[HIGH COURT OF AUSTRALIA.]

HOWARD . . . . . APPELLANT;
DEFENDANT,

AND

JARVIS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1958.

HOBART, *Feb.* 18, 19;

SYDNEY, *April* 30.

Dixon C.J., Fullagar and Taylor JJ.

Negligence—Police constable—Arrest of offender—Detention in cell—Duty of arresting constable to exercise reasonable care for safety of person of offender during detention.

H., a constable of police, in company with another constable S. arrested J. on a charge of assault and took him to a police station manned solely by H. At the station H., in the presence of S., searched J. who had just lighted a cigarette. H. gave evidence that he took from J. *inter alia* matches, cigarettes and tobacco and that as he was taking J. to a cell S. asked J. to extinguish the cigarette and put his thumb and fingers around the end of it to see that J. had done so. J. then placed the cigarette in his coat pocket. It was 10.45 p.m. when J. was locked by H. in the cell. At 11.30 p.m., S. having returned to his own station, H. observed the cell in which J. had been placed and saw nothing untoward. At 2.15 a.m. on the following morning H. found the cell on fire and J. perished in the flames. J.'s widow brought an action under the *Fatal Accidents Act* 1934 (Tas.) for the benefit of herself and her four young children against *inter alios* H. and in such action the jury found that H. was negligent in that he failed thoroughly to search the prisoner before locking him up and to take adequate precautions in respect of the inspection of J. at reasonable intervals throughout the night. Damages were assessed at £7,550. Notwithstanding the jury's verdict the trial judge entered judgment for H., which judgment was reversed on appeal by the Full Court of the Supreme Court of Tasmania. From this decision H. appealed to the High Court.

Held: (1) that H. was subject at common law to a duty to exercise reasonable care for the safety of J. during his detention in custody; (2) that it was not open to the jury to find that a failure on the part of H. in searching J.

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to discover cigarettes and matches in his possession amounted to a breach on the part of H. of his duty to exercise reasonable care for the safety of his prisoner; (3) that it was not open to the jury to find that H. was in breach of his duty in failing to make periodical inspections of the cell between 11.30 p.m. and 2.15 a.m. on the night in question.

In cases where very grave damage would not or might not have ensued if a precaution, trifling in itself, had been taken or more thoroughly taken it is especially necessary to guard against the application of too high a standard of care.

Decision of the Supreme Court of Tasmania (Full Court), reversed.

APPEAL from the Supreme Court of Tasmania.

On 3rd August 1956 Gloria Elaine Jarvis (hereinafter called the plaintiff) brought proceedings in the Supreme Court of Tasmania under the *Fatal Accidents Act* 1934 (Tas.) on behalf of herself and her four infant children against the Attorney-General of the State of Tasmania, as a nominal defendant representing the Crown in right of the State of Tasmania, and Trevor Colin Howard and Maxwell Roy Strong, being police constables appointed under the *Police Regulation Act* 1898-1955 (Tas.), to recover damages for the death of her husband William John Jarvis on 14th November 1955 as a result of the alleged negligence of the defendants whilst they had the said William John Jarvis in their custody. The said William John Jarvis had been arrested on a charge of assault by the defendants Howard and Strong on the night of 13th November 1955 and locked up in a cell at the police station at Hamilton, Tasmania, which station was manned solely by the defendant Howard. In the early morning of 14th November 1955 the cell was found to be on fire and the said William John Jarvis perished in the flames.

At the trial of the action the jury found that the defendant Attorney-General and the defendant Howard were guilty of negligence, that the defendant Strong was not so guilty and that the said William John Jarvis had not failed to take reasonable care for his own safety and assessed damages at £7,550 apportioned as between the plaintiff and her four infant children. Notwithstanding these findings the trial judge, *Gibson* J., on the application of the defendants entered judgment in their favour.

On an appeal by the plaintiff the Full Court of the Supreme Court of Tasmania (*Burbury* C.J. and *Crisp* J.) restored the verdict of the jury as against the defendant Howard and entered judgment accordingly.

