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**IN THE YOUTH COURT
AT CHRISTCHURCH**

**I TE KŌTI TAIOHI
KI ŌTAUTAHI**

**CRI-2018-209-000207
[2019] NZYC 127**

NEW ZEALAND POLICE
Prosecutor

v

[S J]
Young Person

Hearing: 8 March 2019

Appearances: B Grimwood and Sergeant G Nilsson for the Prosecutor
A James for the Young Person

Judgment: 12 March 2019

ORAL JUDGMENT OF JUDGE N A WALSH
Section 214(1)(a)(ii) – Arrest Procedures

Introduction

[1] The pivotal issue is whether [Senior Constable 1] acted in the execution of her duty under s 214(1)(a)(ii) of the Oranga Tamariki Act 1989, in arresting [SJ], then aged 15 years, at the [mall location deleted] , on [date 1 deleted].

[2] Section 214(1)(a)(ii) provides a police officer should not arrest a young person unless the police officer is satisfied on reasonable grounds:

- (a) That it is necessary to arrest that ... young person without warrant for the purpose of –
 - (ii) preventing that ... young person from committing further offences; and
- (b) where the young person may be proceeded against by way of summons, that proceeding by way of summons would not achieve that purpose.”

[3] Section 208(a) provides that unless the public interest requires otherwise criminal proceedings should not be instituted if alternative means exist.

[4] In an oral judgment it is neither necessary nor desirable to recite all of the evidence. I will summarise the witnesses’ evidence, make determinations on the facts and apply the law to the facts. I reserve the right to edit this judgment for any grammatical or numerical errors.

Prosecution evidence

[5] [OM] is the Operations Manager of the security team at the [mall]. She first met [SJ] on [date 2 deleted — 2 days before date 1] but had been made aware by colleagues that, on [2 days previously], there was an incident where a cap-gun had been used in the mall. She was aware that [SJ] and others were asked to leave and were given a verbal trespass by a security guard.

[6] On [date 2] she met [SJ] and she described [SJ]'s demeanour as "very pleasant and as good as gold". She said that [SJ] wanted a written trespass notice, but she told [SJ] "As long as you behave in here it's okay but the moment you come back and misbehave ..."

[7] On [date 1 deleted] about [time deleted] she was informed by a security colleague, [name deleted], that [SJ] and his associates walked passed him being verbally abusive and were saying something along the lines of, "Aha, aha, I'm not trespassing anymore." Therefore, on [date 1 deleted] she personally approached [SJ] and served [SJ] with a trespass notice. She said that [SJ]'s demeanour suddenly changed. She said that [SJ] was aggressive saying, "You can't fucking do that. You're not a security guard."

[8] Under cross-examination she agreed that [SJ] was upset about being served with a notice and that [SJ] considered that it was unfair. She then went to the customer service kiosk in the mall and was followed by [SJ] and [number deleted] associates who were shouting and being disruptive. [SJ] said he was going to telephone [Senior Constable 2], the Youth Aid officer whom he knew.

[9] [OM] said that [SJ] continued to swear, and he then targeted a security officer calling him a "wanker", a "wanna be", "you don't know how to do your job". She said by this time members of the public in the mall were present and "it became quite loud". She was of the opinion that [SJ] was displaying an aggressive demeanour in the public space in the mall. At one stage [SJ] ripped up and discarded the trespass notice that he had been served with by [OM] in the area adjacent to the kiosk.

[10] [OM]'s evidence was that [SJ] continued to be aggressive towards her over the kiosk counter and also towards her staff. She said that by this stage her concerns were first and foremost for her own safety but, secondly, she was concerned for members of the public who were standing and watching the confrontation.

[11] She said that [SJ] and his associates remained in the vicinity of the kiosk for four or five minutes but during this time [SJ] spoke to [Senior Constable 2] on the telephone. [SJ], after he completed his conversation with [Senior Constable 2] said,

“We’ll have to fuckin leave”. [SJ] and his [number deleted] associates walked out of the mall to the southern entrance to [store name deleted]. [OM] telephoned [Senior Constable 1], a community constable at the [location deleted] Police Station with whom she had had previous dealings. She told [Senior Constable 1] that she had trespassed [SJ] and [SJ] and his associates were becoming disruptive and disorderly. She said that she told [SJ] that the police had been called but [SJ] and his companions went outside and sat on the gutter edge adjoining [details deleted] by the carpark near the entrance.

