

EDITORIAL NOTE: PERSONAL/COMMERCIAL DETAILS ONLY HAVE BEEN DELETED.

**IN THE DISTRICT COURT
AT PORIRUA**

**CRI-2015-091-002155
[2016] NZDC 3984**

NEW ZEALAND POLICE
Prosecutor

v

BRUNO ORUPE
Defendant

Hearing: 10 March 2016
Appearances: Sgt. Paul Macky for Police
D Ewan for defendant
Judgment: 23 March 2016

RESERVED JUDGMENT OF JUDGE J A BINNS

[1] Mr Orupe faces four charges which arise out of events on 7 October 2015. The charges are that Mr Orupe:

- (1) Failed to remain stopped for as long as was necessary for an enforcement officer to obtain the particulars referred to in the Land Transport Act 1998.
- (2) Drove a motor vehicle on a road while the proportion of alcohol in his breath exceeded 400 micrograms of alcohol per litre of breath (in that it was 477) having been convicted at least twice previously of an offence against s 56(1) of the Land Transport Act.

(3) Drove a motor vehicle on a road while disqualified from holding or obtaining a driver licence, having been convicted at least twice previously of an offence against s 32(1) of the Land Transport Act.

(4) Resisted Robert Campbell, a constable acting in the execution of his duty (s 23(a) Summary Offences Act).

[2] Constable Campbell is a police dog handler who, on the night in question was working nightshift in Porirua. When he was on Bedford Street, he saw a silver Mitsubishi Lancer, registration no. [registration number deleted] driving the other way, heading east. Constable Campbell turned his patrol car in an attempt to stop the vehicle and noticed as he did so that it started to accelerate. He activated his red and blue lights and caught up to the car as it turned onto [name of street deleted]. The car turned into the first driveway on the right at [address deleted]. This was an address that Constable Campbell knew to be the residence of John and Jarrod Palmer, who are mongrel mob associates.

[3] Constable Campbell said he stopped his patrol car perpendicular to the Mitsubishi, with full view in his headlights of the vehicle's driver's door. He said as the car slowed to a stop, it nudged the gate across the driveway causing it to swing open a couple of feet. He radioed Communications that he had stopped a suspicious car and required a unit to assist him.

[4] Constable Campbell said that John Palmer, who he had previously dealt with, got out of the car's front passenger door and walked towards his house. He said that Mr Orupe, who he has also previously dealt with, got out of the driver's door before turning to look at him and walk towards the house on the property. He said, that Mr Orupe was wearing a leather Porirua mongrel mob patch which made him quite noticeable. He said, believing that Mr Orupe was about to flee on foot he took his police dog from the patrol car and gave chase. He gave no reason for the basis of his belief that Mr Orupe was about to flee. He said he called out to Mr Orupe "Police – stop or I'll let the dog go". He said that Mr Orupe walked over to the southern facing side of the house and urinated on the garden.

[5] Mr John Palmer stood between Constable Campbell and Mr Orupe and was yelling obscenities at the police constable, which in evidence Constable Campbell accepted, included the words “fuck off”.

[6] Constable Campbell said that Jarrod Palmer, who he knew to be Mr Palmer’s son, emerged from the southern facing door of the house with a beer bottle in his hand. He was clearly intoxicated and yelling obscenities at him. Constable Campbell said, while he was being obstructed, Mr Orupe walked to the door of the house and walked into the kitchen adjacent to the door. Constable Campbell entered the house and pushed Mr Orupe outside so that he could keep control of him. He said due to the number of aggressive people he was dealing with, while controlling his dog, he was unable to place Mr Orupe in handcuffs. Despite this, he advised Mr Orupe that he was under arrest for failing to remain. Mr Orupe argued that he had not done anything wrong and walked down the eastern side of the house. As Mr Orupe walked away, Mr Jarrod Palmer strode aggressively towards Constable Campbell and the dog. Constable Campbell said that he pushed Jarrod Palmer back, to keep space between them, as well as preventing him from being bitten by his dog. He said that both Jarrod and John Palmer reacted aggressively to this and became threatening.

