IN THE SUPREME COURT)
)
OF VICTORIA)

Case No. 48/86

B E T W E E N -

WARREN LESLIE BOTTON
Applicant

-AND-

FRANCIS RAYMOND WINN
Respondent

BEFORE THE HONOURABLE MR. JUSTICE PHILLIPS

AT MELBOURNE ON FRIDAY, 18 DECEMBER 1987, AT 10.03 A.M.

APPEARANCES :

MR. L. THOMPSON (Instructed by Messrs. McNab & McNab) appeared on behalf of the Applicant.

MR. J. HARRISON (Instructed by The Victorian Government Solicitor) appeared on behalf of the Respondent.

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COURT RECORDING SERVICES PTY. LTD.,
125-129 Peel Street,
North Melbourne, 3051.

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J U D G M E N T

(Delivered 18 December 1987)

HIS HONOUR : This is the return of an order nisi to review certain orders of the Magistrates' Court at Sunbury, made on 8 April 1986.

On that day, the applicant was before the Court, charged on the information of the respondent as follows -

(1) that, on the 22nd day of December 1985 at Sunbury in the State of Victoria, he was found in a drunk and disorderly condition in a public place, to wit, Evans Street;

(2) that, at Sunbury on the 22nd day of December 1985, he did hinder Graham Henry Comitti, a member of the police force, in the execution of his duty; and

(3) that, at Sunbury, on the 22nd day of December 1985, he did resist Francis Raymond Winn, a member of the police force, in the execution of his duty.

The applicant pleaded not guilty to the informations

as laid and was represented by counsel.

Evidence was called for both the prosecution and the defence and, in the result, the learned Magistrate convicted the applicant on each of the charges. On the first charge, the applicant was fined $20 and on each of the second and third charges, the applicant was fined $150.

On 6 May 1986, the applicant obtained from Master Barker the following order -

"I do order that the above named respondent, Francis Raymond Winn, a person interested in maintaining the orders of the Magistrates' Court at Sunbury, made on the 8th day of April 1986, do, upon service upon him of a copy of this order and a copy of the said affidavit, show cause before this honourable Court before the judge taking the Miscellaneous Causes List on a date to be fixed at the call-over of the said list in 1986 or at such subsequent call-over thereof at which the case may be reached, why the said orders made by the Magistrates' Court at Sunbury on the 8th day of April 1986 constituted by Mr. Tenni, Stipendiary Magistrate, whereby the applicant was convicted of being drunk and disorderly, hindering police and resisting arrest, should not be reviewed on the following grounds -

(1) that the Stipendiary Magistrate was wrong in law in finding the applicant disorderly;

(2) that the Stipendiary Magistrate was wrong in law in finding that the words used by the applicant hindered Constable Comitti, a member of the police

force, in the execution of his duty;

(3) that the Stipendiary Magistrate was wrong in law in finding that the applicant was, in resisting removal of his wristwatch, resisting the respondent in the execution of his duty."

In this proceeding, the applicant made an affidavit, sworn 6 May 1986, and Senior Constable Comitti, and Senior Constable Winn made affidavits on 20 November 1987 and the 19 November 1987 respectively.

In my opinion, the bulk of Senior Constable Winn's affidavit is in a fundamentally unsatisfactory form and I decline to act upon para. 3 thereof. My reasons are as follows.

Paragraph 3 commences with the following statement - "As to para. 7 of the said affidavit" (the deponent is referring to the applicant's affidavit) "I say that the following is a true and accurate account of the evidence in chief given by myself, when called, having reference to my notes."

