

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT WELLINGTON**

**CRI-2017-085-001374
[2018] NZDC 2474**

THE QUEEN

v

[THOMAS MCCARTHY]

Hearing: 13 February 2018

Appearances: L Hann for the Crown
V Thursby for the Defendant

Judgment: 13 February 2018

RESERVED ORAL JUDGMENT OF JUDGE S M HARROP

[1] This is a reserved but oral judgment on [Thomas McCarthy's] application for a discharge under s 147 Criminal Procedure Act 2011 which was heard earlier this morning.

[2] Mr [McCarthy] faces a jury trial today on one charge of escaping lawful custody on or about 23 May last year at Wellington. That is a charge laid under s 120(1)(c) Crimes Act 1961. It is a serious charge, carrying five years' imprisonment. The nature of the custody from which he is alleged to have escaped is the arrest made by [the Sergeant].

[3] The application has been made on the basis that [the Sergeant] did not lawfully arrest Mr [McCarthy] and, accordingly, that there was no lawful holding in custody

from which Mr [McCarthy] escaped. I accept immediately that the Crown must, on this charge, establish beyond reasonable doubt that a lawful arrest occurred, as indeed does the Crown. Without that, obviously, the charge cannot succeed; an essential element would be missing. It is really a mixed question of law and fact. On an application of this kind the Crown is entitled to have the facts taken at their highest from the Crown perspective. So, an assessment has to be made on the basis of the facts as evident from the formal statements. The question is whether as a matter of law I can on the state of the evidence safely conclude that there was a valid arrest so as to leave the matter to the jury to determine and a basis on which if properly directed they could reasonably convict.

[4] The facts here are not disputed and it is probably easiest if I read most of what [the Sergeant] says in his formal statement, which is signed and dated 30 August last year. On 23 May, was in a police safety team rostered to work a night shift. He was called to a disorder job at Frank Kitts Park where a group of people were believed to be drunk and fighting. He drove over to the park and parked near the TSB arena and walked towards the playground where he could hear some people talking and yelling. He saw a group of people walking down the stairs and towards him. They were a mix of males and females: two males and two females.

[5] [The Sergeant] goes on:

The girls appeared quite young and had clearly been drinking; one of the males, who I now know to be the defendant [Thomas McCarthy], was holding a bag, and when he saw me walking towards him put the bag on the ground. I heard the sound of clinking bottles in the bag. I began to speak to him and informed him that I needed to record his details as he was breaching the liquor ban. He initially refused to give his details, but I informed him that he could be arrested if he refused and so he gave me the details of [name deleted], date of birth [date deleted] May 1985.

[6] When [the Sergeant] checked that person's details on his police mobility device there was no result. He then questioned the defendant as to whether or not he had a driver's licence and he said he did. The officer said he did not believe him and that he needed to provide correct details. Mr [McCarthy] told him he had. The officer then said to him, and I quote because this is recorded as a quote in his statement: "*You are under arrest for failing to provide correct details.*" (emphasis added)

[7] The officer says that Mr [McCarthy] then swore at him and immediately turned and ran from the area towards the lagoon. The officer started to give chase but his phone and notebook fell from his vest pockets. Shortly afterwards, with the assistance of [the Constable] the defendant was apprehended nearby. He was spoken to by [the Sergeant] back at the police station. Mr [McCarthy] told him that he had been with a group of people who had been arguing and one of them had broken a window and taken some wine, and he said that when [the Sergeant] had approached him he had been carrying the wine and that he gave false details because he was scared of getting into trouble for stealing the wine when it was someone else.

[8] Those are the essential facts for present purposes. The critical question for present purposes is, on those facts, has there been a lawful arrest? I have received helpful written submissions from Ms Thursby for Mr [McCarthy] and from Ms Hann for the Crown. Without going through each of them in detail the contest is as follows.

[9] I first mention that there is no dispute by the defence that if the officer had said to Mr [McCarthy] that he was under arrest for breach of the liquor ban, there could be no doubt that that would have been a valid arrest and that the charge of escaping from lawful custody would have been well-founded. But Ms Thursby submits that he was not validly arrested. She points out, and there is no dispute about this, that under s 316 Crimes Act it is fundamental that a person being arrested is told by the arresting officer at the time of arrest, unless it is impractical or obvious, of the act or omission for which he is being arrested. This is reinforced by s 23(1)(a) Bill of Rights Act 1990 which says, *“Everyone who is arrested or who is detained under any enactment shall be informed at the time of the arrest or detention of the reason for it.”*

[10] Here, there is no doubt on the evidence contained in his formal statement that [the Sergeant] did give a reason for the arrest at the time of arrest, and that was that Mr [McCarthy] was being arrested for failing to provide correct details. That followed a threat to arrest him for a failure to do so. But the defence says there is no power to arrest under the Local Government Act 2002, or anywhere else, for such a failure.

