Solicitor, for appellant, *The Crown Solicitor for New South Wales.*

Solicitors, for respondents, *Curtiss & Barry*; *Stephen, Jaques & Stephen*; *Macnamara & Smith*; *Sly & Russell*; *Villeneuve Smith & Dawes.*

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ATTORNEY-GENERAL FOR N.S.W. v. ADAMS.

C. A. W.

CONS 94 ALR 575
Appl Lawrence v City of Melville (2002) 29 SR(WA) 210

[HIGH COURT OF AUSTRALIA.]

HAYWOOD AND ANOTHER . . . APPELLANTS; DEFENDANTS,

AND

MUMFORD . . . . . RESPONDENT. INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *October* 5, 6.

Griffith C.J., Barton, O'Connor and Higgins JJ.

Highway—Obstruction—Standing or loitering in street and not moving on when requested—Collecting a crowd—Interference with traffic—By-law—Police Offences Act 1890 (*Vict.*), (*No.* 1126), *sec.* 6*.

The term "obstruction" as used in sec. 6 of the *Police Offences Act* 1890 (Vict.) includes any continuous physical occupation of portion of a street which appreciably diminishes the space available for passing and repassing, or which renders such passing and repassing less commodious, whether or not any person is in fact affected thereby, and the lawfulness or unlawfulness of the obstruction, considered apart from the Act, is immaterial.

The two defendants, at about half-past six on a summer's evening, stood in the carriage way of a street of Sale playing a drum and a concertina and

*Sec. 6 of the *Police Offences Act* 1890 (Vict.), so far as material, is as follows:—

"Any local authority may from time to time make regulations for the route to be observed by all carriages carts vehicles and persons and for keeping order in the carriage and foot ways and public places of any city town or borough and for preventing any obstruction thereof whether by the assemblage of persons or otherwise."

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singing, and thereby collected a crowd of about 80 persons, and they refused to move on when requested to do so by a police officer. The magistrate found that there was no actual interference with the traffic and that the defendants were not making an unreasonable use of the street, but that their acts brought together a crowd which was likely to cause an obstruction of the street.

Held, that the defendants were properly convicted under a by-law made under sec. 6 of the *Police Offences Act* 1890, and which provided that any person obstructing any carriage way, &c., within the municipality by standing or loitering therein or thereon, should, upon being requested so to do by a member of the police force, discontinue such standing or loitering, and that any person committing a wilful breach of that regulation should be guilty of an offence against the section.

Decision of the Supreme Court: *Mumford* v. *Haywood*, (1908) V.L.R., 308; 29 A.L.T., 247, affirmed.

APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at Sale, before a Police Magistrate, an information under a by-law of the Borough of Sale was heard whereby James Hugh Mumford charged Henry Haywood and Millie Ross for that they wilfully obstructed a carriage way in York Street within the Borough of Sale by standing therein or thereon, and did not discontinue such standing upon being requested so to do by the informant, a member of the police force. The by-law provided that:—

"Any person obstructing any carriage way, foot way, or public place within the Borough of Sale, by standing or loitering therein or thereon, shall, upon being required so to do by any member of the police force, discontinue such standing or loitering.

"Any person committing any wilful breach of this regulation is guilty of an offence against the *Police Offences Act* 1890 and is liable to a penalty of £5."

It appeared that at about 6.30 p.m. on the evening of 9th December 1907 the two defendants, who were members of the "Salvation Army," took up their stand on the carriage way in York Street, Haywood playing a drum and Ross a concertina, and that both of them were singing; that a crowd of about 80 people were thereby collected on the foot ways; that there was no actual interference with the traffic; and that, on being requested to move on by the informant, the defendants refused to do so.

At the close of the evidence the Police Magistrate said that

there had been no interference with the traffic, that any one who was familiar with York Street, Sale, on a Monday night would know that it would be possible to fire a cannon down the street without doing any injury, and yet the regulation as it stood made standing in the carriage way an offence if not discontinued after a request by a constable to discontinue.

