

In his written synopsis of argument Mr Ring included the submission that "The proper step would have been to order the defendant to desist and, if he declined, to arrest him for obstruction and seize the loud hailer as evidence;".

It seemed to me that the facts found and included in the Case Stated, showed that Mr Minto had been ordered to desist and had declined. I asked Mr Ring whether he accepted that construction of the Case, and he said he did. He also accepted that Mr Minto's failure to conform with the order would have justified his arrest for that reason.

I am not asked by the Case to consider whether there were sufficient grounds for Mr Minto's arrest apart from the tug-of-war incident, nor whether that would excuse earlier conduct or make it improper to have regard to earlier conduct in considering the charge.

From His Honour's judgment it seems evident that his decision to dismiss the charge, and the three part question, which are the matters I am asked to consider, both proceeded from the assumption that the tug of war incident was the sole conduct at issue. On that basis it may well be that the facts included and noted in the Case Stated are not all the facts which would be relevant to a broader approach. On such facts as are included in the Case it does not appear to me that Mr Minto's involvement in the tug-of-war is necessarily the only conduct relevant to the charge. However, as it may be that the facts brought to my attention are not all the relevant facts, and because it was not a matter directly raised in the Case, or argued on the appeal, it is a matter which I merely note and leave for such further consideration as the learned trial Judge may think appropriate.

In accordance with the answers noted above to the questions raised in the Case Stated, and in terms of the Court's jurisdiction under s 112 Summary Proceedings Act 1957, the dismissal of the information is quashed, and the information remitted back to the District Court for determination in accordance with the answers to the Case Stated set out above.

It does not appear to me that this is a case which calls for any order as to costs.

.....

Solicitors

Meredith Connell & Co, Auckland for Informant/Appellant

McElroy Duncan Milne & Meek, Auckland for Defendant/Respondent