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NZLR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

LOW PRIORITY

AP 108/89

BETWEEN HOWLAND

1321

Appellant

AND THE POLICE

Respondent

Hearing: 24 July 1989

Counsel C.J. O'Neill for Appellant
C.Q.M. Almao for Respondent

Judgment

RESERVED JUDGMENT OF ANDERSON J.

This is an appeal against conviction and sentence in respect of determinations on an information alleging that on 26 March 1989 the appellant did commit an offence against the Summary Offences Act 1981, s. 28(1) and (2) in that he was found in a public place, namely the riverbank at Hamilton, behaving in a manner from which it can reasonably be inferred that he was preparing to commit a crime.

A caretaker in a building situated in Victoria Street, Hamilton, happened to be looking out of the window of his fourth floor flat at about 3.15 pm on Sunday, 26 March 1989, when he saw two persons, one of whom was the appellant, acting in a particular way in respect of a

building near the bank of the Waikato River. This building, which is used by the Martial Arts Society, was close to and visible from the public walkway on the riverbank. The caretaker said in evidence that he saw the appellant

> " ..walking around the back of the karate hall testing the windows. He was shaking the boards that were across the windows. They have a big lock there on the karate hall door and this chappie was testing all the windows and pulling on the boards. After three or four minutes the other fellow came back up to the bank but the chappie over here went round the Citizens Advice Bureau. I couldn't see what he was doing around the back but he came around the front of the Citizens Advice Bureau . He went along testing windows and putting his hands underneath, by this time I had rung the Police and told them I was observing these people, and then he put his hands underneath and spun out the five ply, or whatever it was on the door.....After I saw this board being pulled off, then they came back, there is a walkway between the picture theatre and the bank, they went off there and at about the time they got half way down the Police arrived and I went down by the karate hall and saw the Police interview the people. Immediately after pulling the board off the window, I cannot recall the boys doing anything else. They then made their way to the alley way."

Upon being interviewed in the vicinity of the building in question the appellant made a statement to the effect that he was simply walking around, was not trying any boards or windows, and was just being nosy. He gave evidence at trial to a similar effect.

The District Court Judge reached the conclusion that the evidence established beyond reasonable doubt that any person in the situation of Mr Banks, the caretaker,

could reasonably have inferred that the appellant was preparing to commit a crime, namely the crime of burglary, and a conviction was duly entered. The District Court Judge then sentenced the appellant to one month's periodic detention and placed him on supervision for six months with the special condition that he undertake counselling and/or treatment for drug abuse. In sentencing the appellant, the District Court Judge noted he would deal with the appellant as leniently as possible.

It seems that after such sentence had been imposed and on the same day as its imposition, it was learnt that the particular offence was not one capable of attracting a sentence of periodic detention. The maximum penalty was a fine of $1000. The information notes that a re-hearing was granted as to penalty, in consequence of which the appellant was fined $500, ordered to pay costs of $65, all of which could be repaid at the rate of $30.00. The District Court Judge who noted the information in those terms was not the same Judge who had imposed the penalty earlier in the morning. How another Judge came to deal with the matter is not known. Nor is there anything to indicate whether the re-hearing was at the application of the appellant, whether he was present on the re-hearing, or whether the $500 fine was imposed after consideration of a statement of means. All of these matters are addressed in counsels' submissions on the appeal against sentence. It was further submitted that the imposition of $500, being

half the legal maximum, was scarcely consistent with the view taken by the Judge originally seized of the matter that as lenient a view as possible was appropriate.

The submissions in respect of the appeal against conviction may be summarised as follows:

1. The appellant was not "found" in a public place behaving in a manner relevant to the information.

2. The behaviour as observed by Mr Banks, the caretaker, was not such that one could reasonably infer that the appellant was preparing to commit a crime.

The essence of the submission in relation to the element of being found is that observation of the appellant in one place by a person in another place did not constitute a finding in terms of the section. It was submitted that Mr Banks was too remote from the locus of the conduct to be considered as having found the appellant. I do not accept that submission. In McKenzie v Police [1956] NZLR 1013, the word "found" was considered in the context of s.41(a) of the Police Offences Act 1927 which provided for the offence of being found drunk in a public place. At p.1015, Henry J noted that the word had been the subject matter of judicial decision in other statutes and that the Courts have always imported some perception by means of one of the senses that the person or thing was present. Reference is made to Thomas v Powell (1893) 57 J.P. 329, where it was held that if a person is clearly detected or seen or clearly

ascertained to be on premises he could be said to be found on the premises. That observation was referable to constables in hiding having visual perception of the defendant actually going into and later coming out of the premises.

In The Police v Carter [1978] 2 NZLR 29, the Court of Appeal saw no justification for putting a special meaning on the word "found" in relation to s.54 of the Police Offences Act which refers to being found in certain circumstances. The Court of Appeal considered it "salutary to bear in mind the warning given by the House of Lords in Brutus v Cozens [1973] AC 854, against composing an elaborate definition of an ordinary word in the English language, if the statutory context does not show that the word is used in an unusual sense."

In Palmer-Brown v Police [1985] 1 NZLR 365, the Court of Appeal considered the word "found" in terms of the ordinary dictionary meaning and did so specifically for the purpose of s.28 of the Summary Offences Act 1981. It was observed that the ordinary dictionary meaning of the word suggested some degree of perception by the senses. At p.369 Somers J found that a proposition justified by the language and purpose of s.28 of the Summary Offences Act 1981 was that a person is "found" when he is seen or discovered or perceived to be present.

Just as in Thomas v Powell (supra) the defendant was held to have been found in premises when there had been an ocular observation of him by the constabulary going into and later leaving the premises, the ordinary meaning of the term "found" is not necessarily confined to circumstances when the observer and the observed are in the same place. One need only consider such everyday expressions as:

> "I telephoned various places until I found him at his work."

where the discoverer and the discovered are in quite separate locations, and not even necessarily in each others sight. Further, one commonly refers to finding references in books where naturally the reference and the discoverer are in quite different loci.

In the present case the appellant must be considered as having been "found" by Mr Banks in respect of the conduct observed by that witness. The issue then is whether such conduct amounts to the appellant "behaving in a manner" from which it can reasonably be inferred that he was preparing to commit a crime. The inference that may possibly be taken from behaviour cannot be considered in isolation from the context in which such behaviour occurs. Relevant aspects of the particular context are as follows:

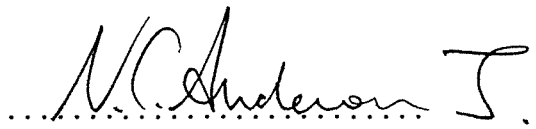
(1) The incident occurred in broad daylight on a Sunday afternoon.

(2) The building in respect of which the behaviour occurred was contiguous to a frequented public pathway where, according to the evidence, people were coming and going.

(3) There was no evidence of any tools being used such as one might expect if the building were being set up for furtive entry at a more convenient time.

(4) The two persons indulging in the behaviour were youths, having been referred to by Mr Banks as "boys".

With all respect to the learned District Court Judge, I cannot accept that the facts, which are not really in dispute, are such as to allow it reasonably to be inferred that the appellant was preparing to commit a crime. A reasonably available, and in my judgment equally available, inference is that the appellant and his companion were, as the appellant said, simply being nosy. Accordingly, the appeal succeeds. The conviction and penalty are quashed.



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Solicitor for the Respondent — Crown Solicitor Hamilton