EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT GISBORNE

CRI-2014-016-002380
[2016] NZDC 6477

NEW ZEALAND POLICE
Prosecutor

v

TYLER ARRON POGAN
Defendant(s)

Hearing: 12 April 2016

Appearances: C A Stewart for the Prosecutor
M P Tarsau for the Defendant

Judgment: 12 April 2016

ORAL JUDGMENT OF JUDGE W P CATHCART

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[1] Mr Tyler Pogan faces a number of charges. There is a charge alleging that on 26 October 2014 in a public place he behaved in a disorderly manner.

[2] The other charges relate to the same time period. He is charged with an offence of resisting a police officer and assaulting the same officer in what is alleged to be the execution of the officer's duty. He also faces a charge of threatening to kill the officer in question, Constable Middleton.

[3] Finally, in relation to the security officer, who was in attendance at the Awapuni Stadium that day where these other incidents are said to have occurred, the defendant pleaded guilty to a charge under s 9 Summary Offences Act 1981 admitting that he assaulted the security officer, Mr Apola Koteka.

[4] In relation to that last charge, this hearing also constitutes a disputed fact hearing in relation to what actually took place between the security officer and Mr Pogan. Mr Pogan denies punching the security officer. He accepts that he pushed him. Mr Pogan also denies that he made a racial slur against Mr Koteka.

[5] For the purpose of sentencing on that charge, I need to make findings of fact in relation to both those issues. I consider that those two factors would have a material influence on sentence so findings need to be made.

[6] The charges of resisting and assaulting of the police officer will be dealt with in more detail later in the judgment. Both those charges, however, require that the police establish that the constable was acting in the execution of his duty at the time. It is said that the officer was executing his power of arrest under the Summary Offences Act. It is said that this duty was alive at the time Mr Pogan resisted and assaulted Constable Middleton.

[7] The threatening to kill charge, of course, does not require any analysis as to the issue of whether the constable was acting in the execution of his power of arrest. A threat to kill simpliciter arises if:

(a) There was an expression made by the defendant that would constitute a threat to kill; and

(b) The defendant intended the threat to be taken seriously.

[8] The fact that a defendant never intended to carry out the threat is irrelevant to proof.

[9] I first deal with the findings of fact in relation to the assault on the security officer. Then I will deal with the threat to kill charge, and finally, I will deal with the charges of assaulting and resisting the police officer in the execution of his power of arrest.

[10] It is accepted by the prosecution that the disorderly behaviour charge should be dismissed. The reason for that concession was confirmed by Ms Stewart for the prosecution. On the prosecution evidence, she conceded that there was no evidence to establish that there was disorderly behaviour as that term is now understood by the case law. Without getting into a detailed analysis of the Supreme Court decision in *Brooker v Police*,[1] it is sufficient to state that the disorderly behaviour concept under s 4(1)(a) means "behaviour that seriously disrupts or violates public order". It has to be a substantial disturbance. That finding will often depend upon the circumstances surrounding the time and place of the conduct. Also, whether affected members of the public could not reasonably be expected to endure the behaviour. Ms Stewart concedes that the evidence does not reach that threshold and has invited the Court to dismiss that charge. That charge is dismissed.

[11] I have gone into some detail about the reason for the withdrawal because it has some bearing on the issue relating to the lawfulness or otherwise of Constable Middleton's arrest of the defendant.

[12] Returning to the assault charge, Mr Koteka spoke about how he was the security officer on the VIP gate at the Awapuni Stadium venue on that day. Public access to the venue was at a different gate. He said he was approached by a Caucasian, which everybody accepts is the defendant, and a female. He instructed them that they could not go through the gate to get out of the stadium. He said he heard the woman say to the defendant, "I told you, you can't".

[13] Mr Koteka said that the defendant came back an hour or so later with a different female. That defendant accepts that is correct. The first woman who attended with him was his girlfriend. He fell out with her during the course of that evening. The second female was Ms Keogh who gave evidence before the Court. The defendant thus endeavoured to exit that VIP gate twice.