[12] [OM] under cross-examination agreed that at this stage [SJ]:

- was not being disorderly;
- was not being abusive; and
- was waiting for the police to arrive.

[13] When the two police officers arrived at the mall, [Senior Constable 1] asked who had been served with the trespass notice and [OM] identified [SJ]. She said that [Senior Constable 1] immediately approached [SJ] who was seated, and [Senior Constable 1] attempted to talk to [SJ] first but [SJ] became abusive, he was swearing and “got quite agitated”.

[14] She said that by this time quite a crowd had assembled in the area. She said that [Senior Constable 1] was repeatedly telling [SJ] to “settle down, settle down”. She said at no stage did she hear [SJ] say that he would leave. She said that [SJ]’s abusiveness and aggressiveness escalated when [Senior Constable 1] attempted to arrest [SJ]. By this time [SJ] who was seated was physically forced back into [a planter box - details deleted] and he was resisting [Senior Constable 1]’s attempts to place her handcuffs onto his wrists.

[15] [Senior Constable 2], who had been instrumental in getting [SJ] to re-engage at school, gave evidence that, on [date 1 deleted] he received a telephone call from the mall and [Senior Constable 1] put her head into his office space to say that she had

had a call from the mall. [Senior Constable 2] said that [SJ], during the telephone conversation, was clearly upset about being trespassed from the mall. He said [SJ] was agitated and swearing, albeit not at him. [Senior Constable 2] told [SJ] that the mall management obviously had a reason to trespass [SJ] and he should leave the mall. [SJ] said that he was not leaving but [Senior Constable 2] said that he told [SJ] three or four times to leave the mall and “Hey, [SJ], there’s two police officers on the way and you’d better leave otherwise ...”

[16] However, [SJ] told [Senior Constable 2] that he was not leaving and reiterated that he found the whole situation unfair. [Senior Constable 2] said, unfortunately, he was of the opinion [SJ] was not listening and actually [SJ] hung up the telephone on him. About 15 minutes later, [Senior Constable 2] received a call for backup help from [Senior Constable 1].

[17] [Senior Constable 3], a community constable, on [date 1 deleted] was alerted to the incident at the [mall] concerning a complaint that there was disorderly behaviour and trespassing offences being committed. Upon arrival at the mall, with [Senior Constable 1] in the police car, they jointly approached the group of young persons, including [SJ], whom he described as “excited but jovial”.

[18] While [Senior Constable 1] spoke to [SJ], [Senior Constable 3] dealt with one of [SJ]’s friends who chose to intervene. This person turned out to be one [PL] who was warned on at least three occasions about being obstructive. Therefore, [Senior Constable 3] said that [PL] became his “main focus”.

[19] [Senior Constable 3] did not overhear the conversation between [SJ] and [Senior Constable 1] but he said that, within a short period, [Senior Constable 1] had pulled out her handcuffs and [SJ]’s demeanour went from being in a calm state to one of being completely irrational.

[20] [Senior Constable 3] saw [SJ] lash out with both his arms and feet. He said that he saw [SJ]’s feet strike [Senior Constable 1] in the chest with sufficient force to send her backwards.

[21] He said that she only had one handcuff on [SJ]'s wrist and was struggling to restrain him therefore he went to [Senior Constable 1]'s assistance and he managed to get a second pair of handcuffs onto [SJ]'s wrist. He then applied pressure but they both ended up wrestling in [the planter box] together.

[22] Meanwhile, several members of the public had gathered, cellphones were out filming the incident and there were comments of "police brutality". However, one tattooed Māori male in a beanie bluntly told [SJ] to "Fuckin stop struggling you dick".

[23] Under cross-examination, [Senior Constable 3] refuted the assertion that he departed from the [Police Station] with a pre-determined notion to arrest [SJ]. He said that [Senior Constable 1] spoke to mall staff but he was aware [SJ] and his mates were throwing papers over the mall floor and that it was the opinion of the mall staff that [SJ]'s behaviour was unacceptable. Under cross-examination, [Senior Constable 3] agreed that [SJ] got "fired up" only after his arrest by [Senior Constable 1].