The magistrate having convicted the defendants, an order *nisi* to review was obtained on the grounds :—

1. That the Police Magistrate wrongly interpreted the regulation of the Borough of Sale made on 7th September 1893.

2. That the said regulation is unreasonable and beyond the powers of the Borough of Sale.

The order to review was heard by the Full Court, by whom the following questions were put to the Police Magistrate :—

"(1) Did you convict the defendants because you were bound to do so as a matter of law in deference to what you understood the case of *Mullany* v. *Miller* (1) to decide, because the defendants were standing in the street, and did not move on when requested to do so? or (2) Did you decide that, although actual interference with the traffic need not be shown, the defendants were, having regard to all the then existing circumstances, making an unreasonable use of the street."

The magistrate answered as follows :—"The reasons which led me to my judgment in this case were—That the defendants as members of the 'Salvation Army' were standing in the carriage way; that about 30 persons on one side of the carriage and foot ways, and about 50 persons on the other side had congregated there, watching them; that, although there was no actual interference with the traffic, nor were the defendants making an unreasonable use of the carriage way themselves, yet their so standing brought the crowd together, and that was likely to cause an obstruction to the carriage and foot ways. So, following my reading of *Mullany* v. *Miller* (1), when I found that the constable, in order to prevent an obstruction arising, required the defendants to discontinue such standing, and they refused to do so, I found them guilty of a wilful breach of the regulation, and convicted them."

(1) 26 V.L.R., 655.

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The Full Court having discharged the order to review (*Mumford* v. *Haywood*) (1), special leave to appeal to the High Court was obtained by the defendants, subject, however, to the case being argued as if the crowd had collected on the carriage way and not on the foot ways.

Starke and *Jacobs*, for the appellants. The regulation is only a prohibition against an obstruction by standing or loitering and does not apply to collecting a crowd. An obstruction is an act which interferes with the commodious use of the highway by the public. It must interfere in an appreciable degree with any member of the public who wishes to use the street: *Rex* v. *Bartholomew* (2). It must be either an actual interference with the traffic or something which renders such an interference practically certain if anyone wishes to use the street. Whether an obstruction exists or not must depend on the character and degree of the user of highway, so that the question is whether at the particular time and under the particular circumstances the act complained of appreciably interfered with the right of the public to pass and repass. If the use which is made of the street is reasonable and there is no interference in fact, the act does not amount to an obstruction: *Dunn* v. *Holt* (3); *Attorney-General* v. *Brighton and Hove Co-operative Supply Association* (4). What the magistrate found amounted to this, that at the particular time and under the particular circumstances there was no appreciable interference with the use of the highway by the public. Upon that finding the defendants should have been acquitted. If the by-law means—as the magistrate thought that, according to the decision in *Mullany* v. *Miller* (5), it did—that the mere standing in a street and not moving on when required to do so is an offence, then the by-law is *ultra vires*: *Berriman* v. *Robb* (6). The word "obstruction" is used in the by-law and in sec. 6 of the *Police Offences Act* 1890 in its technical sense, and must be such an obstruction as amounts to a nuisance at common law: *Walker* v. *Horner* (7); *McKell* v. *Rider* (8).

(1) (1908) V.L.R., 308; 29 A.L.T., 247.
(2) (1908) 1 K.B., 554.
(3) 73 L.J.K.B., 341.
(4) (1900) 1 Ch., 276.
(5) 26 V.L.R., 655.
(6) 18 A.L.T., 153.
(7) 1 Q.B.D., 4.
(8) 5 C.L.R., 480.

[Counsel also referred to *Archbold's Criminal Pleading and Evidence*, 22nd ed., p. 1147; *Rex* v. *Tindall* (1).]

Arthur, for the respondent. A person who makes an unreasonable use of a highway, although he is lawfully there, obstructs the highway within the meaning of the by-law: *Adams* v. *Horan* (2); *Original Hartlepool Collieries Co.* v. *Gibb* (3). This is irrespective of the time when the acts are done. It is an unreasonable use of the highway to hold religious or other meetings there: *Ex parte Lewis* (4), and that is what the appellants claim the right to do. *Rex* v. *Bartholomew* (5), and the other similar cases were cases of nuisance. Here it is not necessary to prove that what was done amounted to a nuisance. See also *Rex* v. *Ward* (6); *Homer* v. *Cadman* (7). The by-law contemplates a case in which the act complained of is calculated to obstruct. No actual interference with the traffic need be proved: *Reg.* v. *Justices of Fermanagh* (8). The Court should not consider the validity of the by-law because of the special provisions of secs. 213 (3) and 232 of the *Local Government Act* 1903 and of sec. 48 of the *Evidence Act* 1890.

