

SUPREME COURT OF QUEENSLAND

CITATION: *Cox v Robinson* [2000] QCA 454

PARTIES: **COX, Donna Maree**
(respondent)
v
ROBINSON, Luke Travis
(applicant/appellant)

FILE NO/S: CA No 175 of 2000
DC Appeal No 2 of 2000

DIVISION: Court of Appeal

PROCEEDING: Application for leave s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Charleville

DELIVERED ON: 7 November 2000

DELIVERED AT: Brisbane

HEARING DATE: 26 October 2000

JUDGES: Davies, Pincus and Thomas JJA
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **Application for leave to appeal granted and appeal to this Court from the District Court allowed. The order of Judge Wylie of 2 June 2000 dismissing the appeal from the orders of Mr Casey SM set aside; the order of Mr Casey SM dated 20 March 2000 convicting the appellant quashed and the sentence imposed set aside and in lieu order that the charge be dismissed.**

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST PEACE AND PUBLIC ORDER – ASSAULTING, RESISTING, HINDERING, OR OBSTRUCTING POLICE OFFICER – PARTICULAR ACTS - whether offence of obstructing police under s 120 *Police Powers and Responsibilities Act* 1997 made out where applicant failed to comply with “Identifying Particulars Notice” within the 48 hours specified for compliance - whether warning in small print on notice sufficient compliance with duty to give warning pursuant to s 57(3) of the *Police Powers and Responsibilities Act* 1997 - warning requirement an ingredient of the offence – warning must be such as would reasonably be expected to convey to the particular recipient the message that non-compliance will be

an offence

Police Powers and Responsibilities Act 1997 (Qld), s 57(1)(b)(ii), s 57(3), s 120

Police Powers and Responsibilities Act 2000 (Qld), s 272, s 445

COUNSEL: B G Devereaux for the applicant/appellant
T A C Winn for the respondent

SOLICITORS: Legal Aid Queensland for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **DAVIES JA:** I agree with the reasons for judgment of Thomas JA and with the orders he proposes.
- [2] **PINCUS JA:** I agree with Thomas JA.
- [3] **THOMAS JA:** In the Magistrates Court at Charleville the applicant was convicted of obstructing a police officer. He appealed to the District Court which dismissed the appeal. He now seeks leave to appeal against the decision of the District Court.
- [4] On 6 October 1999 two police officers spoke to the applicant who was at that time facing a charge of unlawful use of a motor vehicle. They told him that they had to get his fingerprints, and served him with a Notice to Attend the Magistrates Court on 9 November 1999 and a further "Identifying Particulars Notice". The latter notice contained various information identifying the applicant and the police constable who issued it. It included the following statement:

**"You are required to attend at the below
police station within 48 HOURS to enable a
police officer to take or photograph all or
any of your identifying particulars.**

WARNING. It is an offence to contravene this requirement.

The police station you are required to attend is:

Charleville"

The warning (as distinct from the primary requirement of the notice) was in small type. To say the least, it was not printed in such a way as to attract attention.

- [5] The police to some extent discussed the notice with him and told him that "This thing here says 48 hours, right", and that "Half-past seven, Friday night, is the latest you can come in", and "Just don't forget, that's all".
- [6] The applicant did not present himself within 48 hours. The stipendiary magistrate accepted that the applicant simply overlooked the matter. On 12 October, which was four days after the nominated time, Senior Constable Cox spoke with the

applicant by telephone and reminded him to attend. The applicant's reply was, "Yes, I'm coming, I'm coming", and on the following day he attended the police station and was duly fingerprinted.

- [7] The police then proceeded to charge him with the present further offence of obstructing police under s 120 of the *Police Powers and Responsibilities Act 1997*. The relevant sections are as follows:

"57 (1) If a police officer starts a proceeding against a person for a relevant offence –

...

(b) if a police officer decides to start the proceeding by notice to appear or complaint and summons – the police officer may –

...

(ii) by written notice, require the person to attend at a stated police station within 48 hours to enable a police officer to take or photograph all or any of the person's identifying particulars

...

(2) A notice under subsection (1)(b)(ii) must be given to the person with the notice to appear or complaint and summons and may be proved on oath or by deposition under the *Justices Act 1886*, section 56(3).

(3) A police officer must warn the person it is an offence to contravene a requirement under subsection (1)(b)(ii).

(4) A person must comply with a requirement under subsection (1)(b)(ii).

120 (1) A person must not assault or obstruct a police officer in the performance of the officer's duties.

Maximum penalty – 20 penalty units or 6 months imprisonment

...

(2) In this section –

...

"obstruct" includes contravene a requirement or direction under this Act, hinder, resist and attempt to obstruct."

- [8] The magistrate convicted the applicant on the charge of obstruction and fined him \$150 in default three days imprisonment.

- [9] The principal ground of appeal before Wylie DCJ, and again here, is that the written warning on the "Identifying Particulars Notice" is insufficient to satisfy the requirements of s 57(3) that a police officer warn the person. The first question however is whether absence of proof of a warning under s 57(3) is fatal to such a prosecution. Mr Winn, counsel for the respondent police constable, submitted that a failure to warn would be a mere failure of duty on the part of a police officer to which no particular consequences were likely to be attached, except perhaps possible discipline. However in my view the warning is an essential part of a valid

requirement under s 57(1)(b)(ii), and should be regarded as an ingredient of the offence. Furthermore, the offence under s 120(1) is obstruction of a police officer "in the performance of the officer's duties". If a contravention occurs following a police officer breaching his express duty to warn the other person under s 57(3), it would be difficult to say that the obstruction was one in the performance of the officer's duties. The relevant duty would be to make a proper requirement under s 57(1)(b)(ii), and in my view that involves the police officer's own compliance with s 57(3).