[14] When he was refused permission to exit the second time, Mr Koteka said the defendant became enraged and threw punches at him. He said that the defendant

[1] [2007] NZSC 30

called him a "black cunt" and told Mr Koteka to get out of his way. Mr Koteka said punches were being thrown at him. The defendant was using both hands. But Mr Koteka was able to deflect those punches as a result of using his arms. He says the defendant did push him with both his hands.

[15] There was some suggestion that the security officer may have allowed non VIPs through the gate to enter the stadium, possibly to even exit the stadium, although the latter proposition is not really supported in the evidence.

[16] Mr Pogan gave evidence that suggested he had a sense of entitlement to demand from the security officer that he could go through that gate notwithstanding permission was refused. Mr Pogan seemed to suggest that unless he was allowed to exit the stadium, he would have had a melt–down and may have caused problems if he had to exit another way.

[17] The short point is that Mr Pogan had no entitlement to go out that gate. The security officer was authorised to police that gate. He gave no permission for Mr Pogan to exit it. That should have been the end of the matter. Mr Pogan should have obeyed the direction. He did not.

[18] Mr Pogan became aware that there were other security officers in attendance. He said that other security officers were approaching to "close him off" from exiting the gate. He said he walked along the fence–line to try and find a thinner part of the hedge to climb over. He could not find such a place and ended up returning to the VIP gate.

[19] Mr Pogan accepted that he verbally abused the security officer. He said the security officer had one arm on him. Mr Pogan must have been aware at that stage that the security officer was potentially seeking to detain him as the other officers approached. The defendant told the Court that he proceeded to punch the officer's knuckles to let him go. He said he did that repeatedly.

[20] With respect to the racial slur allegation, the defendant said little about that issue in evidence–in–chief. He simply denied that he ever made that comment.

Under cross–examination, however, he said that he was behaving aggressively. He said that he was abusive to the security officer. He was agitated because he had just broken up with his girlfriend. Under cross–examination, he said that someone near the gate made a comment and he wanted to go over and "smash" that person. However, he did not carry out that idea. Nevertheless, he conceded that he had those feelings building inside him.

[21] Under cross–examination, the defendant said that he started to personalise his verbal abuse against the security officer. He called the officer a "dickhead" and a "cunt". He said that he said a "lot of things", including calling the security officer a "faggot" and a "mother–fucker". In short, he was admitting under cross-examination that his verbal abuse had become personal.

[22] There is a pattern in the evidence about the defendant's verbal abuse. When it comes to the threat to kill charge, he accepts that he made the expression to Constable Middleton that he was going to kill the officer and his kids. The defendant said that when he uttered the expression that related to the constable's children, he instantly regretted it and pondered inwardly why he had done that. He accepted that he did mean to say the words. He said he never intended to carry out the threat. But he conceded in cross–examination that he intended the words to be viewed as serious. But, for present purposes, there is a pattern in his verbal abuse towards others that night.

[23] I need to be sure that the expression in relation to the racial slur is made out on Mr Koteka's evidence. If there is a reasonable possibility that the expression was not made, then I should not make the finding. Having heard Mr Koteka, there is no doubt in my mind that the insulting remark about his skin colour was made by this defendant. The defendant denied the racial slur. However, listening to him, I gained the impression that the notion that he could be labelled as a person who would stoop so low, is a label he does not want to wear. Yet, the pattern of the evidence indicates that this defendant is not shy from expressing personalised attacks on people.

[24] I find that the racial slur was made. I also find that punches were delivered to the officer on the knuckles. Also, I accept that the defendant swung at the security officer, albeit that the punches did not connect.

[25] Having already addressed the evidence in relation to the threatening to kill charge, I find that charge proved. The defendant's own evidence convicts him on it. He concedes that the threatening words were made. He accepts that the threat was intended to be taken seriously. That proves the charge.

[26] The two remaining charges deal with the issue of whether the police have proved beyond reasonable doubt that the defendant resisted and assaulted Constable Middleton whilst the constable was executing his power of arrest.