Thereafter, for some five pages, this paragraph contains a narrative of events of Sunday, 22 December 1985, in Evans Street, Sunbury and at an unnamed police station. It contains a deal of material which would have been inadmissible in any proceedings against the applicant and, in my opinion, it is improbable that the learned Magistrate would have permitted such evidence to be given in the subject proceedings. It is entirely unclear to me whether the deponent is saying that he recalls reading or utilising his notes in the witness box with leave of the Court or whether he can now no longer remember

searched her and removed her brassière. The two officers believed they were acting pursuant to Standing Orders of the Chief Constable. The defendant was convicted of unlawfully assaulting one of the police officers in the execution of her duty. It was held on appeal, (Donaldson, L.J. and Musthill, J.), that a police officer was under a duty to take all reasonable measures to ensure that a prisoner did not escape or assist others to do so, did not injure himself or others, did not destroy evidence or commit further crime but that that duty had to be exercised with regard to the disposition of each individual prisoner, in all the circumstances of each particular case and that, even though the police officer believed she was acting in accordance with Standing instructions, she was still under a duty to consider whether the search was necessary for any lawful purpose and whether the removal of the brassiere was necessary for the defendant's own protection and, since she had not applied her mind to those matters, her conduct was not justified. Accordingly, she was not acting in the course of her duty and the defendant was entitled to use reasonable force to resist. Donaldson, L.J. referred to an old case of Bessell -v- Wilson, (1853) 17 J.P., 52, where Lord Campbell, C.J. made the following observations -

> "It may be highly satisfactory and, indeed, necessary that a prisoner should be searched. I have never said that searching a prisoner was always a forbidden act."

Lord Campbell later added -

> "It is said that the search here was justified because the person in custody might have had some instrument about him with which he might make away with and injure himself or the Alderman before whom

he was brought. This does not appear a satisfactory reason. It assumes that, when a man is apprehended, because he has in the first instance appeared by counsel and not in person, he will take with him the means of committing suicide or murder. That is a most absurd supposition."

Donaldson, L.J. cited Reg-v- Naylor, (1979) Crim. L.R. , 532, where Judge H. A. Skinner, in directing a jury, expressed the following views which are set out in summary form in the report -

"Police officers have a right to search a person lawfully in their custody and to take possession of property but it is a very limited one. They may search for and remove objects which they reasonably suspect to be connected with a criminal offence committed by the accused. They may search for and remove any object with which a prisoner might do himself or others injury or they may remove a tool which could be used to effect escape."

Halsbury's Laws of England, 4th Ed., Vol.11, 1976, para. 121, was also referred to by Donaldson, L.J. as follows -

"Search of persons arrested. There is no general common law right to search a person who has been arrested but such a person may be searched if there are reasonable grounds for believing -

(1) that he has in his possession any weapon which which he might do himself or others an injury or any implement with which he might effect an escape; or

(2) that he has in his possession evidence which is material to the offence with which he is charged."

Donaldson, L.J. then made the following observations -

"It is the duty of the Courts to be ever zealous to protect the personal freedoms, privacy and dignity of all who live in these islands. Any claim to be entitled to take action which infringes those rights is to be examined with very great care. But such rights are not absolute. They have to be weighed against the rights and duties of police officers,

acting on behalf of society as a whole. It is the duty of any constable, who lawfully has a prisoner in his charge, to take all reasonable measures to ensure that the prisoner does not escape, or assist others to do so; does not injure himself or others; does not destroy or dispose of evidence and does not commit further crime, such as for example malicious damage to property. This list is not exhaustive but it is sufficient for present purposes. What measures are reasonable in the discharge of this duty will depend on the likelihood that the particular prisoner will do any of those things unless prevented. That, in turn, will involve the constable in considering the known or apparent disposition and sobriety of the prisoner. What can never be justified is the adoption of any particular measures without regard to all the circumstances of the particular case. This is not to say there can be no standing instructions. Although there may always be special features in any individual case, the circumstances in which people are taken into custody are capable of being categorised and experience may show that certain measures, including searches, are prima facie reasonable and necessary in a particular category of case. The fruits of this experience may be passed on to officers in the form of standing instructions but the officer, having custody of the prisoner, must always consider and be allowed and encouraged to consider whether the special circumstances of the particular case justify or demand a departure from the standard procedure, either by omitting what would otherwise be done or by taking additional measures. So far as searches are concerned, he should appreciate they involve an affront to the dignity and privacy of the individual. Furthermore, there are degrees of affront involved in such a search. Clearly, going through someone's pockets or handbag is less of an affront than a body search. In every case, the police officer ordering a search or depriving a prisoner of property should have a very good reason for doing so."