[11] The Crown accepts that is correct, in isolation, but nevertheless says that this was, in all the circumstances, a valid and lawful arrest. The Crown says that one

cannot look at the stated words in isolation and that Mr [McCarthy] can have been under no illusion why he was being arrested. It was, in reality, for breaching the liquor ban. The request that [the Sergeant] made for correct personal details was fundamental to an officer's duty in that situation where he is investigating a breach of the liquor ban, and that is so that a summons can be issued for this fine-only offence. Obviously one needs a defendant's correct name and address in order to send a summons, and as Ms Hann says, people are not normally arrested for breach of the liquor ban, although there is no doubt that s 169(2)(c) Local Government Act 2002 does provide power to arrest for such an offence. As I have already noted, if [the Sergeant] had expressly stated that that was why he was arresting Mr [McCarthy], then there would have been no dispute about the validity of his arrest pursuant to s 169(2)(c) and no dispute that Mr [McCarthy] escaped from his lawful custody.

[12] The defence points out that under s 169(2)(d) there are two grounds expressly providing a power of arrest for a constable in respect of any person who has refused to comply with particular kinds of request: to leave a restricted place and to surrender any alcohol that is in that person's possession in breach of the alcohol ban. Ms Thursby submits that Parliament has turned its mind to the types of request a refusal of which may warrant arrest, but they do not include a power to arrest for a failure to provide correct details in response to a police officer's request for those.

[13] Ms Hann submits that while the words used by the officer in isolation were not correct, and she accepts that there is no power to arrest for failing to provide correct details per se, when one looks at the context here, the immediacy of the breach of the liquor ban, the officer's overall purpose and need to obtain those details, then in context this was a legitimate lawful arrest; it was not a capricious or arbitrary one. She referred me to *Ngeru v Police*, a judgment of MacKenzie J in the High Court of Wellington on 17 November 2006, particularly at paragraphs [7] and [8] where His Honour discussed the validity of arrest in that case. The issue was different there, but Ms Hann drew my attention to the fact that there is a wide discretion about arresting under s 169(2)(c) and that it must be considered from the perspective of the arresting officer. His Honour emphasised that a wide discretion is available and its exercise is not to be subjected to a minute analysis with the benefit of hindsight.

[14] I have taken a short time to consider these submissions. In my view, while there is no doubt that Mr [McCarthy] *could* lawfully have been arrested for breach of the liquor ban, that on the face of the officer's own evidence that was not the offence for which he was arrested.

[15] I do not consider that the collateral existence of a good and lawful reason for arrest arising out of the same incident means that an officer can excuse or "fudge", if I can put it that way, the obligation to give a correct reason for arrest as ss316 and 23 both require. Here he gave a clear reason; effectively, he did so twice, but it was not a valid reason for arresting Mr [McCarthy]. The officer was not in a situation where he was having difficulty conveying information to Mr [McCarthy]; they were having a conversation about the matter. He could easily have said, but did not, that he was being arrested for breach of a liquor ban. I have to deal with what happened and what was clearly said, not with what alternatively might have happened or been said.

[16] I reject the Crown submission that the context means that Mr [McCarthy] must have known why in reality he was being arrested; namely for breach of the liquor ban. On the contrary, in my view he was entitled to rely on the clearly-stated reason given by the officer, effectively twice.

[17] I therefore conclude that Mr [McCarthy] was not lawfully arrested, though he easily could have been. His arrest was for the clearly stated reason of not giving correct details to the officer who had engaged him in discussion about whether he had breached the liquor ban, but not for breaching the liquor ban.

[18] The officer did not comply with his clear and strict obligation under both s 316 and s 23 and, accordingly, the arrest was not lawful because it was not accompanied by a correct and true statement of the reason for it. Therefore, when Mr [McCarthy] ran off, he was not escaping lawful custody and the charge must be dismissed.

[19] I do accept that the existence and the proximity of another basis for lawful arrest would be highly relevant to an assessment of the gravity of the unlawful detention and to assessment of damages on any claim for the brief false imprisonment. There is no doubt that the officer was not acting arbitrarily or capriciously.

[20] Mr [McCarthy] hardly covered himself with glory by both breaching the liquor ban and then not giving correct details, indeed going to the length of providing a false name, despite being warned of the consequences. However that does not mean he was lawfully arrested, and I do not consider that the overall context can turn an unlawful arrest into a lawful one.

[21] For completeness, I mention that I have read the three High Court authorities supplied to me by Ms Hann; as well as *Ngeru*, there is *Kingsbury*¹ and *Oldfield*,² but I have found none of those cases of direct assistance on the particular issue that I am dealing with. They are all distinguishable on the facts and the statements in principle also need to be considered in light of the particular facts in those cases.

[22] For these reasons, I grant the s.147 discharge application and the charge of escaping lawful custody is accordingly dismissed. Mr [McCarthy], you are free to go.

S M Harrop
District Court Judge

¹ *Kingsbury v Police* HC Rotorua CRI-2005-463-000075, 16 November 2005

² *Oldfield v Police* HC Hamilton CRI-2009-419-000062, 11 February 2010