IN THE COURT OF APPEAL [1994] QCA 227

SUPREME COURT OF QUEENSLAND

C.A. No. 66 of 1994.
C.A. No. 67 of 1994.
C.A. No. 65 of 1994.

Brisbane

[R v. Cook, Hartigan & McCart]

T H E Q U E E N

v.

BRETT ANTHONY COOK and BARRY WAYNE HARTIGAN
and THOMAS GERRARD McCART

Appellants

Pincus J.A.
McPherson J.A.
Byrne J.

Judgment delivered 23/06/1994

Joint reasons for judgment of Pincus J.A. and McPherson J.A., Byrne J. separately. All concurring as to the orders made.

IN EACH CASE:

1. **APPEAL ALLOWED.**
2. **CONVICTION QUASHED.**
3. **ORDER THAT THERE BE A NEW TRIAL ON A CHARGE OF UNLAWFUL ASSEMBLY.**

CATCHWORDS: CRIMINAL LAW - RIOT - Apellants participated in an unlawful assembly in a correctional centre - assembly turned into a riot - substantial damage resulted - appellants present but no active participation - whether guilty of riot - meaning of "takes part in a riot" in s. 92(2) *Corrective Services Act* considered.

Anderson v. Attorney-General for N.S.W. (1987) 10 N.S.W.L.R. 198.

R v. Aston (No. 3) [1991] 1 Qd.R. 443.

Counsel:Mr G Long for the appellants.
Mr D Bullock for the Crown.

Solicitors:Legal Aid Office for the appellants.
Director of Prosecutions for the Crown.

Hearing date:12 May 1994.

JOINT REASONS FOR JUDGMENT OF PINCUS J.A. AND McPHERSON J.A.

Judgment delivered 23/06/1994.

These are appeals against conviction, by persons convicted of having taken part in a riot of prisoners. The charges in question are defined by s. 92 of the *Corrective Services Act* 1988 and the principal issue in the case, so far as the appeals are concerned, is the proper construction of that section. There are also before us applications for leave to appeal against sentence.

The charges arose out of a disturbance on 12 November 1992 at the remand unit of the Arthur Gorrie Correctional Centre. It is said that most of the 34 prisoners in the unit were involved, and it appears not to be in question that the jury was entitled to be satisfied that a riot occurred; but counsel for the appellants says that the Crown had to prove that the appellants took part in that riot and that the learned primary judge did not make that clear to the jury.

It was established that, being of opinion that their cells were being searched unnecessarily, prisoners declined to muster and barricaded themselves in the unit; they used chairs and a refrigerator for this purpose. The affair escalated when the authorities brought dogs to the area with a view to restoring order. Some of the prisoners began to throw furniture about and to damage and attempt to damage property; a substantial amount of damage was done.

The three appellants were part of the group which was involved, but the extent of the involvement of each appellant was different. We take the allegations against them from the account given by the trial judge of the Crown's submissions, made below. As to Cook, the Crown said that he put his arm around another prisoner, pushed or moved chairs and was "continuously moving around in a purposive manner". With respect to Hartigan, the Crown relied upon his having pushed a chair before the riot started and, after it started, moving around in such a manner as to support a conclusion that he was continuing to support the riot. McCart, it was said, had thrown a chair. The Crown also relied, of course, on the presence of each man in the rioting group.

The precise details of the appellants' involvement is a matter which it is unnecessary to discuss at further length in order to determine the point on which the appeal hinges, which is whether certain directions given by the judge reflect a proper understanding of the provisions under which the charges were brought and convictions entered. Section 92 of the *Corrective Services Act* 1988 reads as follows:

> **"Unlawful assembly, riot and mutiny.** (1) A prisoner who takes part in an unlawful assembly of prisoners is guilty of a crime and is liable to imprisonment for 3 years.
>
> (2) A prisoner who takes part in a riot or mutiny of prisoners is guilty of a crime and, subject to subsections (3), (4) and (5), is liable to imprisonment for 6 years.
>
> (3) If a prisoner taking part in a riot or mutiny of prisoners wilfully and unlawfully destroys or damages, or attempts to destroy or damage any property, he shall be liable to -
>
> (a) imprisonment for 10 years;
>
> or

(b) where the property is part of a prison and the security of a prison is thereby endangered - imprisonment for life.

(4) If during a riot or mutiny of prisoners a demand is made by any of them that anything be done or not done with threats of injury or detriment of any kind to any person or property to be caused if the demand is not complied with, each prisoner taking part in the riot or mutiny shall be liable to imprisonment for 14 years.