From this decision the defendant Howard appealed to the High Court.

Further relevant facts appear in the judgment of the Court hereunder.

D. M. Chambers Q.C., Solicitor-General for the State of Tasmania, and *H. J. Dobson*, for the appellant.

R. C. Wright, for the respondent.

Cur. adv. vult.

April 30.

THE COURT delivered the following written judgment :—

This is an appeal from a judgment of the Full Court of the Supreme Court of Tasmania, which allowed an appeal from a judgment of *Gibson* J. in an action tried by him with a jury. The action was brought under the Tasmanian equivalent of *Lord Campbell's Act*. The plaintiff, who sued for the benefit of herself and four young children, is the widow of William John Jarvis, whose death in tragic circumstances occurred during the night of 13th to 14th November 1955 at Hamilton, a small township in southern Tasmania.

The appellant Howard was at the material time a constable of police stationed at Hamilton. He was the only policeman there stationed. Jarvis was employed by a Mr. Downie on a station property known as Glenelg near Hamilton. On the evening of 13th November, which was a Sunday, he returned to Glenelg from a week-end fishing trip under the influence of liquor and aggressive and disposed to violence. Howard was summoned by telephone, and proceeded to Glenelg. At the entrance to the property he met Maxwell Roy Strong, another constable of police, who was stationed at Bushy Park, a township near Hamilton. Jarvis and his wife were at the time at the house of Johnson, another employee on Glenelg, and the two constables proceeded to Johnson's house. Very shortly after their arrival Jarvis knocked Johnson to the ground unconscious. A little later Howard arrested him, and the two constables took him to the police station at Hamilton, where a charge of assault was entered against him. The constables then proceeded to lock him up for the night in a cell at the station. Howard and Strong gave evidence that, before he was locked up, he was searched by Howard in the presence of Strong. Just before this he appears to have lighted a cigarette. The constables' account of the search would appear not to have been accepted in its entirety by the jury. Howard's account had better be quoted in full as

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recorded by the learned trial judge. Howard said :—" I started from top pocket of his coat and continued down through the pockets to his trouser pockets, searched his jacket and shirt—jumper, then ran both hands down both legs to the top of his boots. I then ran my hands down his arms. Strong took no part in the search. I took £19 4s. 10d. in money from him; two boxes of matches—a packet of cigarettes and part used packet of tobacco—a pocket knife—wallet and personal papers—a small quantity of papers in top pocket—could have been cigarette papers among these. When I was taking papers out of top pocket he commented that I didn't have to go that far in searching him. The property was entered in the charge book, and the money was counted in front of him. I asked Strong to take him to the cells. Trooper Strong asked him to butt the cigarette—he did so. Strong then asked him to let him see the butt. This was half way between the office and the cell. Before he walked into the cell Strong asked him to show him the cigarette. Strong caught hold of the end of the cigarette in his thumb and fingers. Jarvis then placed the cigarette in his coat pocket." In cross-examination he said :—" I left nothing on deceased with which he could start a fire within the cell."

Immediately after the search had been completed Jarvis was placed in the cell, and the door of the cell was locked. The cell was one of a pair, the two being adjacent and separated by a common wall. The other cell was unoccupied : it was used by Howard for storing vegetables. The outside walls of the cell were of weatherboard, and it was lined inside with hardwood. The area of the floor, which was wooden, was about ten feet by five feet. In the wall above the wooden door was an open space in which iron bars were set. Near the top of the door was a peep-hole about two inches in diameter. In the wall opposite the door was a small window, which opened horizontally inwards on hinges. Iron bars were set in the window space. The window was open on the night in question. There was no electric light or other lighting provision in the cell. The roof was of corrugated iron, and the ceiling of hardwood. In the cell were two mattresses composed of straw covered with canvas, and some six or eight blankets, which were folded up. The ground adjacent to the cell was covered with green grass.

