POLICE v. GREAVES [1964] N.Z.L.R. 295 C.A.

The respondent, Greaves, had been convicted in the Magistrate's Court of assault. He appealed successfully to the Supreme Court, but the decision of the learned Magistrate was restored in the Court of Appeal. The case is significant for its interpretation of that part of the definition of "assault" in s.2(1) of the Crimes Act 1961 which refers to threats to apply force, as distinct from actual or attempted application of force. The relevant part of the statutory definition is:

> Assault means the act of intentionally . . .
> threatening by any act or gesture to apply . . .
> force to the person of another if the person making the threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose.

This "third limb" of the statutory offence includes two elements: firstly, a threat, which is not merely verbal, to apply force to another person, and secondly either (a) that the person making the threat has present ability to carry it out or (b) that the person threatened has reasonable cause to believe, and does believe, that there is such ability. It is to be noted that the *mens rea* is not an intention to apply force, but is an intention to raise the expectation that force can and will be applied.

The present case arose out of a visit by two police constables to Greaves's home in answer to a telephone call by his de facto wife for assistance and protection. When they arrived, Greaves came and stood at the door holding a carving knife pointed towards the leading constable and said, "Don't you bloody move. You come a step closer and you will get this straight through your ------- guts." When the constables tried to reason with him he said, "Get off this ------- property before you get this in your guts." He was within a few feet of the constables but made no move towards them. The constables then withdrew to obtain reinforcements and later arrested Greaves. The learned Magistrate (whose judgment is not reported) found that Greaves's actions constituted a threat within the meaning of the section and that he had had present ability to carry out such threat.

In the Supreme Court, counsel for Greaves argued that the threatened force must be believed by the complainant to be imminent, and the fact that the threats had been conditional showed that the force threatened was not imminent. The authorities and the course of argument were summarised by Hutchison J. in his judgment, [1963] N.Z.L.R. 853, 854;

> The important question in the case rises on Mr Moulder's submission that the point of time had not arrived when it could be believed that

> an assault was imminent. The question is whether there could be an assault when the threat was, and was understood by the other party to be, to apply the force only if such other party did something more than he had done. Mr Birks referred to *Read* v. *Coker* (1853) 13 C.B. 850; 138 E.R. 1437 but there the threat was to do something if the other party did not do something, in that case go away, and I do not think that that covers this case. The point is that, in that case the threat was of imminent action, while in this case it was not of imminent action.
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> At common law it seems to be clear that, for a threat to constitute an assault, there must be a belief that unlawful physical contact is imminent: *Kenny's Outlines of Criminal Law*, 17th ed. 195 or immediate: 10 *Halsbury's Laws of England*, 3rd ed. p. 741 para. 1423, or about to be inflicted or applied: *Russell on Crime* 11th ed. 724, 725.
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> No case was cited on this point in relation to our statutory definition. In my opinion, that definition should be read the same way.

His Honour therefore allowed the appeal as, on the facts, "there was no such imminence as would make the threat an assault."

It is submitted, with the greatest respect, that the learned Judge was in error in two respects, firstly in distinguishing *Read* v. *Coker* (supra) and secondly in following and applying the three authorities mentioned in the second paragraph of the passage quoted above from his judgment.

His Honour drew a careful distinction between cases in which a threat is made to apply force if a person does something and cases in which the threat is to apply force if the person does nothing. The distinction is relevant in deciding whether the threatened force is "imminent" or not. *Read* v. *Coker* (supra) clearly fell in the latter category; in that case the defendant had moved towards the plaintiff, rolled up his sleeves and threatened to break the plaintiff's neck if he did not leave the premises where he had a right to be. His Honour held that the present case fell in the former category. It is to be noted, however that Greaves made two threats, one to the effect that if the policemen came any closer he would stab them, and the other to the effect that if they did not go he would stab them. The latter threat appears to be indistinguishable from the *Read* v. *Coker* situation, while the other falls into the more harmless category. There is unfortunately no reference to the second threat in the report of Hutchison J's judgment and it is possible, with respect, that his Honour may have overlooked it.

