NZLR

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

AP 55/88

LOW PRIORITY

BETWEEN FROST

Appellant

A N D POLICE DEPARTMENT

Respondent

Date of Hearing: 16 June 1988

Counsel: P S Coles for Appellant
G R Anson for Respondent

Date of Decision: 8 JUL 1988

RESERVED DECISION OF McGECHAN J

Appeal

This is an appeal against conviction in the District Court at Palmerston North on 23 November 1987 on a single charge under s 23(a) Summary Offences Act 1981 that the appellant intentionally assaulted a police constable named Cotton acting in the execution of his duty. There is also an appeal against sentence by way of a fine of $300.00 and costs $55.00.

The Facts

There is no significant dispute as to what occurred. The evidence by two police officers largely was uncontested. The learned District Court Judge found the facts in summary fashion. I think it might be helpful to record what occurred in a little more detail. In the early hours of Saturday,

18 July 1987 a substantial police party under the charge of Senior Sergeant Paula Stevens went to the premises of the Mothers motorcycle club at Napier Road, Palmerston North. The premises concerned were surrounded by a solid perimeter fence as is not unknown in fortified gang headquarters. As the police arrived at the premises a siren sounded. Senior Sergeant Stevens with some others went to the entrance gate. Constable Cotton overheard the conversation which followed. There is a fairly small grill area in the gate. The Senior Sergeant announced "who we were", and that she had a warrant to enter the premises. She was in fact in possession of no less than three warrants issued the previous day. The first was in written form under s 198 Summary Proceedings Act 1957. The second was under s 271 Sale of Liquour Act 1962. The third was under s 18(1) Misuse of Drugs Act 1975. The first two warrants on their face authorised entry and search of buildings, garages, vehicles, boxes, receptacles, the premises and the place situated at the Napier Road headquarters of the Mothers motorcycle club, with the usual empowering provisions as to use of force to enter and to seize. The third warrant was in similar form but on its face expanded to confer rights to search "any persons found therein or with (sic) thereon". There was some delay before, as the Senior Sergeant put it in evidence, any sense was obtained from persons inside the premises. A "voice" asked if the police had a warrant. The Senior Sergeant replied she had three, and held them up to the viewing part of the gate. She opened the warrants up as she so held them up for viewing. It is possible, and having seen the warrants I think it probable, that under the conditions then prevailing they could not easily be read through the viewing hatch in the gate. The Senior Sergeant was asked to slide them under the gate. She refused to do so. Her explanation in evidence was that there was a fire burning, and she doubted if she would see them again. The conversation in any event became somewhat academic as meantime other police were forcing entry ino the premises at other points around the perimeter fence.

One of those who so entered opened the front gate. There were a number of buildings within the premises, and apparently some 60 odd persons were present. There is no evidence identifying the persons inside who conducted this discussion with the Senior Sergeant through the hatchway in the gate. Likewise, there is no evidence as to the extent if any to which those at the gate communicated onward to others in the premises. In particular, there is no evidence that the appellant was informed or otherwise learned of the existence of the warrants, let alone their text. The operational technique utilised was the standard one of surrounding the premises concerned with a view to search, and to detention and search of persons found on those premises pursuant to a s 18(1) Misuse of Drugs Act 1975 warrant. Exit from, and for that matter entry to, the premises while the operation continued was to be controlled accordingly. Constable Cotton was detailed to so control the front gate. So far as exits were concerned, he was to release persons brought to the gate for release by police operating inside. The first person Constable Cotton saw come out of the gate was a man named Ivan Brosnan. He was being removed by police. Outside the gate some incident occurred which resulted in Brosnan receiving head injuries and bleeding. A pool of blood resulted on the ground. Constable Cotton a few minutes later was gathering grass from a drain to cover that blood when the appellant Frost came out the gate. He approached Constable Cotton, pointing past the Constable at the pool of blood on the ground and shouting. The general atmosphere by this stage was, in the Constable's words "anti police". The Constable stood his ground, stretching out his arms on either side, and telling the appellant he was not to leave the premises and was to go back inside. The appellant began to push past. The Constable repeated the warning. He did not refer in terms to the search warrants, or otherwise to authority for that direction to return. The appellant did not desist. Constable Cotton accordingly arrested him for obstruction. For completeness, trouble then ensued which required three officers to assist in effecting the arrest. It is the action of the appellant in

pushing past, or endeavouring to push past the constable after the second warning which is pinpointed as the act of obstruction of a constable acting in the execution of his duty.