It was about 10.45 p.m. when Jarvis was placed in the cell. Howard then, after a brief visit to his wife at the police residence, which was close by, drove Strong back in the police utility to Glenelg, where Strong had left his own vehicle. He then returned, placed the utility in the garage, which was close to the cell, and

proceeded to the residence. On the way he passed the cell, and neither saw nor heard anything of moment. After visiting the laundry, which is the part of the residence nearest to the cell, he went to bed. It was then about 11.30 p.m. At about 2.15 a.m. he was awakened by a man named Apted, who came from the local hotel, and told him that there was a fire at the back of the residence. (Apted was not called as a witness at the trial.) He rushed out and saw that the cell was in flames. After a delay of a minute or two he and Apted succeeded in getting the door of the cell open. Inside was what he described as " a complete inferno ". Jarvis was lying a little back from the doorway with his feet towards the door. It seems to have been taken as clear that he was then dead. What followed need not be described in detail. Assistance was summoned, the body of Jarvis was got out of the cell, and the fire was ultimately extinguished, though not before both cells completely collapsed. It may be mentioned—though we cannot see that any helpful inference can be drawn from it—that, while the walls of the cells were burnt through, and the mattresses and blankets appear to have been more or less completely destroyed, the floor of Jarvis's cell was consumed only round the edges.

The action was brought against three defendants—the Attorney-General of the State of Tasmania, Howard and Strong. The Attorney-General was sued as a nominal defendant representing the Crown under s. 64 of the *Supreme Court Civil Procedure Act* 1932 (Tas.). After delivery of pleadings certain preliminary points of law were set down for argument under O. XXVII of the *Rules of the Supreme Court of Tasmania*. The argument was heard by *Green* J. The Attorney-General contended that the Crown owed no duty of care in relation to the construction, supervision, maintenance or protection of the cell. This contention was rejected by *Green* J. It was next contended that neither Howard nor Strong owed any duty to exercise reasonable care for the safety of Jarvis after his arrest and while he was confined in the cell. This contention also was rejected by *Green* J. Finally it was argued that the Crown could not be vicariously liable for any breach of duty by Howard or Strong in relation to the detention of Jarvis in the cell, and the case of *Enever* v. *The King* (1) was cited. *Green* J. held that, so far as Strong was concerned, no allegation was made against him of any breach of duty for which the Crown could be vicariously responsible, but that the Crown would be vicariously responsible for any breach of duty committed by Howard in relation to the detention of Jarvis in the cell. The decision of *Green* J.

(1) (1906) 3 C.L.R. 969.

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was, of course, binding on the parties at the trial, but any part of it could be challenged on appeal from the judgment in the action.

The action was tried before *Gibson* J. with a jury. At the close of the plaintiff's case, the defendants submitted that there was no case to go to the jury. His Honour decided to leave the case to the jury, but reserved leave to each of the defendants to move for judgment notwithstanding verdict. The jury did not return a general verdict, but answered certain questions left to them by his Honour. The relevant questions and answers were as follows :— "Q. (a) Was the defendant, the Attorney-General, guilty of negligence ? A. Yes. Q. (b) If guilty of negligence, in what respect or respects ? A. 1. In not providing adequate protection in respect of glass window on inside of back of cell; glass being accessible to prisoner. 2. Failure to provide adequate and adjacent fire protection. 3. And not being properly enclosed such as fencing. Q. (a) Was the defendant, Trevor Colin Howard, guilty of negligence ? A. Yes. Q. (b) If guilty of negligence, in what respect or respects ? A. 1. In failure to thoroughly search prisoner. 2. To take adequate precautions in respect to inspection of prisoner at reasonable intervals. 3. Also leaving adjacent cell open at all times leaving free access. 4. Failure to adequately supervise contents of cell. Q. (a) Was the defendant, Maxwell Roy Strong, guilty of negligence ? A. No. Q. (a) Was the deceased, William John Jarvis, guilty of failing to take reasonable care of his own safety ? A. No. In absence of any evidence to contrary." The jury assessed damages at £7,550.