(5) If a prisoner taking part in a riot or mutiny of prisoners escapes or attempts to escape from lawful custody or aids any other prisoner in escaping or attempting to escape from lawful custody, he shall be liable to imprisonment for 14 years.

(6) For the purposes of this section -

(a) when 3 or more prisoners with intent to carry out some common purpose assemble (whether inside or outside of prison) in such a manner or being assembled (whether inside or outside of prison) conduct themselves in such a manner that there are reasonable grounds to believe that they will tumultuously disturb the peace or will provoke other prisoners to tumultuously disturb the peace, they are an unlawful assembly, whether or not the original assembling was lawful;

(b) when an unlawful assembly has begun to act in so tumultuous a manner as to disturb the peace, the assembly is called a riot."

Mr Long for the appellants said that the Crown had to prove not only that there was a riot, but as against each appellant, that he took part in it. Mr Bullock argued for the Crown that if the jury was satisfied that the appellants formed part of a group which constituted an unlawful assembly, and was satisfied that the unlawful assembly became a riot, the appellants were guilty of riot, whether or not they themselves took part in it.

The passage in the judge's summing-up which is that chiefly attacked by the appellants is recorded as follows:

"If you are satisfied that an accused person was party to an unlawful assembly, then if that unlawful assembly tumultuously disturbs the peace, the accused is guilty of riot...Now for an accused to be guilty of riot it is not necessary that he personally act

> tumultuously to disturb the peace, provided that whilst he remains party to the unlawful assembly one or more members of the unlawful assembly tumultuously disturb the peace, so an accused can be guilty of riot without himself tumultuously disturbing the peace provided that whilst remains party to an unlawful assembly, one or more members of the unlawful assembly tumultuously disturb the peace".

Mr Bullock argues that these directions were correct in law, and relies principally upon the decision of the Court of Criminal Appeal in Thomas [1993] 1 Qd.R. 323. The relevant part of the judgment of Derrington J in that case deals principally with the construction of subs. (6) of s. 92, whereas it is subs. (2) upon which Mr Long places reliance. Derrington J explained, in the third sentence of his judgment, that the appellant's "only ground of appeal was that there was not a riot because there were not three persons or more involved in the disturbance at any time". The issue raised here was not before the court in Thomas and one finds in the reasons of Derrington J no discussion of the proper interpretation of subs. (2). We are of opinion, then, that the judgment in Thomas has no direct bearing upon the present point.

If Mr Bullock is right, then the operation of the relevant provisions in a case like the present is that once the Crown proves unlawful assembly, and then proves that the accused person was part of that assembly, and that the assembly began "to act in so tumultuous a manner as to disturb the peace", the case against the accused is complete as long as the accused was still a part of the assembly when it became a riot. One can see

that from the point of view of keeping order in prisons a legislature might wish so to provide, but it is not clear that the Queensland Parliament has done so by s. 92.

The Crown's argument essentially is that the statute contemplates that a doctrine of collective responsibility will be applied: those who happen to be in the assembly which turns into a riot are just as responsible as if they have themselves rioted. It should be noted that subs. (4) expresses such a notion: if a certain sort of demand is made during the riot, those taking part in the riot are liable to a special penalty, without any requirement that they have had anything to do with the demand.

If the Crown submission is right, then when an unlawful assembly becomes a riot, a person who took part in the former is deemed, so long as he remains present, to be taking part in the latter. The line of reasoning leading to this conclusion is as follows. Under para. (6)(a) of the section, when a number of persons act as described in that paragraph, they are an unlawful assembly. Paragraph (b) of the same subsection does not require that all the persons who constitute the assembly begin to act in "so tumultuous a manner as to disturb the peace"; it is not necessary that every individual in the assembly act in that way so long as one can say of the assembly, considered as a whole, that it is so acting. Then the assembly is "called a riot", which implies that all the persons who constitute the assembly are part of the riot; going to subs. (2), all of them are

persons who take part in the riot, because they have remained part of the assembly when it has been transmuted into a riot. The question is whether this argument should be accepted.

Suppose that a group of prisoners gathers together, forming an unlawful assembly, in the sense that they are discussing grievances in a way which the jury accepts is likely to lead to a tumultuous disturbance of the peace. Some but not all of the group then begin to act in the way mentioned in para. (6)(b), for example, by shouting threats at the warders and damaging property. On the Crown's theory of this section, even those who do not so act are then, by their very presence, guilty of riot. The alternative view is that the words "taking part in" in subs. (3) require that the accused be found to have done more than be merely present in the unlawful assembly at the time the riot begins.