District Court Decision

In an oral decision the learned District Cout Judge briefly traversed the facts. Salient points were that the constable's duty was to ensure persons did not leave without police approval; the appellant sought to leave; he was told he could not; but nevertheless he endeavoured to push past the constable. The constable's actions which otherwise would be unlawful were legitimised by the s 18(1) warrant authorising personal search, and detention meantime. The constable was acting in the course of his duty, and was obstructed. Having found that general position, His Honour then considered a defence submission that an ingredient of the offence had not been established in as much as, while the appellant was told not to leave, he was not given the statutory basis or told of the warrant empowering that direction. His Honour referred to Waaka v Police (now reported) [1987] 2 CRNZ 370 in its unreported text with particular emphasis on the question of mens rea in a passage identified as second para p 12. (That passage appears to be the first three sentences of the second para in the more expanded passage quoted later in this judgment.) His Honour then referred indirectly to immediately following observations as to persons entertaining a misconception as to the law regarding the extent of constables' powers, and to that being no excuse. The learned District Court Judge then held that the behaviour of the appellant in:

> ""insisting to leave for whatever reason is certainly in the category of wilfully shutting his eyes to the possibilities or indifference as to whether or not they were the truth. He wanted to leave for whatever reason and that was that, ...".

Appellant's Submissions

At the centre of the appeal was a factual submission that it had not been shown the appellant was aware of the existence of the warrant, from which the submission was developed that the intention to obstruct ie mens rea had not been shown beyond reasonable doubt. The ingredients of obstruction as analysed in Lewis v Cox [1984] 3 All ER 672 were noted as was the need to enquire whether police conduct, albeit within the general scope of duty, involved an unjustifiable use of powers, citing Police v Ford [1979] 2 NZLR 1. Absence of knowledge of the warrant on the appellant's part was ignorance of fact, not law. The learned District Court Judge's reference to Waaka's case accordingly was misplaced. Prima facie the constable's acts appeared unlawful, and given ignorance of the existence of the warrant there was both reasonable doubt that the appellant knew the constable was acting in the execution of duty, and the manner of exercise of powers was unjustified in that the constable should have made the existence of the warrant known.

Respondent's Submissions

With no disrespect I need not detail these. They are sufficiently taken up in the decision which follows. Briefly, the respondent submitted that the constable was acting in the execution of his duty at the time, the appellant's actions amounted to obstruction; and that mens rea existed in the sense that the appellant wilfully shut his eyes to material facts. The constable performed his duty in a reasonable way in the circumstances then prevailing.

Legal Principles

Any question of police powers must be approached carefully and sensitively. There are policy issues involved. I respectfully echo the observation of Hardie Boys J in Williams v Police [1981] 1 NZLR 108, 110:

> "The need of the community to have an efficient and effective police force must of course be balanced against the necessity of ensuring that the citizen's freedom is restricted only when and to the extent that the law permits. The proper preservation of the balance is a very difficult thing in situations of stress or strife."

I also adopt His Honour's approach to the ingredients of the offence of obstruction based on English authority appearing op cit 111. What was the constable actually doing? Was it prima facie an unlawful interference with a person's liberty or property? If so (a) did such conduct fall within the general scope of a duty imposed by statute or recognised by common law and (b) did such conduct, if within the general scope of such duty, involve an unjustifiable use of powers associated with the duty? On the question of mens rea I refer initially to Lewis v Cox [1984] 3 All ER 672, 677 and 678. In the words of Kerr LJ 678:

> ""The word 'wilful' clearly imports an additional requirement of mens rea. The act must not only have been done deliberately, but with the knowledge and intention it will have this obstructive effect".