Starke, in reply. It is not illegal to use a highway for a meeting, and the question is to what extent the by-law limits the right to do that which is not unlawful. Although, where a permanent structure is placed on a highway, the question of whether it is an obstruction or not is one irrespective of time, that is not so with regard to a temporary act, in which case the time at which the act is done as well as all other circumstances must be taken into consideration.

GRIFFITH C.J. This is an appeal from the Supreme Court of Victoria dismissing an appeal from justices by way of order to review. The appellants were charged with a breach of a regulation made by the Borough of Sale under powers conferred by sec. 6 of the *Police Offences Act* 1890, which provides that

(1) 6 A. & E., 143.
(2) 26 N.Z.L.R., 169.
(3) 5 Ch. D., 713.
(4) 21 Q.B.D., 191.
(5) (1908) 1 Q.B., 554.
(6) 4 A. & E., 384.
(7) 54 L.T., 421.
(8) 14 L.R. Ir., 50.

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any local authority may from time to time make regulations for, amongst other things, "keeping order in the carriage and foot ways and public places of any city town or borough and for preventing any obstruction thereof whether by the assemblage of persons or otherwise." The Borough of Sale made a regulation in these words: [His Honor read the regulation and continued.] The appellants were two members of the Salvation Army, and they were, in fact, holding a meeting in a street in Sale at about seven o'clock on a summer evening. It appeared that this street is not much frequented at that time, and the magistrate who convicted did not think that anybody was really inconvenienced by the presence there of the defendants, who had collected around them a crowd of persons numbering about 70 or 80.

It was contended by the appellants that it was not sufficient that there should be physical occupation of the street which diminished the space available for persons to pass and repass, but that it must also be shown that the public could not without substantial inconvenience go round the obstruction, and so make that use of the street which a reasonable and not churlish man might desire. In my opinion the term "obstruction," as used in the *Police Offences Act* 1890, includes any continuous physical occupation of a portion of a street which appreciably diminishes the space available for passing and repassing, or which renders such passing or repassing less commodious, whether any person is in fact affected by it or not. In the nature of things such a diminution of available space might be made by a single individual, although that is unlikely. For instance, a man who stood in the middle of the road with his arms stretched out or holding something in his hands might so appreciably diminish the available space. A crowd of persons standing in the street would certainly do so, and, if they were acting in concert, they would all be sharers in obstructing the street.

The lawfulness or unlawfulness of the obstruction is immaterial. A large van standing in a narrow street equally obstructs it, whether it is standing at the roadside to discharge goods or is left empty in the street, although in the former case the driver of the van is using the street for the purposes of a highway. But, if a by-law were made requiring vehicles standing under such

circumstances to be moved on, if so required by a police officer, it would be no answer to say that but for the by-law the driver would have been lawfully obstructing the highway.

The only question open on this appeal is whether or not the appellants were obstructing the street by standing or loitering within the meaning of the *Police Offences Act* and the Regulation. So far as the physical facts are concerned there can be only one conclusion. The crowd were collected by the action of the defendants, who were themselves part of the crowd, and the available space was thereby appreciably diminished. The case of *Rex* v. *Bartholomew* (1) is a clear authority against the contention that that was not enough unless under the circumstances of time and place it was likely that some person would be prejudicially affected. In that case the defendant was indicted for a nuisance caused by erecting a coffee-stall in the middle of a public street. The jury found a special verdict, that the coffee-stall was an obstruction, but that it did not appreciably interfere with the traffic in the street. The question was whether that finding was equivalent to a verdict of guilty. Lord *Alverstone* C.J. said that it might mean that, although there was an obstruction, so few people wanted to use the street that it did not matter, or that, having regard to the place where the coffee-stall was situated, it was no appreciable obstruction. He was of opinion that if it meant the first, it was a verdict of guilty, and that if it meant the second, it was a verdict of not guilty. That is to say, that, if the jury meant that the coffee-stall was an obstruction, but that so few people wanted to use that part of the street that it did not matter, the verdict was one of guilty. In that respect the present case is not distinguishable. *Channell* J. agreed on the same ground that the finding was ambiguous. Lord *Alverstone* C.J. pointed out, as it has been pointed out in other cases, that it is not necessary that anybody should in fact be passing down the street while the obstruction is there. The question is whether the obstruction is there ? As I pointed out in argument, it would be a very singular thing if, in the case of a log laid across a foot way, the person who put it

(1) (1908) 1 K.B., 554.