It must be said the language of the section does not suit the Crown's argument well. To achieve the result for which it contends, the legislature need have said no more than that anyone forming part of the unlawful assembly when it begins to act in the way mentioned in para. (b) is guilty of the crime of riot; the Crown's argument requires one to dilute the natural force of the words "takes part in a riot" in subs. (2).

Assuming that the construction for which the Crown contends is a possible one, i.e. that the section is ambiguous, it is relevant to examine English authority on the offence of

riot. The Crown's contention might more readily be accepted, if an ambiguity in s. 92 is present, should it be found that the doctrine it puts forward had been established, under pre-existing law. In Royce (1767) 4 Burr. 2073, the accused was indicted for a statutory offence which may shortly be described as riot. The jury found, in effect, that there was a riot, that the accused was present and that he encouraged and abetted the others. The question was whether the accused was a principal in the second degree and therefore deprived of the benefit of clergy. The Court did not act on the view that Royce's mere presence was enough. The matter came before the court a number of times and ultimately the argument for Royce was unsuccessful, with dire consequences for him. Lord Mansfield, after explaining that "tenderness ought always to prevail in criminal cases", said that:

> "But tenderness does not require such a construction of words (perhaps not absolutely and perfectly clear and express,) as would tend to render the law nugatory and ineffectual, and destroy or evade the very end and intention of it: nor does it require of us, that we should give into such nice and strained critical objections as are contrary to the true meaning and spirit of it".

The same problem arises here: although the Crown's interpretation of the provision in question may seem a little strained, it has the advantage that it would tend to make the statute more efficacious.

In a civil case, Clifford v. Brandon (1810) 2 Camp. 358, Mansfield CJ summed-up to the jury on a question whether the plaintiff was guilty of riot. He said:

> "The law is, that if any person encourages or promotes, or

> takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter, and he is liable to be arrested for a breach of the peace". (370)

Then in Atkinson (1869) 11 Cox C.C. 330 at 332, it is reported that Kelly CB, in summing-up in a trial for riot, expressed himself to the following effect:

"The question was whether these five defendants were parties to the riot. He had already ruled as regarded the principal defendant that the mere presence of a person among the rioters, even though he possessed the power and failed to exercise it of stopping the riot, did not render him liable on such a charge; and the question was whether, as regarded these five defendants, there was sufficient evidence that they were assembled for an unlawful purpose. One description of unlawful purpose would undoubtedly be the preventing voters of a particular party from coming to the poll and recording their votes; and if the jury were satisfied that any number of persons (above three), and among them the defendants or any of them, were assembled with that purpose, and in the prosecution of that purpose committed any acts of annoyance on the voters, such persons would undoubtedly be guilty. So, if the defendants, or any of them being assembled for that purpose, had, as alleged, thrown stones at any of the houses, they would be guilty upon this indictment; and so as to any who obstructed or assaulted the officers in the discharge of their duty".

Again, the language does not encourage the notion that mere presence can make one guilty of riot.

The last English riot case to which we will refer is Caird [1970] 54 Cr.App.R. 499. There, Sachs LJ said:

"It is the law...that any person who actively encourages or promotes an unlawful assembly or riot, whether by words, by signs or by actions, or who participates in it, is guilty of an offence which derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose". (505)

Dealing with what was described as the "Why pick on me?" argument, the judge said:

> "This is a plea which is almost invariably put forward where the offence is one of those classed as disturbances of the public peace - such as riots, unlawful assemblies and affrays. It indicates a failure to appreciate that on these confused and tumultuous occasions each individual who takes an active part by deed or encouragement is guilty of a really grave offence by being one of the number engaged in a crime against the peace".

Although the point is not beyond argument, the cases taken together suggest that under English law some individual activity in furtherance of the riot has been regarded as necessary in order to justify a verdict of guilty against an accused person. There is nothing in these authorities to support the idea that once riotous behaviour is discerned on the part of some of a group of persons unlawfully assembled, so that one can say that a riot has begun, all the members of the group are guilty of riot. To constitute the offence, those charged must, it has been said, have "had an intent to assist each other in the execution of their purpose and...displayed force or violence sufficient to put a bystander of reasonable firmness and courage in fear": Anderson v. Attorney-General for New South Wales (1987) 10 N.S.W.L.R. 198 at 212 per McHugh JA (as his Honour then was). If these requirements are correctly stated, then it would be inherently impossible for mere presence in the crowd to be enough for a conviction of riot.