[7] John Palmer verbally threatened to assault Constable Campbell while raising his fists in a threatening manner. Jarrod Palmer was carrying an empty clear beer bottle which he was holding upside down by the neck. Constable Campbell said that Jarrod pointed the bottom of the bottle at him and verbally threatened to assault him.

[8] Jarrod and John Palmer’s actions, as well as their verbal threats, made Constable Campbell believe that they intended to cause harm to him. While Constable Campbell was confronted by Jarrod and John Palmer, Mr Orupe continued to walk away from Constable Campbell, out of sight by the northern side of the house. He managed to get past Jarrod and John Palmer and confronted Mr Orupe on the northern side of the house. Mr Orupe was walking towards the waist height boundary fence. He challenged Mr Orupe telling him “you are under arrest – stop or I’ll let the dog go”.

[9] Mr Orupe initially stopped, but as Constable Campbell approached him, he darted towards the fence. Constable Campbell released the dog to apprehend him. Constable Agate arrived in a vehicle, seconds later and quickly restrained Mr Orupe as he took him into custody.

[10] Constable Agate confirmed that he attended the address, heard Constable Campbell dealing with a male (the defendant) and that he helped to restrain the man and placed him under arrest for failing to remain.

[11] Constable Campbell said that after arrests were made (although Mr Orupe was only arrested for failing to remain) Constable Campbell made checks on the police data bases and discovered that Mr Orupe was indefinitely disqualified from driving a motor vehicle.

[12] Constable Agate confirmed that Mr Orupe had been consuming alcohol although the basis for this was not identified in his evidence. Constable Agate carried out breath alcohol procedures which returned a positive result of 477 micrograms of alcohol per litre of breath.

[13] Confirmation of previous convictions in relation to Mr Orupe were provided, namely:

- (a) 19/8/10 excess blood alcohol having been convicted at least twice previously;
- (b) 19/8/10 – driving while disqualified having been convicted at least twice previously of driving while disqualified.

[14] Mr Orupe was sentenced on 19 August 2010, on the excess blood alcohol charge, to a period of indefinite disqualification. I do not know the information contained on the police data bases and whether it would show if Mr Orupe had taken steps to obtain a driver's licence, but I conclude from Constable Campbell's evidence that on the night in question Mr Orupe was a disqualified driver.

[15] Constable Campbell said that when he went into the house at [address deleted] he used the power of entry under s 8 of the Search and Surveillance Act. This had not been covered in Constable Campbell's evidence-in-chief. When cross-examined Constable Campbell indicated that he suspected that Mr Orupe was driving while disqualified as he has been disqualified since he has known him. Constable Campbell also said that he has been a police officer for 9 years, that he has dealt with him his whole police career. He did not say when he had dealt with Mr Orupe, the number of times he had dealt with him, or the context.

[16] Counsel for the defendant made a no case to answer submission based on the following:

- (1) The implied licence to Constable Campbell to enter onto [address deleted] was clearly and unequivocally revoked by Mr John Palmer;
- (2) Constable Campbell said that when he entered the house at the address, that he did so with the authority contained in s 8 of the Search and Surveillance Act, however, the charge on which the defendant was arrested was not an offence punishable by imprisonment as is required in s 8, rather it is a fine only matter.
- (3) That the entry into the house at [address deleted] was without authority as Constable Campbell did not at the time have reasonable grounds to suspect that the defendant had committed offence(s) punishable by imprisonment.

[17] In submissions the prosecutor emphasised the following:

- (a) Mr Orupe attempted to evade Constable Campbell after being followed with red and blue lights flashing and after the car stopped at the address.
- (b) Constable Campbell had reasonable grounds to suspect that the defendant had been driving under the influence of drink in that:

- (i) Mr Orupe nudged/hit the car into the gate when he arrived at the property, swinging the gate open a couple of feet;
- (ii) Mr Orupe stumbled when he got out of the car;
- (iii) Constable Campbell was concerned due to the way the defendant was walking.

