

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

326

BETWEEN

DUIGNAN

Appellant

AND POLICE

Respondent

Hearing 4 April 1984

Counsel K. G. Stone for the Crown
 F. N. Tuiasau for the Appellant

ORAL JUDGMENT OF ONGLEY J

Duignan appeals against a conviction for obstruction of a police officer in the execution of his duty entered against him in the District Court at Wellington on 5 October 1983. The circumstances of the offence allegedly committed were that 100 or so demonstrators gathered outside the St James picture theatre. It is not disclosed what they were demonstrating about but, whatever it was, it attracted the attention of the police and several constables attended outside the theatre to clear a path for theatre patrons through the crowd which formed in a semi-circle round the entrance blocking off the footpath accessway.

A young woman who was arrested near the entrance resisted violently as she was led towards the police van. A Constable Dyson endeavoured to assist the arresting constable by grabbing hold of the woman's arm which she was flailing

about her. As he did so he felt a blow from behind which he took to be a punch. At about the same time, so he said in evidence, he was grabbed at the top of his tunic and was pulled backwards. He also suffered a punch to the face by another woman demonstrator standing in front of him about the same time. His evidence on the matter proceeded as follows:

"I then turned round to see who was holding me. I then saw a male person whom I now identify as the defendant. This male person had a hold of the top of my tunic with both hands. I held him with my left hand and turned round and I identify this person as the defendant who is now in Court today with the brown cardigan, seated next to his counsel. This person continued to pull me by the back of my tunic with both hands for approximately three metres. The actions of the defendant caused me to lose my control of the arrested female. I lost my grip. He pulled me backwards and I lost my footing. I then managed to control the defendant, advising him that I was arresting him for obstruction. I placed him in a hold and marched him towards the van. When I turned around in order to hold him, Constable Salt came to my assistance."

The constable whom he had been endeavouring to assist was fully engaged with his prisoner and did not see what initiated the struggle between Constable Dyson and the appellant. There is nothing in his evidence which throws any light upon the alleged act of obstruction. The appellant described his own actions in this way:

"He put either a hand or two hands, I think, perhaps up round here sort of thing because he was coming from behind and appeared to me like he was actually being pretty rough about the whole thing and I was quite close to him at that stage and I approached him from behind and I put my hand on his shoulder and I said something like "Don't do that. Why don't you calm down", because his whole actions and manner seemed to be unnecessarily aggressive and as soon as I did that he swung round and

grabbed hold of me. He grabbed me on the shoulder. I was wearing a coat and a shirt under that and it was like sort of he was trying to drag me away and during that time, more so than that even before, it struck me like he was quite agitated. Everything was happening and I basically said those few words to the effect of "Cool it. Why don't you calm down", sort of thing. "There is no need to behave like this", sort of thing. I don't remember Constable Salt coming up to me. I couldn't see him. I don't remember Constable Dyson saying I was under arrest. That was not said. I have heard the evidence of Constable Dyson. He said in his evidence in chief that I pulled him back. I wouldn't say it was pulling back in the circumstances because there was a lot of people around and that did actually get his attention. No, it was more than a touch on the shoulder and it was a reasonably firm touch like that (demonstrates to the Court) as opposed to a pat on the shoulder or something but it wasn't pulling back. I didn't pull him back."

The defence then called two witnesses, the first, a Miss Massoff, a young woman who was in the crowd. She supported the appellant's version of events in a general way but went on to describe what appeared to her to be a severe assault by the constable upon the appellant as he lay on the ground. It appeared she may have been exaggerating and the Judge did not place much weight on her evidence. Then there was Miss Nana, a teacher trainee, who said that she saw the appellant with his hand on the shoulder of the constable but did not see that constable going backwards before the appellant was grabbed from behind by a second constable. She said that she had a clear view of what she was describing and it might reasonably be thought that if the events described by the constable had taken place she would have had an opportunity to see them.

After reviewing the evidence the District Court Judge approached the matter in this way: he said:

"So it is really a question of what was the defendant's intention at the time that he was approaching Constable Dyson. The actions of the defendant as described by Constable Salt are consistent one way or the other whichever version of the events you wish to accept. So we have Constable Dyson in the execution of his duty going to assist this other constable. As a result of the constables' act in restraining this girl the organised protest made a general movement towards the constables and with the defendant in the forefront. Now if there had been a situation of the defendant going up and tapping the constable on the shoulder and saying "You are being a bit heavy with this girl", or "Calm down", then the authorities as quoted by Mr Tuiasau could assist the defendant and the Court would be left with a reasonable doubt as to whether he intentionally obstructed. However, in my view, in the circumstances pervading at the time and the mood as set by the protestors, this general movement forward of all the protestors or of the group towards these two policemen holding the woman protestor, is not consistent with an innocent explanation of anybody who does an act likely to hinder or obstruct a constable who is acting in the execution of his duty. For that reason I find this charge proved."

With respect I think there is an hiatus in this reasoning. In the circumstances I think that the appellant's intention could only have been inferred from his actions; unless it could have been gathered from what he said and that did not necessarily indicate an intention to interfere physically with what the constable was doing. If he pulled him back by his collar as described by the constable one would not need much convincing that that was an act which in fact obstructed the constable and that the intention to do so was apparent from the nature of the act. If on the other hand he did no more than place his hand on the constable's shoulder and speak calming words it would be difficult to find either the act of obstruction or the intent proved. Without deciding what

had taken place I do not see how one could conclude that the charge had been proved in both its aspects . The heart of the Judge's decision is in that last passage but I believe that that passage begs the question because there is no finding as to the nature of the act which the appellant is said to have committed except by implication in the words "does an act likely to hinder or obstruct a constable who is acting in the execution of his duty" etc. I agree that if it was the act described by the constable in evidence the movement forward in a crowd would have lent support to the inference of a guilty intent if anything more than the act itself were needed. If on the other hand the touching of the shoulder were all that occurred then I do not agree that any assistance is to be gained from the movement of the crowd either as to the obstructive nature of the act or the intent with which it was done.

It was reasonably possible to perform an innocent act in the circumstances then existing and the Crown must prove that it was other than an innocent act. The Judge did not find what the act was that was allegedly obstructive and so I now find myself in difficulty as to what inference as to intent should be drawn from the act whatever it was. As the Judge did not specifically find against the appellant on the ground of credibility I am of the view that the innocent version of the facts put forward by the appellant should be taken to have been a reasonable possibility in the circumstances and accordingly that the burden of proof is not discharged. The appeal will be allowed and the conviction quashed.

John A. T.

Solicitors:

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