Read v. *Coker* is not of course binding on a New Zealand Court, but, in any event, it is submitted that that case and the other three authorities applied by his

Honour ought not to have been considered or applied. For the Crimes Act 1961 is a complete code not merely consolidating the common law, but replacing it; whilst it is clear that it is permissible to refer to cases which were decided since the codification in 1893, provided that the words of the statute have not been materially altered, it is not permissible to refer to earlier common law cases unless there is ambiguity or obscurity in the words themselves, which is not the case here. Thus in *Bank of England* v. *Vagliano Brothers* [1891] A.C. 107 H.L. Lord Herschell said, at 144-145:

> I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

The code in question in that case was the English Bills of Exchange Act, but Lord Herschell's words are of general application to all codes, and were approved by the New Zealand Court of Appeal in a theft case, *R.* v. *Hare* (1910) 29 N.Z.L.R. 641 C.A.; in that case Williams J. said at 645:

> The law is stated by Lord Herschell in *Bank of England* v. *Vagliano Brothers* [1891] A.C. 107 "The Criminal Code Act 1893," was a code and not a consolidation. In order to construe any of its sections we must look only at the words of the section unless the words are ambiguous or doubtful.

and Edwards J. said, at 645:

> In my opinion, it is clear that we cannot look at the history of the legislation for the purpose not of settling a doubt but of raising a doubt.

The same type of approach was expressly adopted by the Judicial Committee in *Wallace-Johnson* v. *R.* [1940] A.C. 231 when interpreting the Criminal Code of the Gold Coast Colony.

It is true that there is a dictum of Blair J. in *Fogden* v. *Wade* [1945] N.Z.L.R. 724, an assault case, in which he said at 728:

> In England, assault is a common law offence. In New Zealand it is a statutory crime, and a perusal of the definition abovequoted [i.e. the common law definition] shows that our definition is intended to be an adoption of the result of the numerous cases exemplifying the English common law.

With respect to the learned Judge, his dictum is misleading if it is intended to imply that the cases may be used to interpret or add to the words of the codifying statute. If it was so intended then it conflicts with the authorities on interpretation cited above, and those authorities are of course binding on the New Zealand courts.

In the present case Hutchison J. considered and applied *Halsbury*, *Kenny* and *Russell*, each of which based its statement quoted above on the 19th century English common law cases. These authorities must, however, be regarded as having been superseded by the Criminal Code Act 1893, now our Crimes Act 1961. The proper place of the common law in relation to the statute is, in the words of Edwards J. in *R.* v. *Hare* (supra), in "settling a doubt" but not of "raising a doubt." In effect Hutchison J. introduced the requirement of imminence of force as a new element of the crime. With respect, this element does not appear in, and cannot be inferred from, the words of the definition. The only element of time referred to in the definition is the requirement that the accused should have had, or be believed to have had, present ability to effect his purpose, and it is submitted that imminence of force is an entirely different thing altogether.

The judgment of the Court of Appeal (delivered by North P. in [1964] N.Z.L.R. 295) throws little further light on the interpretation of the definition. The Court simply summed up the facts and history of the case and continued at 298, line 24:

> In our opinion, if the other conditions of the definition were met – as they undoubtedly were – there is no reason why a conditional threat should not constitute an assault.

The Court devoted the larger part of its judgment in explaining why this was so, but, with the greatest respect, the contrary had not at any time been put forward. Counsel for Greaves submitted that there were some types of threat which made it clear that the force threatened was not imminent, and that the threats in the present case were examples of these types. It would clearly be too sweeping to say that no conditional threat can ever indicate imminent force (assuming that imminence is relevant); it is necessary to look at all the facts of each case, and mere conditionality itself does not per se negative imminence. For these reasons it is respectfully submitted that the highwayman example – "Your money or your life" – given by North P. at 298 is not helpful since it involves an entirely different fact situation. There is no point in categorising a threat away from the situation in which it occurred, on the basis of its gramatical construction alone, for its context gives it the meaning which may make it an assault.

However, for the same reasons it is submitted with respect that the Court was right in refusing to differentiate between the two types of threat as had Hutchison J.; North P. said at 299:

> We can see no difference in principle between a demand that a person threatened should retire and a demand that he should not proceed further on his lawful occasions.

The Court was accordingly unable to distinguish *Read* v. *Coker* (supra) not only on the grounds just given but also because (p. 299) –

> ... in any event – though nothing was made of this either in the Court below or before us – it would appear that both kinds of threat were made.

The appeal was therefore allowed, and the question of imminence was left untouched. The decision of Hutchison J. on this point was neither expressly nor impliedly overruled and therefore remains as an authority for the proposition that the threatened force must be or be believed to be imminent. Nevertheless it is submitted with the greatest respect that his reasoning was in conflict with principles set out by the highest authorities and consequently ought not to be followed.