[18] It was put to Constable Campbell that his evidence was “recent invention” and changed on the morning of the hearing once he became aware of the issues to be raised by the defence alleging unlawful entry into the house.

[19] Constable Campbell said there were a number of drunk people at the address who were threatening to assault him and while he may have been vague, he had a number of different powers of entry into the house which were available to him.

[20] The legislative provisions which Constable Campbell identified which gave him a right to enter the house at [address deleted] were:

- (a) s 8 Search and Surveillance Act, and
- (b) s 114 and s 119 Land Transport Act.

These sections provide:

Search and Surveillance Act 2012

8 Entry without warrant to avoid loss of offender or evidential material

- (1) In the circumstances set out in subsection (2), a constable may—
 - (a) enter a place or vehicle without a warrant; and
 - (b) search for and arrest a person that the constable suspects has committed the offence.
- (2) The circumstances are that the constable has reasonable grounds—

- (a) to suspect that the person has committed an offence that is punishable by imprisonment and for which he or she may be arrested without warrant; and
- (b) to believe that the person is there; and
- (c) to believe that, if entry is not effected immediately, either or both of the following may occur:
 - (i) the person will leave there to avoid arrest:
 - (ii) evidential material relating to the offence for which the person is to be arrested will be destroyed, concealed, altered, or damaged.

Land Transport Act 1998

114 Power to require driver to stop and give name and address, etc

(1) An enforcement officer who is in uniform, or wearing a distinctive cap, hat, or helmet, with a badge of authority affixed to it, may signal or request the driver of a vehicle to stop the vehicle as soon as is practicable.

(2) An enforcement officer in a vehicle following another vehicle may, by displaying flashing blue, or blue and red, lights or sounding a siren, require the driver of the other vehicle to stop.

(2A) Subject to subsections (4) and (5), the driver of a vehicle that is stopped by an enforcement officer under this Act must remain stopped for as long as is reasonably necessary for the enforcement officer to complete the exercise of any powers conferred, or duties imposed, on an enforcement officer by this Act.

(3) An enforcement officer may require the driver of a vehicle that is stopped under this Act to—

(a) remain stopped for as long as is reasonably necessary for an enforcement officer to obtain the particulars referred to in paragraph (b), or to complete the exercise of any other power conferred on an enforcement officer by this Act; **and**

(b) on demand by an enforcement officer,—

(i) give his or her full name, full address, date of birth, occupation, and telephone number, or such of those particulars as the enforcement officer may specify; and

(ii) state whether or not he or she is the owner of the vehicle; and

(iii) if the driver is not the owner of the vehicle, give the name and address of the owner or such particulars within the driver's knowledge as may lead to the identification of the owner.

(4) The driver of a vehicle that is stopped under subsection (2) is not obliged to remain stopped if the vehicle with flashing lights and siren does not itself stop in the near vicinity of the place where the driver has stopped.

(5) An enforcement officer may require a driver to remain stopped on a road for as long as is reasonably necessary to enable the officer to establish the identity of the driver, but not for longer than 15 minutes if the requirement to remain stopped is made under this subsection only.

(6) An enforcement officer may arrest a person without warrant if the officer has good cause to suspect the person of having—

(a) failed to comply with this section or a signal or request or requirement under this section; or

(b) given false or misleading information under this section.

119 Powers of entry

(1) An enforcement officer may exercise the powers conferred by subsection (2) if the enforcement officer—

(a) has good cause to suspect that a person—

(i) has contravened a request or requirement or demand made under section 114 (other than subsection (1)); **and**

(ii) has also committed or is committing an offence against section 35(1)(a) or section 35(1)(b) (which relate to reckless or dangerous driving offences), or is, or has recently been, driving under the influence of drink or a drug, or both; **and**

(b) is freshly pursuing that person.

(2) The enforcement officer may, without warrant, in the course of the pursuit enter, by force if necessary, any premises which the person has entered, for either or both of the following purposes:

(a) determining whether or not a power conferred on an enforcement officer by section 68 or section 69 should be exercised in respect of that person:

(b) exercising or completing the exercise of any such power in respect of that person (as if the person were in a motor vehicle on a road).