[24] [Senior Constable 3] under cross-examination by [SJ]'s counsel, Mr James, was asked, "It wasn't necessary to arrest [SJ] was it?" [Senior Constable 3]'s response was, "The thing was we were to talk to them, that their behaviour was unacceptable" and "We were there because of the fact they were upsetting other users of the mall and their behaviour was inappropriate."

[25] [Senior Constable 3] also said that, initially, [Senior Constable 1] talked to [SJ] but "his demeanour immediately changed to highly agitated and irrational" within a very short time and "my opinion was that he wasn't in control of his emotions".

[26] [Senior Constable 1] gave evidence that she is a police officer with 32 years' experience. She is the community liaison police officer in the [location deleted]. [Senior Constable 1] spends a lot of her policing time in the mall and works closely with [OM].

[27] On [date 1 deleted], [OM] telephoned [Senior Constable 1]. She said that [OM] was agitated and said, "I need help – can you get over here?" [Senior Constable 1] was told by [OM] that a youth in the mall was causing a disturbance. She said that she

had trespassed this young person, but he refused to accept it and had thrown the trespass notice documents onto the mall floor and was being verbally abusive.

[28] She spoke briefly to [Senior Constable 2] who said that he had spoken to [SJ] and told him to leave the mall and “they had an exchange which didn’t go well”.

[29] [Senior Constable 1] en route to the mall received a second telephone up-date from [OM] who advised that [SJ] and his associates had not left the mall but were sitting outside the entrance way to [a store], and they weren’t leaving. She said it was her sense from her discussions with [OM] that the situation needed urgent resolution. She said that [OM] was concerned about the behaviour of [SJ] and his associates. She wanted [SJ] removed from the mall.

[30] Upon arrival at the mall carpark [Senior Constable 1] said that her immediate impression of [SJ] was one of “feigned disinterest”. She said that [SJ] was laughing and joking with his friends and was “somewhat of a show pony, treating it as a joke”. She said that there were between six to eight young persons as well as members of the public in the vicinity of the planter box outside the entrance way to [a store].

[31] [Senior Constable 1] in her evidence-in-chief said that the first thing she said to [SJ] was to enquire if he had been trespassed by the mall. However, [SJ] insisted that the mall could not do this as “I haven’t done anything wrong”. [Senior Constable 1] said that she tried to explain to [SJ] that the mall management did not need to specify a reason for trespassing him but [SJ], in her opinion, displayed a dismissive and argumentative attitude.

[32] She said that she attempted to explain to [SJ] that the carpark was still part of the mall and he would need to move; however, she said [SJ] said, “No, I’m not doing that, it’s not happening” and he was very sure about his position. She said, “I told [SJ] if he didn’t leave I’d be forced to take action but again [SJ] refused to leave.

[33] Meanwhile [SJ]’s friends who were watching the incident were jeering and urging him not to co-operate.” She described the atmosphere as one of a “mob

mentality”. Under cross-examination she said that on two occasions during her discussions [SJ] refused to leave and he was laughing and joking with his friends.

[34] She said that she then took out her handcuffs and told [SJ] he was under arrest and he said, “Get off cunt”. She attempted to proceed with the arrest, but [SJ] struggled aggressively. She said that she had not anticipated the ferocity of [SJ]’s actions and therefore she was unable to physically apply the second handcuff to [SJ]’s other wrist, therefore [Senior Constable 1] attempted to use her torso to apply physical force onto [SJ]; however, [SJ] lent back into the [planter box] to evade being manacled.

[35] She described [SJ]’s demeanour as “incredibly hostile” and she said that she attempted to keep her voice quiet, for example, “We need to get this done” but she felt that [SJ] was not accepting of her advice. At one stage, from the leaning back position [SJ] drew one knee up to his chest, put one foot on her chest and kicked out causing her to stumble. She got to her feet and pushed [SJ] down again and, assisted by [Senior Constable 3], they managed to get one of [SJ]’s arms each in order to apply the handcuffs.

[36] She said that she told [SJ] to stand up but [SJ] refused and she observed that the crowd of public onlookers were moving closer. [SJ]’s associates were encouraging [SJ] in his resistance while other bystanders were asking if she was all right. It was [Senior Constable 1]’s sense that the public were getting concerned about what was unfolding in the carpark.