[27] Prior to the commencement of this hearing, there was no formal challenge as to whether the arrest was lawful. During the course of Constable Middleton's evidence I was sufficiently concerned about the legal boundaries of his power of arrest to enquire as to the basis of his belief. In particular, whether he had good cause to suspect an offence had been committed under the Summary Offences Act.

[28] Section 39 Summary Offences Act states:

> Any constable, and all persons who he calls to his assistance, may arrest and take into custody without a warrant any person whom he has good cause to suspect of having committed an offence against any provisions of this Act except ss 17 to 20, 25 and 32 to 38.

[29] If Constable Middleton did not have good cause to suspect that Mr Pogan had committed the offence of disorderly behaviour, then the arrest was unlawful. If the arrest was unlawful, then the constable was not acting in the execution of his duty at the time of the alleged resisting and assault. If I find that the arrest was unlawful, the charge collapses at that first hurdle. I would not need to go into an analysis as to whether Constable Middleton went beyond the lawful bounds of his power of arrest by using unnecessary force to effect it. That issue remains a live one between the parties. However, it becomes moot if I find that the arrest was unlawful.

[30] There are other legal issues that would follow if the arrest was lawful, including whether or not the defendant had an honest, but mistaken, belief that the constable was acting in the execution of his duty. All of those issues hinge on an analysis as to whether or not Constable Middleton was using excessive force to effect the arrest. As I say, those legal and factual issues do not arise if the arrest was pro tanto unlawful.

[31] Dealing with the issue of arrest, I am reminded that the concept on disorderly behaviour focuses on a defendant's actions. It can also embrace a defendant's appearance at the time. The case referred to on the last point is *Ceramalus v Police*.[2] In that case the defendant walked naked along a beach area where there was a group of primary school children and teachers present. It was argued that there was no behaviour ensnared by the section, apart from the act of walking along the beach. In his defence, it was said his naked appearance was the issue; not his behaviour.

[32] Tompkins J rejected that submission in the circumstances of that case. He said that the behaviour of the appellant "embraced his actions in walking along the beach and lying upon it in the state in which he was while he did so." The combination of those facts constituted his behaviour. That scenario, of course, is different from this case.

[33] The mere use of words in a quiet conversational tone cannot constitute behaviour. That must be the case under s 4. The structure of s 4(1)(a) is such that threatening words are dealt with in other subsections of s 4. The structure of s 4 thus supports the notion that words alone could not suffice for a s 4(1)(a) offence.

[34] Each case depends on its own facts. Here, Constable Middleton said that he had spoken to the security officer at the gate. He told the Court that he did not have the full story of what had taken place. However, he certainly had information which suggested the defendant may have assaulted the security officer.

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[2] (1991) 7 CRNZ 678

[35] He and Constable Bell approached the defendant who was leaning up against a vehicle outside the stadium. The defendant said that he saw the constable approaching. The defendant told the Court that he suspected the police officers were approaching because of what had taken place with the security officer inside the gate.

[36] The focus of course, is on Constable Middleton. He had a power of arrest under s 39 if he had good cause to suspect the defendant of having committed an offence under the Summary Offences Act. He told the Court that he arrested the defendant on the basis that he had good cause to suspect him of disorderly behaviour. In doing so, he was not incorporating into his decision the allegation of the assault on the security officer. Also, he did not base his decision to arrest on the ground that the defendant used insulting or threatening language. He rested his belief on the defendant's behaviour outside the stadium.

[37] It is clear from Constable Middleton's evidence that when he approached the defendant outside the stadium, the defendant looked upset. However, the defendant made no threats to the police officer. According to Constable Middleton, the defendant was pacing around. Apart from that observation, there was no other description given by Constable Middleton about the defendant's behaviour. He said that the defendant was not aggressive towards to him or anyone else at that point. He said that he had heard the expression, "f-off" from the defendant.

[38] However, Constable Middleton relied on two factors to support the proposition that he had good cause to suspect that the defendant had committed the offence of disorderly behaviour. Those two factors were the defendant's swearing and the defendant's body language.