(2A) The provisions of Part 4 of the Search and Surveillance Act 2012 (except subpart 3) apply in respect of the power in subsection (2).

(3) An enforcement officer may, without warrant, enter, by force if necessary, a building or place where a vehicle to which section 96, 96A, or 123 applies is being stored or kept, and seize and impound the vehicle,—

(a) if—

(i) an enforcement officer has been freshly pursuing the vehicle; or

(ii) it is likely that a person was about to remove, conceal, destroy, or dispose of the vehicle; or

(iii) an enforcement officer believes on reasonable grounds that the vehicle was about to be used in the commission of a crime; and

(b) if, because of the time of the day or the locality, it was impracticable to obtain a warrant without creating an opportunity for the person to do anything referred to in paragraph (a)(ii) or (iii).

(4) For the purposes of seizing and impounding a vehicle under section 96 or section 96A or section 123 in any case where subsection (3) does not apply, an enforcement officer may enter a building or place where a vehicle to which that section applies is being stored or kept only with the consent of the occupier or under a warrant issued under subsection (5).

(5) An enforcement officer may apply, in the manner provided for an application for a search warrant in subpart 3 of Part 4 of the Search and Surveillance Act 2012, to an issuing officer (within the meaning of section 3 of that Act), for a warrant to enter a place referred to in subsection (4) and, if satisfied that there is reasonable ground for believing that a vehicle to which section 96 or section 96A or section 123 applies is being stored or kept in the building or place, the Judge may issue a warrant authorising an enforcement officer to enter, by force if necessary, any part of the building or place, and seize and impound the vehicle.

(6) The provisions of Part 4 of the Search and Surveillance Act 2012 apply in respect of the powers in subsections (3) and (5) (except for subpart 3 of that Part in relation to subsection (3)).

(7) An enforcement officer who enters any premises under this section may not exercise on those premises any power of arrest conferred by this Act other than a power of arrest conferred by any of sections 68(3), 69(6), and 120.

[21] I also refer to Sections 9 and 10 of the Search and Surveillance Act which provide:

9. Stopping vehicle to find persons unlawfully at large or who have committed certain offences

A constable may stop a vehicle without a warrant to arrest a person if the constable has reasonable grounds—

(a) to suspect that a person—

(i) is unlawfully at large; or

(ii) has committed an offence punishable by imprisonment; and

(b) to believe that the person is in or on the vehicle.

10 Powers and duties of constable after vehicle stopped

(1) A constable exercising the stopping power under section 9 may do any 1 or more of the following:

(a) require any person in or on the vehicle who the constable has reasonable grounds to suspect is unlawfully at large or has committed an offence punishable by imprisonment to supply all or any of his or her name, address, other contact details, and date of birth:

(b) search the vehicle to locate the person referred to in section 9, if the constable has reasonable grounds to believe that the person is in or on the vehicle:

(c) search the vehicle to locate property that is evidential material in relation to any offence in respect of which the vehicle was stopped under section 9, if the person referred to in section 9—

(i) has been arrested; or

(ii) is seen fleeing from the vehicle before he or she can be arrested.

(2) Before conducting a search under a power conferred by subsection (1)(c), a constable must tell the driver the object of the proposed search, if the driver is not the person referred to in section 9.

[22] Counsel for the defendant referred me to decisions in *Talwar v Police* [2013] NZAR, 291 and *Caie v AG* (HC, Auckland CP334-SD99, 6 April 2001).

[23] *Caie v AG* is a civil case where the plaintiff, Mr Caie, sought damages for false imprisonment, malicious prosecution and breaches of the Bill of Rights Act. The decision includes a helpful discussion in relation to the police power to arrest.

[24] The decision in *Talwar v Police* discussed the duties upon counsel for a defendant, under the Evidence Act, and determined that s 92 Evidence Act 2006 did not impose a duty on defence counsel to cross-examine on defects or perceived weaknesses in the prosecution case.