[37] [Senior Constable 1] was asked in her evidence-in-chief, “Were there any other options other than to arrest him?” In response she said that she had tried, without any success, to explain to [SJ] rationally why he needed to leave the mall. In any event, [SJ] was subdued with both wrists being handcuffed by the two officers and en route back to the police station he became tearful, he calmed down and he verbally apologised to [Senior Constable 1] about him kicking her.

[38] [Senior Constable 1] in her evidence-in-chief rejected the suggestion that upon arrival at the mall she had gone directly to [SJ] saying, “You’re under arrest.” Under cross-examination [Senior Constable 1] rejected the suggestion that she never gave

[SJ] the opportunity to leave the mall carpark. She also rejected the assertion that her first option upon arrival at the carpark was to immediately arrest [SJ] without giving him the opportunity to depart.

[39] Under cross-examination about her powers of arrest under s 214, [Senior Constable 1] said the arrest was undertaken to “partly” prevent the commission of any other offence and “partly because she believed she had a general power of arrest”.

[40] She disagreed with the suggestion under cross-examination that she fell over backwards when she impacted with [SJ]’s shoulder in the [planter box]. She also rejected [SJ]’s claim that she threatened him with being pepper-sprayed, being tasered, or being dealt with by the dog unit. Under re-examination [Senior Constable 1] described [SJ] as “uncooperative, insolent, dismissive and rude”.

[SJ]’s case

[41] [SJ], now 16, is attending [course details deleted]. [SJ] denied being abusive to the security guard at the [mall]. [SJ] said that he was upset about being trespassed as “we’d done nothing wrong” and he rang [Senior Constable 2] because “he knows how I react to things”.

[42] [SJ] said, contrary to [OM]’s evidence, that he was not causing any disturbance and, furthermore, it was his expectation that upon the arrival of the police “we would be able to talk this through”.

[43] [SJ]’s evidence was that from the second [OM] identified him to [Senior Constable 1], “she had the cuffs out” and he was never at any time given the opportunity to leave the carpark. [SJ] said when [Senior Constable 1] said, “Put your hands behind your back” he deliberately put his hands under his bottom where he was seated, and she ended up pushing him back into the [planter]. [SJ] denied lashing out with his foot and explained that “I did a basic rugby move and pushed my shoulder into hers”. [SJ] refuted the police officer’s evidence that he was not listening but he decided not to co-operate as “I didn’t believe what they were doing was right”.

[44] [SJ], under cross-examination by Ms Grimwood, disagreed that he was verbally trespassed by a security guard on [the day before date 1] and, furthermore, denied that he asked [OM] for a copy of the trespass notice. He agreed that he tore up the trespass notice given to him by [OM] but denied yelling and swearing at her. Under cross-examination, [SJ] agreed that he gave a security guard the “wanker” sign and he also agreed that he wanted to show off in front of his friends.

[45] [PL], the 16 year old friend of [SJ]’s, gave evidence and admitted that he was the other young person who got involved with [Senior Constable 3] outside the entrance way to the mall.

[46] [PL] denied causing any trouble. It was [PL]’s evidence that [SJ] was pointed out to [Senior Constable 1] and she came over to him and said, “You’re arrested.” He said that there was no discussion prior to [SJ]’s arrest.

[47] Under cross-examination by Miss Grimwood, [PL] explained that he overheard [SJ] speaking to [Senior Constable 2] and that “we were waiting for the cops ‘cos we wanted them to get both sides of the story.”

[48] [PL] under further cross-examination then acknowledged that [Senior Constable 1] did come over and gave them the option of leaving and said, “Yeah, but it was nothing to do with me.”

[49] However, in conflict with [PL]’s evidence-in-chief, he agreed under cross-examination that [Senior Constable 1] did speak to [SJ] and also acknowledged that there were bits of conversation between [SJ] and [Senior Constable 1] that he could have missed during his interactions with [Senior Constable 3]. However, [PL] was adamant that [SJ] at no time kicked [Senior Constable 1].