I refer also on the topic of mens rea to the decision of the Court of Appeal in Waaka v Police [1987] 2 CRNZ 370. While that decision turns on s 10 Summary Offences Act 1981 ("assaults any constable ... acting in the execution of his duty"), I see no reason why the observation of the Court of Appeal should not apply with equal force to s 23(a) obstruction cases. It was said (375):

> "As to s 10 of the Summary Offences Act, there is insufficient reason for not applying the approach in Millar. Accordingly we think that mens rea must go to all the ingredients of the offence. The prosecution must prove that the defendant knew that the person assaulted was a police officer and knew that he was acting in the execution of his duty; or that the defendant wilfully shut his eyes to these possibilities or was indifferent to whether or not they were the truth. Knowledge or its equivalent may be assumed, however, unless there is a foundation in the evidence for a contrary view. Further it can be no defence that the defendant, while aware that the person was a police constable, entertained an incorrect understanding of the law regarding the extent of a constable's powers. Section 25 of the Crimes Act 1961 expressly enacts that the fact that an offender is ignorant of the law is not an excuse for any offence committed by him. The defence of total absence of fault cannot extend to pure mistakes of law.
>
> We would leave open for future consideration if need be the position under s 10 of a defendant who knows that the person assaulted is a police constable but gives no thought at all to whether or not he is acting in the execution of his duty. Compare Howe at 623-4, which turned on the particular subject-matter of s 90 of the Crimes Act. The question was not specifically argued in the present case and postulates an unlikely set of facts."

Decision : Conviction

There is no doubt the constable's action in physically preventing the appellant from proceeding further away from the premises prima facie was an unlawful interference with the appellant's liberty. Equally, however, there is no doubt that such conduct fell within powers conferred under s 18(1) Misuse of Drugs Act 1975 to conduct a personal search of persons found on premises searched pursuant to warrant. That power to search under s 18(1) as a matter of necessary implication must carry power within reasonable limits to detain for the purpose of search. A constable can hardly search a man who is in the process of a 100 metres dash or climbing a wall. That is the power this constable was exercising at the time in question. By like necessary implication, it was not necessary that constable himself be intending to search. The legislature would have been well aware of the existence of team policing

operations, and the likelihood that certain police officers would in effect be acting as sentries while others were assigned to search duties. I need hardly refer to the obvious possibilities of male guards and female searchers, or vice versa. Was this power of detention exercised in a justifiable manner? Given the circumstances at the time, I think so. The constable was operating in a tense and fast moving situation where immediate and decisive action was required. The appellant was shouting and pointing towards a pool of blood and was in the act of physically pushing past the constable. It was not a situation allowing for gentle persuasion or long explanations. In particular, it was not a situation in which the constable realistically could attempt some exposition of the provisions of s 18(1) coupled with s 198 Summary Proceedings Act and the form and wording of the warrant under which the police were acting. Indeed, it was not even a situation in which any reasoned and comprehensible reference to the warrant and its consequences was practicable. It was a time for action first and possible explanations later. Such excuses for immediate action will not always be available. Different situations can demand different responses. However, this case is clear. Given that the constable was acting in the execution of his duty, and was not acting in an unreasonable way, is the additional requirement of mens rea established? I accept it has not been proved the appellant knew of the existence, let alone the text, of the warrant pursuant to which the police, including the pesent constable were acting. However, that by no means determines the question of mens rea. Even if ignorant of the existence of the empowering warrant and perhaps ignorant of all matters of law relating to police powers, it must have been patently obvious to the appellant that there was a organised body of police attempting to go about an operation in a systematic fashion. That operation involved keeping occupants, including himself, inside the premises, at least for the time being. Applying even minimal common sense, it would have been obvious to the appellant that the police appeared to believe they had lawful

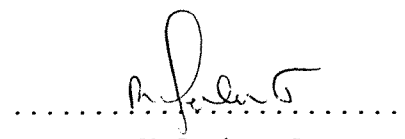
authority to act in that fashion, and on that basis may indeed perhaps have such authority. In short, it was a situation where it is readily inferred the appellant realised that the police may perhaps have some basis for their actions, including his detention, even though he was unaware of the existence and effect of the warrant actually issued. Against that background, to ignore the constable's instruction and physical restraint, and to press on regardless without further enquiry or demand for justification, amounted to mens rea in the sense of a wilful shutting of the eyes to possibilities or indifference to the truth. That was the view which the learned District Court Judge took of the matter. I concur. There was obstruction in fact and on the above basis there was also intention to obstruct.

Order : Conviction

The appeal against conviction is dismissed.

Order : Sentence

The appeal against sentence was not pressed. Nor could it be. If anything, it was lenient. The appeal against sentence is dismissed.



R A McGechan J

Solicitors: Coles & Hoogendyk, Palmerston North for Appellant
Crown Solicitor, Palmerston North for Respondent