[25] Following Mr Ewan's no case to answer submission, I indicated that I needed time to consider the submissions. Because the defendant lives in Tauranga and because there were other hearings scheduled, in the event that I find that there is a case to answer, evidence was called for the defence from Mr John Palmer who said that on the night in question he was driving the motor vehicle and not the defendant.

Issues

[26] The critical issues are whether at the time Constable Campbell entered the house at [address deleted] without warrant, he had:

(1) reasonable grounds to suspect that the defendant had committed an offence that is punishable by imprisonment pursuant to s 8(1)(a) and (b) and s 8(2)(a), (b) and (c) Search and Surveillance Act 2012; and/or

(2) good cause to suspect that the defendant:

a. had contravened a request or requirement or demand made under s 114(2) Land Transport Act, and

b. has recently been driving under the influence of drink; and

c. is freshly pursuing that person

(s 119(1)(a) and (b) Land Transport Act)

(3) grounds to arrest the defendant without warrant under s 114(6) of the Land Transport Act.

Discussion

[27] Constable Campbell could not have had reasonable grounds to suspect that the defendant has committed an offence punishable by imprisonment when he first saw the vehicle on Bedford Street. This was because he was unable to identify any of the occupants of the vehicle. Constable Campbell indicated that he turned his patrol car in an attempt to stop it, but he did not indicate his reasons for wanting to stop the vehicle. He said he noticed that it started to accelerate as he did so. The initial speed of the vehicle was not identified nor the degree of acceleration. While

Constable Campbell's vehicle was clearly following the other vehicle from Bedford Street to [name of street deleted], the evidence does not satisfy me that the vehicle was fleeing or that Constable Campbell was in pursuit. In fact, Constable Campbell acknowledged that he wouldn't call it a pursuit.

[28] It is clear that any implied licence was clearly and immediately revoked by Mr John Palmer. Constable Campbell clearly found himself in a difficult situation. Mr John Palmer was immediately aggressive and confrontational and later, too, Mr Jarrod Palmer.

[29] Constable Campbell contacted police communications to seek backup because of a suspicious vehicle. He did not say why it was suspicious. There is no evidence that he inquired whether the driver who says he had just identified, was a disqualified driver. (*Dumbell v Roberts & Ors* [1944] 1 All ER 326, *Craig v Attorney-General* [1986] 2 CRNZ 551). The absence of this inquiry and the failure to refer to his belief that the defendant had been driving under the influence of drink and /or while disqualified until challenged, strengthens the defendant's position that Constable Campbell had not formed "reasonable grounds to suspect" in relation to the defendant having committed an offence punishable by imprisonment at the requisite time, which would have been before he entered the house.

[30] If I am wrong in my assessment, in objectively reviewing all the evidence, I do not consider that the act of hitting or nudging the gate was indicative of driving under the influence of drink. There were no signs of driver fault. There was no description of the "stumbling", or the way Mr Orupe was walking.

[31] Furthermore, in relation to reasonable grounds to suspect in relation to the driving while disqualified charge, Constable Campbell would have needed to give much more precise evidence about when he dealt with Mr Orupe and the context.

[32] I consider it was more likely that the bases for having reasonable grounds to suspect, in relation to driving under the influence of drink or while disqualified, were "reconstructed" after the fact and were not consciously to the forefront of Constable

Campbell's mind as part of a rational or logical process before he entered the property or the house.

[33] I have no doubt that Mr John Palmer and Mr Jarrod Palmer were yelling obscenities at Constable Campbell, before Mr Orupe entered the house, which would have been intimidating. This behaviour did not obstruct Constable Campbell as he said, or somehow validate his actions in entering the house.

[34] After Constable Campbell entered the house, pushed Mr Orupe outside to keep control of him and arrested Mr Orupe for failing to remain (the first reference to his arrest), I accept that Jarrod and John Palmer reacted aggressively and became threatening. This did not validate or justify Constable Campbell's entry into the house either.

[35] When Mr Orupe argued with Constable Campbell that he hadn't done anything wrong, the absence of evidence from Constable Campbell of giving any explanation to Mr Orupe that he suspected Mr Orupe of driving under the influence of drink or while disqualified, was significant.