[50] Therefore, Mr James submitted in closing that there was no power by the police officer to arrest [SJ] in terms of s 241(a)(ii) in that [SJ]’s arrest was intended for the purpose of the offence of trespass and there was no other arrest for any other charge and that [SJ] at no stage had been charged with intimidation or disorderly behaviour. Mr James submitted there was no evidence of further offences being committed by

[SJ]. Mr James said that [SJ] had in fact already exited the mall, he was in the carparking area causing no bother and there was no lawful justification under s 241(a)(ii) to arrest [SJ].

[51] Section 214 requires [Senior Constable 1] to have been satisfied on reasonable grounds that [SJ]’s arrest was necessary to prevent [SJ] from committing further offences and where [SJ] might be proceeded against by summons, proceeding that way would not achieve that purpose. Mr James helpfully referred to the decisions of Harrison J in *Pomare v Police*¹ and to District Court Judge J Maze’s decision in *NZ Police v T Q*.²

[52] In the case of *T Q*, this was a situation where on 23 July 2016, *T Q* was charged with assaulting another young person at [location deleted] and he was also trespassed from entering [location deleted]. Two days later *T Q* was observed by the police on a security camera footage back at [location deleted], therefore, four police officers went to [location deleted] and *T Q* was arrested as the police officer did not believe that proceeding by way of summons would stop the offending of trespass. Judge Maze concluded that the Timaru police officers conducted an invalid arrest for trespass, an offence which she described as “very low level offending” at the Timaru skate park. Judge Maze was satisfied that *T Q* was actually leaving [location deleted] when the officers arrived “**determined to arrest him**” (*emphasis added*).¹

[53] Judge Maze found that the arresting officers saw nothing else prior to deciding upon arrest, which could be considered any additional offence.

[54] After the benefit of seeing and hearing all witnesses in [SJ]’s case as well as evaluating the security CTV footage and [SJ]’s private footage of what occurred, I find, unlike the facts situation in *T Q*, that [Senior Constable 1] did not arrive outside the entrance to the [mall] with the predetermined mindset to arrest [SJ]. I find that there was nothing sinister or untoward in [Senior Constable 1]’s decision to drive to the mall as that this was her usual practise. I find nothing unreasonable or improper in [Senior Constable 3]’s decision to take a taser which he explained is part of his

¹ *Pomare v Police*, HC Whangarei, AP8/02, 12/03/2002.

² *Police v TQ* [2016] NZYC 548.

training. In the end, [Senior Constable 3] did not use the taser. I accept [Senior Constable 3]'s evidence under cross-examination that he had no predetermined agenda in setting off to the mall with his colleague [Senior Constable 1] to arrest [SJ].

[55] I find that [Senior Constable 1] endeavoured to explain in a reasonable and non-provocative manner to [SJ] that the carpark area was still part of the mall and that the mall management did not need to specify reasons for [SJ] having been trespassed. [Senior Constable 1] was aware before her arrival of the concerns of [OM] about [SJ]'s disorderly behaviour inside the mall.

[56] I find that [SJ]'s demeanour dramatically changed from one of what [Senior Constable 1] described as a "feigned disinterest" where he was initially treating the situation as somewhat of a joke to a situation where [SJ] displayed aggressive, uncooperative behaviour in a situation which was quickly escalating.

[57] I accept [Senior Constable 1]'s evidence that, as [SJ]'s argumentative attitude escalated, she told [SJ] that if he did not leave she would be forced to take action. I accept her evidence that [SJ] repeatedly and defiantly refused to cooperate. I find that [SJ]'s attitude was not assisted by what [Senior Constable 1] described as the "mob mentality" from his associates and other young persons who were jeering and telling [SJ] not to cooperate.

[58] I find as a fact that, in the heightened circumstances facing [Senior Constable 1], namely, two senior police officers confronted by at least four young persons and other hangers on, she made the reasonable and appropriate judgement call on her assessment of the situation in a moment of time, to arrest [SJ] rather than proceeding by way of summons, in order to prevent [SJ] from committing further offences in the manner of disorderly behaviour.

[59] I am fortified in this finding when I reflect on [OM]'s evidence about the aggressive behaviour of [SJ] and his associates inside the mall and whilst at the kiosk in the presence of members of the public. She described it as a situation where "it became quite loud". [OM] said that her main concern at this time was her safety as well as members of the public standing and watching. She said that she told [SJ] that

she had called the police. [OM] said that she had advised [Senior Constable 1] by telephone not only that she had trespassed [SJ] but that in her opinion they were becoming disruptive and disorderly.