In pursuance of the leave reserved the defendants moved for judgment, and *Gibson* J., after hearing argument, gave judgment for each of the defendants. The plaintiff appealed to the Full Court from this judgment so far as it affected the Attorney-General and Howard. The Full Court (*Burbury* C.J. and *Crisp* J.) allowed the appeal against Howard, and ordered that judgment should be entered for the plaintiff against Howard for the amount of damages awarded by the jury. Their Honours disagreed with the opinion of *Gibson* J. that the only reasonable view of the evidence was that the sole proximate cause of the death of Jarvis was his own negligent conduct. They were of opinion (as had been both *Green* J. and *Gibson* J.) that Howard owed a duty to exercise reasonable care for the safety of Jarvis while he was in custody. They thought that the only supportable part of the verdict was that which found that Howard had been guilty of negligence in failing to inspect the cells at intervals between 11.30 p.m. on 13th November and 2.15 a.m. on 14th November. They thought, however, that the jury could

reasonably find that Howard's omission to make any inspection of the cell between the hours mentioned amounted to negligence on his part, and could reasonably find further that that negligent omission was a cause of Jarvis's death in the sense that, if due inspections had been made, the fire could have been prevented or could have been extinguished in time to save Jarvis from death. It is from this decision of the Full Court that the defendant Howard appeals to this Court.

We feel no doubt that the learned judges of the Supreme Court of Tasmania were right in holding that Howard was subject at common law to a duty to exercise reasonable care for the safety of Jarvis during his detention in custody. He had deprived Jarvis of his personal liberty, and assumed control of his person. In arresting and detaining Jarvis he was no doubt acting lawfully and properly and in the due execution of his duty, but he *was* depriving Jarvis of his liberty, and he *was* assuming control for the time being of his person, and it necessarily followed, in our opinion, that he came under a duty to exercise reasonable care for the safety of his person during the detention. If authority be needed for this proposition, ample authority is found in the cases cited by the learned Chief Justice of Tasmania.

We would also agree with *Burbury* C.J. and *Crisp* J. that the third and fourth findings of the jury against Howard that he was guilty of negligence in " leaving adjacent cell open at all times leaving free access " and in " failure to adequately supervise contents of cell " clearly cannot be supported. There is no evidence whatever to suggest that the fire owed its origin to any failure on the part of Howard in either of these respects. The jury's verdict indeed seems to indicate that either they were unable to determine the cause of the fire or they thought it unnecessary to do so. In particular it would seem that either they were unable to determine whether the fire originated inside or outside the cell, or they thought it unnecessary to determine that question. The questions put to them did not expressly refer to causation, but they had been directed in effect that the only relevant negligence was negligence which operated as a cause of the fire. We think that the direction was sufficient, but (speaking in the light of what happened) it would perhaps have been a wise precaution either to repeat it when the questions were handed to the jury, or to frame the questions with express reference to causation. The correct view of their findings is probably that they considered all possibilities as to the origin of the fire, and then said that, whatever its origin may have been, the death of Jarvis was attributable to a negligent act or omission

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on the part of one or more of the defendants, which they then attempted to specify. It is conceivable that they took the view that Howard had the deceased in his custody, and that it was for him to explain how the death occurred. But, whatever inference may be drawn from the circumstances, the necessity of making out some plausible hypothesis involving negligence on Howard's part and leading to the fatality rested upon the plaintiff. The first finding against the Attorney-General, which refers to the glass window, seems more or less unintelligible, but the reference to the accessibility of the glass to prisoner seems to have been based on the assumption that the fire arose inside the cell. The second finding against the Attorney-General of " failure to provide adequate and adjacent fire protection " is again of dubious import, but seems more consistent with the view that the fire began outside. The third finding against the Attorney-General—" not being properly enclosed such as fencing "—is consistent only with the view that the fire arose outside the cell. The first finding against Howard is relevant only if the fire arose inside the cell. The second is the only finding against Howard which could support a verdict against him whether the fire arose inside or outside the cell. The third finding of " leaving adjacent cell open at all times leaving free access " is relevant only if the fire began outside the cell, and the fourth only if it began inside.