[36] Neither was there any reference to suspicion about driving while disqualified or under the influence of alcohol when Constable Campbell referred to a second arrest or when Constable Agate referred to Mr Orupe's arrest for failing to remain. This was also telling.

[37] I therefore find that Constable Campbell had no powers of entry under s 8 of the Search and Surveillance Act or s 119 of the Land Transport Act.

[38] This is relevant in relation to the excess breath alcohol charge and resisting Constable Campbell, because the evidence of the breath testing procedures would not in my view be admissible under s 30(1) and (2) of the Evidence Act 2006.

[39] The evidence of the breath testing procedures was improperly obtained. In this case the impropriety, being the wrongful entry into the house at the address, was a fundamental breach of legislative requirements which govern when an officer can

enter onto a property without a warrant. Pursuant to s 30(2)(b) of the Evidence Act, I have taken into account the need for an effective and credible system of justice, however, this was a serious intrusion against the rights of the defendant, notwithstanding that I accept that Constable Campbell's actions were not done in bad faith. On the evidence I heard, I did not think that Constable Campbell's actions were necessary to avoid physical danger, which is a relevant consideration under s 30(3)(g). I therefore conclude that exclusion of this evidence is proportionate to the impropriety.

[40] The charge of excess breath alcohol in its aggravated form cannot therefore be sustained.

[41] Furthermore, because Constable Campbell had no lawful authority to be on the property after he was told to leave, I consider that he was not acting in the execution of his duty when he physically removed the defendant from the house. As a result, there is similarly no case to answer in relation to the charge of resisting a constable in the execution of his duty.

[42] I now turn to consider the charges of failing to remain and driving while disqualified, in its aggravated form.

[43] Constable Campbell was on duty. I infer he was in uniform. While the grounds in s 10 of the Search and Surveillance Act were not established when he first saw the vehicle and decided to stop it, he appeared to have acted in accordance with s 114(2) of the Land Transport Act ("the Act").

[44] The vehicle stopped at the address and remained stopped. This would have allowed Constable Campbell to complete any of the powers under the Land Transport Act. Constable Campbell stopped in the near vicinity and although he did not say that the red and blue lights were flashing when he stopped, it is a reasonable inference that they were still doing so and there was compliance with s 114(5) of the Act.

[45] Constable Campbell had a discretion under s 114(3) to require the driver to remain stopped and although he yelled out “police – stop or I’ll let the dog go”, no demand was made of Mr Orupe under s 114(3)(b)(i), (ii) and (iii) of the Act.

[46] While there is no power of entry, there is power to arrest without warrant if the officer has good cause to suspect the person of having failed to comply with this section or signal or request or requirement. Ultimately, putting aside the issue of whether the vehicle was stopped on a road which, on the evidence I heard, seems unlikely as it appeared to be off the footpath on private property, I am not satisfied beyond reasonable doubt that Constable Campbell exercised a discretion to require Mr Orupe to remain or made a demand to him in terms of the requirements in s 114(3)(a) and (b) of the Act.

[47] Therefore, I do not find the charge of failing to remain proved.

[48] While I have found that Constable Campbell did not have reasonable grounds for entering the house at the address, I still need to consider whether there is a case to answer in relation to the driving while disqualified charge.

[49] Prior to Constable Campbell entering the house, he had already seen the car being driven on a road and had followed it to the address. He immediately identified Mr Orupe as the driver as he got out of the car. It seems to me that if I accept that Constable Campbell’s identification of Mr Orupe as the driver, when he saw him exit the vehicle, is reliable that would establish a prima facie case of driving while disqualified.

[50] Evidence was produced that the defendant was indefinitely disqualified. Constable Campbell said that he made checks of police data bases on the night to confirm Mr Orupe’s disqualification.

[51] The critical issue is whether or not the police can establish beyond reasonable doubt that Mr Orupe was the driver of the motor vehicle as I consider that there is a case to answer on that charge.