Some slight assistance is able to be obtained from a decision of the Court of Criminal Appeal on another charge under

this section, viz. the offence of mutiny, in R v. Aston (No. 3) (1991) 1 Qd.R. 443. To put the issue broadly, Aston had some involvement with mutineers, but the question was whether he was guilty of mutiny. The Crown relied upon s. 8 of the *Criminal Code* and Williams J, with whom the other members of the Court agreed, said:

> "The principal argument of counsel for the appellant was that the learned trial judge was in error in leaving the case go to the jury based on s. 8 of the Code. There may well be difficulty in applying s. 8 to this offence, because by definition the person must 'take part in' the mutiny with the intent discussed above..."

In its context the remark is illuminating, as indicating the court's view that some active step was necessary on Aston's part, he himself did no act intended to further the mutiny: 450.

One must give a meaning to the expression "takes part in" in subs. (2) with the help of the definition of "riot" in para. (6)(b). It appears to mean that the accused, to be guilty as a principal offender, must take part in the actions which make the assembly a riot. For example, if the tumultuous behaviour which makes the assembly a riot consists in the assembly moving in a threatening way, the accused must in our view be so moving, to support a verdict of guilty. If the behaviour relied on consists in a number of elements - for example, movement, threats and damage to property, the accused must himself or herself, be involved in at least some of that activity. The question whether a particular accused is sufficiently involved to justify a finding that he or she took part in the riot must be left to the jury.

It follows that the direction set out in the passage from the summing-up quoted above was incorrect. Other passages in the summing-up had a different tendency, but Mr Bullock did not argue that if the passage quoted was a misdirection the verdicts could stand.

There can be no question here of applying the proviso on the basis that there was no miscarriage of justice. We have had the advantage of being shown the relevant parts of the video record of the prisoners' behaviour, and from that it appears that if the jury had been told that no accused could be convicted of riot unless it was shown that he personally took part in the actions which made the assembly into a riot, there might have been different verdicts as to all three appellants. Indeed, although the point was not argued, we are inclined to think that a verdict of riot against the appellants, with the possible exception of McCart, would probably be unsafe, on the proper construction of s. 92. The video, according to the Crown, shows McCart throwing a chair, but Mr Long argued that it is difficult to say whether he did that, rather than lifting a chair up high and putting it down. At best for the Crown, there seems to be a weak case on a charge of riot against McCart; but there is certainly evidence of unlawful assembly against all the appellants.

In our view, a verdict of unlawful assembly was open on the charge of riot: s. 575 of the Criminal Code, as construed

in Tognolini (1983) 1 Qd.R. 99; a riot is an aggravated unlawful assembly.

The conclusion at which we have arrived on the argument concerning the judge's directions makes it unnecessary to consider a contention advanced by Mr Long, that verdicts of acquittal on certain other charges were inconsistent with the verdicts of guilty on the charges of riot.

The appeals must be allowed and there should not be a new trial, as to any of the appellants, on a charge of riot. The High Court ordered a new trial on a lesser charge open on the indictment in Kelly (1923) 32 C.L.R. 509, and that practice appears to have been accepted: Kolacz [1950] V.L.R. 200, Miller [1951] V.L.R. 346, Callaghan (1952) 87 C.L.R. 115, Hanias (1976) 14 S.A.S.R. 137 at 157, Cheatley (1981) 5 A.Crim.R. 114 at 124. It should be ordered that the appellants be retried on charges of unlawful assembly. The orders will be as follows:

In each case:

1. Appeal allowed.
2. Conviction quashed.
3. Order that there be a new trial on a charge of unlawful assembly.

REASONS FOR JUDGMENT - BYRNE J

Judgment delivered : 23/06/1994

"Takes part in" ordinarily connotes active participation in the conduct in question.[1] The analysis by Pincus and McPherson JJA of the riot cases reveals that the English common law affords no basis for supposing that, in choosing "takes part in" to describe the extent of involvement necessary to criminal responsibility for an association with a prison riot, the Parliament intended the expression to comprehend a passive spectator. And, in my opinion, s.92 of the Corrective Services Act 1988 does not manifest an intention to attach responsibility to a mere on-looker when an unlawful assembly of which the prisoner has been a member becomes a riot. Neither the Parliament's choice of language nor, as those words tend to reveal it, the section's evident intent suggests that, in s.92(2), "takes part in" has other than its ordinary meaning.[2] The judge's direction concerning the elements of the offence was wrong. The convictions must be quashed.