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there could be allowed to say that there was no obstruction because nobody fell over the log.

In my opinion the conviction was right, and upon the facts the magistrate could not have come to any other conclusion.

BARTON J. I am of the same opinion and do not think it necessary to add anything.

O'CONNOR J. I also agree that the conviction was right, but in view of the importance of the question, I wish to add a few words to what has been said by the Chief Justice. The foundation of the by-law is sec. 6 of the *Police Offences Act* 1890. The power given there is a power to manage the traffic and orderly conduct of the streets which are placed under the control of the Borough. It is important to observe the wording of the Act because, in interpreting the word "obstruction" in the by-law, a larger meaning cannot be given to it than it bears in the Act. The Act gives power to manage the streets. But the law recognizes certain rights of the public and of individuals to use the streets. It will not be taken that the Statute would interfere with those rights unless by express words. The section gives power to make by-laws "for preventing any obstruction thereof," *i.e.*, of the carriage and foot ways and public places. The obstruction must be an obstruction of some right to be exercised in the highway. I assent therefore to the argument of Mr. *Starke* that some limitation must be placed upon the meaning of the word "obstruction." It is not a word of art nor has it acquired any special meaning, but it is always used in describing a particular kind of nuisance, viz., the obstruction of a highway. What is obstruction of a highway? It is not only an obstruction which actually prevents someone from exercising his right on the highway; it is any obstruction which interferes to an appreciable practical extent with the right which every member of the public has to use the highway, and to use it at all times and under all circumstances.

The right of each person is not restricted to the particular part of the highway which may happen not to be in use by others at the time; it extends to the whole of the highway. Everybody

has the right to use the whole of the highway at any time he thinks fit for the purpose of passing and repassing, and anything which appreciably and practically interferes with that right is an obstruction of the highway. Mr. *Starke's* interpretation of the word "obstruction" would materially narrow the meaning. He did not contend—he admitted that it was impossible to contend—that some actual obstruction of some individual in the exercise of his right must be proved, but he contended that the obstruction must be something calculated to interfere with the public right under the then existing conditions of time and place. To adopt an interpretation of that kind would be to defeat the purpose of the Act. That purpose is to prevent the obstruction of highways. The Council may pass any by-law which is reasonably calculated to prevent the arising of an obstruction before it does arise, and it is therefore clearly in their power to make a by-law providing means by which an obstruction may be prevented. The by-law has provided that where a person is, by standing or loitering, causing an obstruction, notice may be given him to move on. If he does not move on, he commits an offence. In my opinion "obstruction" must be there interpreted in the sense I have explained, that is to say, any person who is standing or loitering in a highway in such circumstances that he is obstructing the use of the highway to which everyone is entitled—that is, the use of the whole of it—is committing an obstruction, and notice may be given him to move on. If it were otherwise, there would be no certainty in the duty which a constable is to perform in directing the actual working of the street traffic. If a constable is not to be guided by the rights of the public, but by the circumstance whether there is sufficient space left for the passing and repassing of the persons who happened to be in the streets at the particular time and under the particular circumstances, there would be a continually varying and uncertain rule which would be practically no guide to the constable. It seems to me, therefore, that Mr. *Starke's* interpretation of the word "obstruction," is not tenable.

Coming now to the facts of this case, there can be no doubt that standing in the street and collecting in the carriage way—for it must be assumed for the purpose of this appeal that it was

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in the carriage way—the number of persons described to have been collected here, is an obstruction to the right of members of the public passing and repassing along the street to use it in any way they think fit for that purpose. Under these circumstances the constable was justified in notifying the defendants to move on, and, as they failed to comply, they have been guilty of an offence against the by-law. The magistrate, it seems to me, clearly found sufficient facts to constitute the offence. Under these circumstances I think the decision of the majority of the Supreme Court was right.

HIGGINS J. I concur in the judgment of the Court. I should like to add that the point upon which *Madden* C.J. based his dissenting judgment was not open to the appellants on this appeal. I mean the point as to the distinction between the foot way and the carriage way.

Appeal dismissed with costs.

Solicitors, for the appellants, *Johnson & Johnson.*
Solicitor, for the respondent, *Guinness*, State Crown Solicitor.

B. L.