[60] I accept [OM]’s evidence that she personally observed [Senior Constable 1] trying to talk to [SJ] in a rational manner by repeatedly saying, “settle down, settle down”. She said that [SJ] became agitated and told [Senior Constable 1] to “fuck off”. Under cross-examination, [OM] agreed that, prior to the arrival of the police, whilst the young persons were outside in the carpark:

- they were not being disorderly;
- they were not being abusive; and
- they were waiting for the police to arrive.

[61] But I find that the Court cannot just evaluate these events in isolation and ignore what had been happening earlier on inside the mall. The Court needs to make a cumulative evaluation of all of the events taking into account the timeframe.

[62] [Senior Constable 3], under cross-examination, was asked, “It wasn’t necessary to arrest [SJ] was it?” His response was, “The thing was, we were to talk to them..., their behaviour became unacceptable.” [Senior Constable 3] explained that “we were there because they were upsetting other users of the mall and their behaviour was inappropriate”. He further explained that, after [Senior Constable 1] spoke to [SJ], [SJ]’s demeanour immediately changed to a highly agitated and irrational state. [Senior Constable 3] observed “my opinion was that he wasn’t in control of his emotions”.

[63] I adopt a cautious approach in evaluating [SJ]’s video clip which, in my opinion, is a selective snapshot of events. In my view, the video confirms [Senior Constable 1]’s evidence that upon arrival she attempted to persuade [SJ] to cooperate. I could not hear what she said but, from my evaluation of the officers’ demeanour and

their approach, I could not see this was a situation where [Senior Constable 1] immediately applied the handcuffs.

[64] With the benefit of seeing and hearing [SJ] giving his evidence-in-chief and then being cross-examined, I find [SJ] repeatedly minimised his actions and conduct in the mall on [date 1 deleted]. For example, he said, “We weren’t really yelling”. [SJ] was also asked, “You had other options that day?” and his response was, “Not really.”

[65] I also find [SJ] gave a sanitised account of his physical encounter with [Senior Constable 1], particularly when he said, “Not violently, but I struggled.”

[66] I find proven as a fact:

- (i) [SJ] acted in a disorderly manner inside the mall by his threatening, abusive and insulting words towards [OM] and her colleague;
- (ii) [SJ] was given a fair opportunity by [Senior Constable 1] to leave the mall carpark;
- (iii) [SJ] was totally uncooperative and belligerent in a hostile and escalating situation after the police tried to get [SJ] to move and leave the mall carpark; and
- (iv) [Senior Constable 1] made the reasonable and objective assessment in a moment of time after the benefit of speaking to [OM] on two occasions to arrest [SJ] out of a concern that [SJ] would commit further offending by way of disorderly behaviour. In my opinion it is irrelevant that [SJ] was not charged with disorderly behaviour or intimidating behaviour. It was the disorderly behaviour that [Senior Constable 1] was trying to prevent and even [SJ] on his own evidence admitted to acting up in front of his friends.

[67] I find proven beyond reasonable doubt that:

- (a) [SJ], having been warned by mall security an occupier on [date 1 deleted], to stay off the [mall] premises wilfully trespassed on that place within two years after the giving of the warning;
- (b) [SJ], on [date 1 deleted], resisted [Senior Constable 1], a constable acting in the execution of her duty; and
- (c) [SJ] assaulted [Senior Constable 1], a constable acting in the execution of her duty.

[68] I reject [SJ]’s defence that with respect to the resisting charge he was merely protesting about his situation. I find [SJ] deliberately lent back to evade being manacled by the police officer.

[69] I reject [SJ]’s evidence that he never lashed out with his foot and I also reject his explanation that the physical contact occurred as a result of a “basic rugby move” when his shoulder pushed into [Senior Constable 1]’s shoulder area. Again, I find that [SJ] gave a sanitised version of his role in this confrontation.

[70] I accept [Senior Constable 1]’s evidence about the account. I also accept [Senior Constable 3]’s evidence of witnessing [SJ] lashing out with his foot which struck [Senior Constable 1] with sufficient force to propel her backwards.

[71] Therefore, I find all charges are proven.

N A Walsh
Youth Court Judge