With that judgment, Musthill, J. agreed.

In another old case, R. -v- William Kinsey, 173 E.R., 198, Baron Gurney and Patteson, J., being the judges of the court at which a prisoner was indicted, directed the return of a watch and other articles, which had been taken from the prisoner upon his apprehension on a charge of rape. In Brazil -v- Chief Constable of Surrey, a divisional court, Robert Goff , L.J. and McNeil, J.

held that there was no general rule that everyone brought into a police station had to be searched for their own safety and, accordingly, police officers were not entitled to carry out a personal search without regard to the circumstances of the particular case. Lindley -v- Rutter was followed in circumstances where the facts were that, having been arrested and taken to a police station, a defendant complied with a request to empty her handbag but, when told that everyone brought to the police station had to be searched for their own safety, became abusive and struck the policewoman concerned across the face with her handbag. A senior officer, who was then called, formed the suspicion on reasonable grounds that the defendant was in possession of prohibited drugs but did not tell her this before, or at the time of, informing her that she had to be searched. She was forcibly searched and, in the course of which she assaulted another policewoman; she was charged with two offences of assaulting a police constable in the execution of her duty. The Court held that a personal search by police officers imposed a restraint on a person's freedom, to which he should not be required to submit unless he knew in substance the reason for it, that a police officer who had decided to carry out a search should inform the person concerned of the reason for it unless the circumstances rendered the giving of reasons unnecessary or impracticable and that, accordingly, since the officer in charge failed to communicate to the defendant the reason for the search, the officers were not acting in the execution of their duty when searching the defendant and the conviction for the second assault should be quashed.

These authorities appear to establish the following

matters of principle -

(1) that a police officer has a right to search a prisoner in lawful custody and take possession of property in circumstances where he or she reasonably suspects the property may be connected with a crime committed by the prisoner (and arguably any other crime) or where part of the property is an object which might be used to do injury to the prisoner or others or to effect an escape or cause damage;

(2) a police officer purporting to exercise this right must have regard to all the circumstances of the particular case to ensure its valid exercise;

(3) at least some searches should be preceded by the police officer informing the person to be searched of the reason or reasons for the search.

In the instant case, it was encumbent upon the prosecution to prove that Senior Constable Winn, in removing the applicant's watch, was acting "in the execition of his duty". Proof of this matter directly raised the justification in law for the removal of the watch.

I was referred to the Police Standing Orders by counsel, namely, the Victoria Police Standing Orders 1986, which were issued under the authority of Chief Commissioner S. I. Miller. With respect, I consider that they appropriately reflect the need referred to by Donaldson, L.J., in Lindley-v- Rutter for the circumstances of the particular case to be adverted to by the police officer concerned.

The relevant orders read -

"9.9 (1) Any search of the person of another conducted without authority and without the consent of the person being searched, is unlawful

and could result in legal action being taken against the member conducting the search.

(2) Power to search the person of another without warrant is vested in common law only under the following circumstances:

(a) Following a lawful arrest, a member may search a prisoner if he behaves with such violence or language or conduct that the member may reasonably think it prudent to search him to ensure he does not possess any weapons, instruments or articles with which he may do mischief; and

(b) on the lawful arrest of a person, the member may take and detail property found in the prisoner's possession, if such property is likely to afford material evidence for the prosecution in respect of the offence of which the prisoner has been charged or any other criminal offence and then only by the use of such force as is reasonably necessary (see also Standing Order 4.15).

9.10 (1) It is responsibility of both the Watchhouse Keeper and the arresting member of the Force to see that no prisoner retains in his possession anything with which he might effect an escape from the watchhouse or any weapon, implement, poison, matches or other article with which he might cause mischief or injury to himself, harm to others or damage to property. For this purpose, every prisoner, whether held for criminal or civil matters, shall be searched.