[39] Here, Constable Middleton said that he framed that suspicion on the basis that the defendant's overall conduct constituted disorderly behaviour. Of course, such a belief on the part of the police officer alone is never sufficient. The good cause element must be assessed objectively.

[40] In my view, Constable Middleton did not have good cause to suspect that the defendant had committed the offence of disorderly behaviour outside the stadium. The behaviour of the defendant outside the stadium did not give any objective basis to the suspicion that he had breached the disorderly behaviour provisions of the Summary Offences Act. Yes, he swore and he paced around, according to the constable. But, in my view, neither of those propositions individually nor collectively constituted good cause to suspect that the offence of disorderly behaviour was committed.

[41] Interestingly, Ms Keogh, who gave evidence for the defence, also described how the defendant uttered an expression under his breath when the police officers were approaching. She said the defendant then got up and moved away. She confirmed that there was no aggressive behaviour by the defendant up until the point he was arrested. Her evidence thus supports the general evidence of Constable Middleton. However, as I say, it is the evidence of the constable that is the major focus on the ground for arrest.

[42] I find that the arrest was unlawful. Accordingly, the police cannot satisfy me that the constable was acting in the execution of his duty. The charges of resisting and assaulting Constable Middleton are dismissed on that ground.

[43] I need to record that there were some serious allegations against Constable Middleton about the force it is said he used to carry out the unlawful arrest. If, in fact, Constable Middleton had exercised his power of arrest on the basis of the information about the alleged assault on the security officer, he would have had good cause to suspect that Mr Pogan had committed an arrest–qualifying offence.

[44] The same point applies to Mr Pogan's use of threatening language outside the stadium. That conduct could have constituted good cause to suspect upon which the officer would have power to arrest. However, as I have pinpointed, Constable Middleton did not rely on those two propositions. He focussed his belief on the disorderly behaviour element. In my view, the evidence that was available to

the officer at that point was far too thin to constitute a good cause to suspect that offence.

[45] There is a big conflict in the evidence relating to whether Constable Middleton used excessive force in his dealings with Mr Pogan. I found Ms Keogh's evidence to be quite compelling. She did not strike me as a person who embellished her account or was unreliable on any material point. She conceded there were very brief moments when she did not watch the incident. But, it is abundantly clear, she was very close by and observing what took place.

[46] Ms Keogh said that she saw Constable Middleton delivering what she described as around "six punches to the side of the face" of the defendant. At that point, the defendant was laying face–down. The constable had part of his body over the top of the defendant. She said she was right next to the incident when it occurred. She said the punches followed the threat that the defendant had made to the constable about wanting to kill him and his children.

[47] On her evidence, these blows were effected at a point when the defendant was defenceless face–down on the ground. She felt shocked by that part of the incident and she was quite disturbed by what she had seen.

[48] Constable Middleton describes a different version. He admits that there were times when he punched the defendant but he did so because he received a punch and the defendant was consciously resisting arrest. It is clear that the defendant was not giving up. There was clear resistance from the defendant.

[49] Constable Bell gave evidence. She did not see much of the incident. She did not see the defendant strike Constable Middleton. She did not see Constable Middleton strike the defendant. She simply answered questions on those points with the interesting phrase of either "positive" or "negative".

[50] In his evidence, the defendant said that he was punched several times to the head. He said at that point that he felt like just giving up.

[51] I record these observations because it remains a live issue between the parties for other reasons. I do not have to make a finding of fact in relation to that matter given the position I have reached as to the unlawful arrest.

[52] However, I formed the view that Ms Keogh's evidence is sufficiently reliable such that it would behove the police to continue its internal investigation, or reopen it. This will allow the issue to be resolved one way or the other.

[53] In the end, the charges are dealt with in the following way:

(a) I made the findings of fact in relation to the assault on the security officer.

(b) The charges of resisting and assaulting Constable Middleton are dismissed.

(c) The charge of disorderly behaviour is withdrawn.

(d) The charge of threatening to kill Constable Middleton is proved.

W P Cathcart
District Court Judge