- [10] The next question is whether the evidence establishes that a warning was given in compliance with s 57(3). That section requires that the police officer "must warn the person". Mr Devereaux, on behalf of the applicant, submitted that an effectively communicated warning is contemplated. Mr Winn, for the respondent, submitted that the notice endorsed on the "Identifying Particulars Notice" was a warning and that it was sufficient irrespective of its effect. Although the obligation upon the police officer is to "warn the person" I do not think that this places any burden upon the prosecution to prove that the recipient actually understood the warning. But it is necessary to prove that such a warning was given as would reasonably be expected to convey *to that recipient* the message that if he or she does not attend at the nominated police station within 48 hours he or she will be guilty of an offence. In my view it is immaterial whether the warning is written, oral or a combination of warnings of different kinds.
- [11] I do not think that such a warning, particularly in the small print and configuration of this particular notice can be regarded as automatically satisfying the requirement. A significant portion of our population is illiterate and would not be appropriately warned by the mere receipt of such a form. The most recent survey of literacy published by the Australian Bureau of Statistics is the "Survey of Aspects of Literacy" conducted in 1996, the results of which have been published in the report "Aspects of Literacy: Assessed Literacy Skills, 1996".¹ The most relevant part for present purposes is that dealing with "prose literacy" which was described as "the ability to understand and use information from various kinds of prose text, including texts from newspapers, magazines and brochures". On a rating of 1 to 5 (with 1 being the lowest) the conclusion in the report is that 19.7% of people aged 15 to 74 had level 1 prose literacy skills, and a further 27.5% had level 2 prose literacy skills. With respect to level 1 it was stated that "People at this level have very poor skills, and could be expected to experience considerable difficulties in using many of the printed materials that may be encountered in daily life". Significantly, some people at this level could not successfully complete tasks that involved locating a single piece of information in a relatively short text. The report suggests that some 47.2% of Australians aged between 15 and 74 could be expected to experience some difficulties in using many of the printed prose materials that may be encountered in daily life. On the basis of this survey it seems likely that almost one person in five would have significant difficulty in successfully grasping the meaning of a warning in a form such as the "Identifying Particulars Notice" in question. This merely confirms my initial impression that the unexplained inclusion of such a notice in the middle of a form would be inadequate in relation to a significant proportion of likely recipients.

¹ ABS 8 September 1997.

- [12] Even a significant part of the literate population tends to be flustered by forms. It may be noted that this 19 year old applicant was given two separate forms on the occasion in question, one called a "Notice to Appear" and the other called "Identifying Particulars Notice". The purpose of the legislation is to warn a recipient of an "Identifying Particulars Notice" that non-compliance with it will amount to a criminal offence. It is also to be remembered that any police officer can give an Identifying Particulars Notice to any person whenever he or she starts a proceeding against a person for a "relevant offence" and does so by means of a Notice to Appear or by a complaint and summons. The police officer may nominate the police station to which the citizen must present himself or herself within the prescribed 48 hours. The capacity of this procedure to multiply the convictions of offenders is very considerable. It is important that the protection afforded by s 57(3) not be under-valued.
- [13] I reject any notion that any particular mode of warning will always suffice for all occasions. I also reject the notion that it will always be necessary for an additional oral warning to be given. The inclusion of a written warning, whether on the notice itself or on a separate notice, is of course a useful starting point as it may at least avoid unnecessary areas of factual contention over the terms of the warning. But I am prepared to say that the inconspicuous statement in small print of the same colour as the other parts of the notice is less than might be expected from a department concerned with law and order and motivated by a desire to ensure that fair warning is given.
- [14] Whether a warning is sufficient to persuade a magistrate beyond reasonable doubt that it constitutes a warning to the particular defendant is a matter which will depend upon the circumstances revealed by the evidence in the particular case. The burden of doing so is upon the prosecution. Mr Devereaux drew the court's attention to the fact that the legislation here in question (the *Police Powers and Responsibilities Act* 1997) has now been replaced by another Act; namely the *Police Powers and Responsibilities Act* 2000. Under the latter Act ("the PPR Act 2000") it is worthy of note that although the failure to comply with a requirement or direction of this kind remains an offence, it no longer constitutes the artificial, and it might be thought inappropriately named offence of obstructing a police officer in the performance of the officer's duties. Under s 445 of the PPR Act 2000 the offence is more appropriately stated to be that of contravening a direction or requirement. It is also worthy of note that under the PPR Act 2000 there is a dual warning requirement on the part of the police officer. The notice itself must contain the statement that it is an offence to fail to comply with the notice, and that the police officer must warn the person it is an offence to contravene a requirement of the notice.²
- [15] So far as the present case is concerned, which is to be decided under the 1997 legislation, in my opinion the form of notice that was served, and the limited oral conversation at that time was not such as would reasonably be expected to succeed in conveying to the applicant the necessary message. Section 57(3) was not satisfied, and the charge should have been dismissed.

Orders

² *Police Powers and Responsibilities Act* 2000 s 272.

- [16] Leave to appeal should be granted and the appeal to this court from the District Court should be allowed. The order of Judge Wylie of 2 June 2000 dismissing the appeal from the orders of Mr Casey SM should be set aside; the order of Mr Casey SM dated 20 March 2000 convicting the appellant should be quashed and the sentence imposed set aside and in lieu it should be ordered that the charge be dismissed.