But, whatever may be the correct view of the jury's findings as a whole, what has been said seems to leave for serious consideration, so far as Howard is concerned, the first and second findings against him that he was negligent " in failure to thoroughly search prisoner " and in failure " to take adequate precautions in respect to inspection of prisoner at reasonable intervals ". The first of these findings must, we think, be treated as a finding that the fire was caused accidentally inside the cell by a lighted cigarette or match, and that Howard was negligent in that he failed to discover on search that the prisoner had cigarettes and matches in his possession. And the second must, we think, be treated as a finding that, wherever and however the fire was started, Howard was negligent in not making inspections of the cell between 11.30 p.m. on the 13th and 2.15 a.m. on the 14th, and that, if he had made the inspections which he ought to have made, he would have been able to prevent the fire or at least would have discovered it in time to save the life of Jarvis.

It was, in our opinion, open to the jury to infer from the evidence that the fire was caused accidentally inside the cell by a cigarette or match which had been left in the possession of the prisoner.

This seems to be the most likely explanation of the origin of the fire. It is not improbable that the prisoner, before or after lighting a cigarette, lay down, that he then fell asleep dropping the lighted cigarette in contact with the canvas covering of one of the mattresses, that the canvas or mattress smouldered for some time, and then, fanned by a draught coming through the window or the opening above the door (it was a very windy night) burst into flame.

It was also, we think, open to the jury to find that Howard, on searching Jarvis, overlooked cigarettes (or the "makings" of cigarettes) and matches in his possession. Both Howard and Strong gave evidence to the effect that Howard carefully searched Jarvis and deprived him of tobacco and matches. But the jury were not bound to believe this evidence, and they may have disbelieved it. They might even have thought (though whether they could have found to this effect is another matter) that it was not improbable that Howard, not wishing to deprive his prisoner of a small solace in his misfortune, actually acceded to Jarvis's request that he be permitted to retain the materials for smoking during his confinement. In any case they did not so find, and the question is whether it was open to them to find that a failure on the part of Howard in searching Jarvis to discover cigarettes and matches in his possession amounted to a breach on the part of Howard of a duty to exercise reasonable care for the safety of his prisoner. We do not think that it was.

This is a case of a spectacular calamity. It is one of that not uncommon class in which very grave damage would not or might not have ensued if a precaution, trifling in itself, had been taken or had been more thoroughly taken. In such cases it is specially necessary to be on one's guard lest too high a standard of care be applied. It is not, in our opinion, really possible to say on the evidence that a more thorough search would have discovered cigarettes and matches, and that, if they had been discovered, the fire would not have occurred. Still less is it possible to say that a failure to discover cigarettes and matches meant that the search was negligently conducted. It is to be remembered that the duty to search Jarvis was imposed upon Howard as an officer of police : it was not itself a duty owed to Jarvis. The truth is that—on the theory of the fire which is involved in the jury's finding on this point—the accident could not have happened without carelessness on the part of Jarvis, and a reasonable man in the position of Howard might well not advert to the possibility that a fire might be so caused.

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Nor, in our opinion, can the finding that Howard was negligent in not making periodical inspections of the cell between 11.30 p.m. and 2.15 a.m. be supported. We can see no ground for saying that Howard ought to have stayed up all night, or ought to have taken steps to have himself roused every hour or so from sleep in order to inspect the cell. It is Howard's own personal negligence that is now alone in question. The station was a one-man station, and he had no reason to suppose that there was any risk or danger. Jarvis had been locked up at 10.15, Howard had passed close to the cell about 11.30, and nothing untoward was then to be observed.

The case seems to us to be a case of a tragic accident, for which no blame can be fairly or properly attached to any of the defendants in the action. The appeal should be allowed, and the judgment of *Gibson* J. restored.

Appeal allowed with costs. Discharge order of Full Court of Supreme Court of Tasmania. In lieu thereof order that appeal from judgment of Gibson J. be dismissed with costs.

Solicitor for the appellant, *J. R. M. Driscoll*, Crown Solicitor for Tasmania.

Solicitors for the respondent, *Crisp & Wright.*

J. F. D.