I would order a new trial. The evidence, which is summarized by Pincus and McPherson JJA, could, I think, sustain convictions on the footing that the appellants' conduct transcended passive presence and constituted such calculated encouragement to those who were engaged in the riot as to establish their complicity in the offence s.92(2) creates by virtue of s.7 of the Criminal Code.[3]

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[1]Commissioner for Corporate Affairs v Bracht [1989] VR 821, 831; cf Connecticut v Roque 460 A 2d 26,31; 39 ALR 4th 1158, 1166 (Conn, 1983).

[2]This view is consistent with the interpretation of American analogues: see W Burdick, 3 The Law of Crime, §759, cited in Campbell v City of Birmingham 405 So 2d 65, 68-9 (Ala Cr App, 1981); South Dakota v Bad Heart Bull 257 NW 2d 715, 719 (SD, 1977); Commonwealth v Reeves 387 A 2d 877 (Pa Super, 1978); Williams v Osmundson 281 NW 2d 622, 624-625 (Iowa, 1979); People v Bundte 197 P 2d 823, 830-831 (Cal Ct App 3rd, 1948); Delaware v Abbadini 192 A 550,552 (Gen Sess Del, 1937); 54 Am Jur 2d, "Mobs and Riots", §20, p.518.

[3]The Corrective Services Act does not exclude the operation of s.7 in respect of the offences s.92 prescribes either expressly or by implication: cf Mallan v Lee (1949)

Generally,[4] mere presence[5] at the scene of a crime does not involve criminal responsibility.[6] But presence to facilitate the commission of an offence by others has every potential to attract criminal responsibility under S.7. And so those present to "lend the courage of their presence to the rioters, or to assist, if necessary"[7] may be guilty with the active participants.

Incrimination under s.7(c) depends on demonstrating that the conduct knowingly aided contravention.[8] Criminal responsibility arises under s.7(b), however, where the presence is "for the purpose of enabling or aiding" another to commit an offence and may, it seems, attach even where the presence does not cause such an effect[9] provided, of course, that the offence is actually committed. These appellants were nearby, within sight and sound, throughout the riot. They must have observed

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80 CLR 198. And s.7 is not confined to offences created by the Code: West v Perrier; ex parte Perrier [1962] QWN 5; West v Suzuka [1964] WAR 112.

[4]Offences by omission involve special problems : J. Finn, "Culpable Non-intervention: Reconsidering the Basis for Party Liability by Omission", (1994) 18 Crim LJ 90.

[5]That is to say, the disinterested presence of a person not attending pursuant to a criminal design common with the main offender(s).

[6]It did not at common law: R v Coney (1882) 8 QBD 534; R v Russell [1933] VLR 59; Allen v Ireland [1984] 1 WLR 903,909; Black v Corkery (1988) 33 A Crim R 134,140; E. Wise, The Law Relating to Riots, 3rd ed (1889), pp.50-52; Archbold Criminal Pleading, Evidence and Practice, 45th ed (1994), § 18-14. It does not under the Code: Jefferies v Sturcke [1992] 2 Qd R 392; cf Larkins v Police [1987] 2 NZLR 282,289; and Dunlop v The Queen [1979] 2 SCR 881,891,893,896.

[7]77 CJS, "Riot", §17, p.429; cf R v Mammolita (1983) 9 CCC (3d) 85,90. As to presence and complicity under s.7, see R v Beck [1990] 1 Qd R 30.

[8]R v Jervis [1993] 1 Qd R 643, 647.

[9]R v Beck at 38, 45; cf S Bronitt, "Defending Giorgianni - Part One: The Fault Required for Complicity", (1993) 17 Crim LJ 242, 243 fn 4; K.J.M. Smith, "The Law Commission Consultation Paper on Complicity", [1994] Crim LR 239,241; contrast Larkins v Police at 290; R v Wentworth [1993] 2 NZLR 450, 453; and K.J.M.Smith, A Modern Treatise on the Law of Criminal Complicity, (1991), Chap.3.

its progress.[10] In all the circumstances, a jury might fairly regard their conduct as evidencing intentional encouragement to those engaged in the riot, which exposes the prospect of convictions based on s.7(b) and, perhaps, on s.7(c).[11]

However, Mr Bullock expressly disclaimed reliance on s.7. But for this, I would have ordered a new trial on charges of having contravened s.92(2).[12] In view of Mr Bullock's attitude, I agree in the orders proposed.

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[10]see R v Ancuta [1991] 2 Qd R 413, 418-419.

[11]It is unnecessary to consider whether there is scope here for s.8 of the Code, to which Mr Bullock made no reference.

[12] With particulars of the grounds relied on: Giorgianni v. The Queen (1985) 156 CLR 473, 479; King v The Queen (1986) 161 CLR 423,437.