(2) Immediately after a charge is entered against

a prisoner, it shall be the duty of the arresting member of the Force to carefully search such prisoner and to remove all property from him for safe keeping and to note and compile such items of identification of the prisoner and his property as are necessary. Discretion is to be exercised in relation to the removal of certain property, for example, property of a sentimental or religious nature such as wedding ring, prayer book, etcetera. In cases where the prisoner objects to the removal of property of this nature, providing the requirements of sub-para.(1) are observed and having regard to para. 9.9, the prisoner shall be allowed to retain it."

It will be observed that these Standing Orders have a number of points of similarity with the instructions of the Chief Constable, to which the Court in Lindley-v- Rutter, was referred although, in the Victorian Standing Orders, the description of what might be termed personal items is expanded and includes such objects as prayer books, although I should have thought that the number of prisoners who actually have their prayer books in their possession upon arrest would not be substantial.

In the court below, the two police officers sought to justify the removal of the watch on apparently different grounds. Senior Constable Comitti asserted, in effect, that it represented a potential weapon and Senior Constable Winn referred to Standing Orders.

With respect, I agree entirely with what was said by Donaldson, L.J. about Standing Orders in Lindley-v- Rutter,

namely, that they instance measures which are prima facie reasonable and necessary in particular categories of case but the statements of principle to which I have earlier referred make it clear that regard must be had by police officers to all the circumstances of the particular case and, indeed, the Victorian Standing Orders plainly acknowledge this.

In my opinion, the only clear evidence justifying the removal of the watch was that given by Senior Constable Comitti . He regarded it as a potential weapon. But to the point of its attempted removal the applicant had exhibited no violence or tendency to violence whatsoever. The worst that could be said of him, to that point, was that he was in a drunken condition and had previously made a nuisance of himself. If regard had in fact been had to the particular circumstances of his case, there was simply no basis for the conclusion that he might use the watch as a weapon.

I now turn to the justification referred to by Senior Constable Winn, in para. 10 of his affidavit, "I gave evidence that it was a requirement provided in the Police Standing Orders that all property be removed from a prisoner for their own safety." I ask myself, what does that mean? This paragraph is a further reflection of the highly unsatisfactory drafting of this document. Is the safety referred to the safe keeping of the watch or the safety of the prisoner? The reference to Standing Orders suggests it is the safe keeping of the object.

At first sight, it would appear that the two

justifications cannot be related but this is not so, for Standing Order 9.10(2), while apparently incorporating a blanket instruction, then expressly makes provision for objection to removal of property which might be compendiously described as property of a personal nature. A wristwatch could plainly come within this description. The Standing Order provides that, upon objection being made, which is the case here on the evidence, then the prisoner shall be allowed to retain the property, providing it does not come within a description of a weapon or implement or other article with which he might cause mischief or injury to himself, harm to others or damage to property. The police officer is also required to have regard to Standing Order 9.9, which reference I take to relate to prisoners who have behaved violently on arrest or prisoners who have in their possession property likely to afford material evidence with respect to a criminal charge. Neither of these circumstances are relevant here.

In this way, therefore, the Standing Orders - as they were intended to do - reflect the common law as it emerges from the authorities to which I have already made reference and, at the end of the day, proof that Senior Constable Winn was acting in the execution of his duty, in terms of this information, required evidence that in the particular circumstances of this case the watch answered the description of any of the objects referred to in Standing Order 9.10(1). In my opinion, such evidence was lacking and it was not open in law for the learned Magistrate to convict the applicant on this charge.

The order nisi obtained with respect to this charge is made absolute, the conviction quashed and the penalty set aside.

I will now hear counsel on the question of the costs of this proceeding.

CERTIFICATE

I certify that this and the 19. . .preceding pages are a true copy of the reasons for judgment of the Honourable Mr. Justice PHILLIPS. . . . . of the Supreme Court of Victoria delivered on 18/12/1987. .

Dated this 18th day of January 1988

Catherine Hukhtan

Associate