[52] Mr John Palmer gave evidence that he was driving the motor vehicle that evening and that he is the licensed driver in the house. He said he was sober and that after the events of the evening and Mr Orupe's arrest, he went to the police station to tell them that he was driving and that the defendant had been in the back seat of the motor vehicle. He said that the rear doors of the car had child locks and that the defendant would have had to exit the car via the front driver or front passenger doors, as he could not exit from the back seat.

[53] Mr Palmer had complaints about the behaviour of police towards his son on the night in question. He raised issues about whether Constable Campbell would have been able to see who exited the car and where from, due to the existence of a Totara tree shown in a photograph produced by police, which he says would have obscured Constable Campbell's view.

[54] Constable Campbell's evidence was that the Mitsubishi Lancer motor vehicle, which I heard was Mr Palmer's daughter's car, turned into the driveway at [address deleted]. Constable Campbell said he stopped the police vehicle perpendicular to the Mitsubishi with full view of the driver's door. He said he clearly saw the car being driven to the address and witnessed the car being stopped. Constable Campbell said he knew John Palmer, who he said got out of the front passenger door of the vehicle. He said he knows the defendant who he says got out of the driver's door, before turning to look at Constable Campbell and walk towards the house.

[55] I am required to caution myself on the reliability of Constable Campbell's identification which was challenged and I have done so.

[56] Constable Campbell's evidence was that he had Mr Orupe in his direct line of sight, lit up by the headlights of the police vehicle. Mr Orupe was a person he had dealt with before. He was known to him. I accept there was no need to have any formal identification procedure because of the chain of evidence from when Constable Campbell first saw the vehicle, caught up with it, watched it being stopped, saw Mr Orupe exit, and identified him.

[57] I do not accept Mr John Palmer's evidence for the following reasons:

- (a) Mr Orupe was known to Constable Campbell who had, had previous dealings with him;
- (b) When he gave his evidence, Mr Palmer at times displayed control and was measured on occasions, however, there were times when his animosity towards the police was very clear. While he may believe he has justification for his beliefs, it gave him a reason to lie as did his association with Mr Orupe;
- (c) Mr John Palmer did not present as a person who would not lie to the Court. My impression is that he would not be unduly concerned about lying to a Judge;
- (d) His evidence was illogical. Three people were identified as being at the address; himself; Mr Jarrod Palmer and the defendant;
- (e) Constable Campbell's evidence satisfied me that he knew all three people including Mr Orupe who he saw driving. Constable Campbell kept Mr Orupe in his sight and identified his subsequent movements after he saw him exit the front driver's side of the vehicle. The person he identified as the driver of the motor vehicle was the person who was later arrested on the charge of failing to remain. If Mr John Palmer was the person who had hopped out of the front driver's door he would have been the person arrested. Mr John Palmer was clearly identified as having hopped out of the front passenger door.

[58] I consider that Mr Orupe's criminal record in relation to his previous convictions which records his indefinite disqualification and previous convictions for a third or subsequent charge of driving while disqualified, even though obtained following Constable Campbell's wrongful entry into the house is admissible and I do not consider, that, that evidence, was improperly obtained. It was obtained subsequently. It is a matter of formal record. Because the objective facts in relation

to Mr Orupe driving the vehicle on the road were prior to the wrongful entry, any impropriety was unrelated to the driving while disqualified charge.

[59] If I am wrong about this, in my view, the need for an effective and credible system of justice would trump other considerations in section 30(3) Evidence Act and I consider that evidence would not be disproportionate to any impropriety (if that was the case). This would be even though I accept that it was open to Constable Campbell to have made enquiries about whether Mr Orupe was disqualified when he contacted police communications.

[60] In conclusion I am satisfied that each element of the charge of driving while disqualified in its aggravated form, is proved beyond reasonable doubt.

[61] Mr Orupe will need to appear in Court so that the charges of failing to remain, driving with excess breath alcohol (aggravated) and obstruction of a constable in the execution of his duty can be dismissed and a conviction entered on the driving while disqualified charge (aggravated).

J A Binns
District Court Judge