

**IN THE DISTRICT COURT  
AT MANUKAU**

**I TE KŌTI-Ā-ROHE  
KI MANUKAU**

**CRI-2023-092-002164  
CRI-2023-092-002034  
[2024] NZDC 10363**

**NEW ZEALAND POLICE**  
Prosecutor

v

**ELIZABETH JANE COONEY (LIZ GUNN)  
JONATHON ANDREW CLARK**  
Defendants

Hearing: 7 and 10 May 2024  
Appearances: Mr Beverage for the Prosecutor  
Mr Hague for the Defendant  
Judgment: 21 May 2024

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**RESERVED JUDGMENT OF JUDGE J FORREST**

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[1] On 25 February 2023 Ms Gunn and Mr Clark were at the international arrivals area at Auckland International Airport. They were there to welcome “friends”, which was a family who were due to arrive from the Pacific Islands. Five or six other people were also at the international arrivals area to meet the family.

[2] Ms Gunn and Mr Clark had a large video camera, and Ms Gunn also had a handheld Bluetooth microphone. She had interviewed some of the people who were there to meet the family when she was approached by Ms Kolodeznaya, an airport staff member who was wearing a high vis vest, to ask whether she had permission to

film at the airport. The interaction between Ms Kolodeznaya and the defendants is detailed below in relation to the assault charge.

[3] Ms Kolodeznaya requested the assistance of police who arrived at the international arrivals area and approached the defendants and asked them to leave. Within approximately 17 or 18 seconds of the arrival of the police, both defendants were arrested.

[4] Both defendants were charged with trespass and resisting police officers. Ms Gunn also faces a separate charge for assault (on Ms Kolodeznaya). I heard evidence from the parties in a judge alone trial on Tuesday 7 May 2024. The trial was not completed that day and continued on Friday 10 May 2024.

#### *Dismissal of Trespass Charges*

[5] Following the police case, the defence applied for all charges to be dismissed. After hearing from Counsel, I dismissed both trespass charges on the basis that the prosecution had failed to prove the elements of the charge beyond a reasonable doubt. To establish the charge, the prosecution had to first prove that the defendants had been warned to leave the property by an occupier or lawfully approved person. Secondly, they had to prove that the defendants had refused or neglected to leave the property after having been given a reasonable opportunity to do so.

[6] My reasons for the decision to dismiss the charges were reserved at the time but are:

- (a) In relation to the first element of the charge, the evidence was that Ms Kolodeznaya had not asked the defendants to leave the airport. On the arrival of the police, Senior Constable Postlethwaite said to the defendants “we need you to leave”. He was challenged as to the reasons for that by Ms Gunn. Within seconds Ms Gunn and Mr Clark had been arrested. The defence submitted that the words “we need you to leave” was not sufficient and did not satisfy the first element of the charge. I

do not accept that view and find that this was a warning to leave the property and that it was given by an approved person.

- (b) However, the prosecution did not prove beyond a reasonable doubt that after being asked to leave the airport, the defendants had failed or refused to do so **after having been given a reasonable opportunity to leave.**

[7] Ms Gunn's challenge as to the authority or legal basis for the request to leave may have been interpreted by Constable Postlethwaite and Constable Luong as an intention not to comply with the direction, in circumstances where Mr Clark and Ms Gunn continued to record the interaction. However, to move to arrest in such a short time frame meant that the defendants did not have a reasonable opportunity to leave. In my view there was insufficient time for the police to form a view about their intentions. Regardless, the defendants must have been given a reasonable opportunity to comply with the direction to leave. That did not occur, and it follows that the defendants are not guilty of trespass.

[8] I now turn to consider the remaining charges.

*Onus/standard of proof*

[9] The defendants are presumed to be innocent unless and until the prosecution have proved their guilt. The prosecution must prove that each defendant is guilty of the charges they face beyond a reasonable doubt. That is a very high standard proof which the police will only have met if, having considered all the evidence, I am satisfied (i.e. sure) that the defendants are guilty. It is not enough for the prosecution to persuade me that the defendants are probably guilty or even that they are very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events so the prosecution does not have an obligation to do so.

[10] What then is a reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of the defendant(s) after I have

given careful and impartial consideration of the evidence. In summary, if, after careful and impartial consideration of the evidence, I am sure that the defendants are guilty, I must find them guilty. On the other hand, if I am not sure that they are guilty of the charge or charges, I must find them not guilty.<sup>1</sup>

### *Prejudice and sympathy*

[11] I come to my verdicts solely on the evidence that was before me in Court. I put aside any feelings of prejudice or sympathy.

[12] Ms Gunn has become a prominent person in recent years, especially relating to her views about vaccines and/or mandates during the Covid-19 pandemic. While there was minimal reference to this during the trial, the context of Ms Gunn and others being at the airport related to those issues. At some stage Ms Gunn formed a political party. I understand in the most general terms that the family she was at the airport to meet had been impacted as a result of the border controls or other laws in place relating to Covid-19.

[13] During the trial the public gallery was full of Ms Gunn's supporters. On occasion, members of the public gallery were warned about the need to be respectful of the process and those involved, including witnesses, media, and court staff. I expressly put aside any prejudice I may otherwise have relating to the behaviour of Ms Gunn's supporters. Similarly, I put aside Ms Gunn's political views which are irrelevant to the issues before the Court.

### *Evidence*

[14] I have considered all the evidence that has been put before me including the evidence of witnesses, and the exhibits produced. It is for me to decide, however, what evidence I do and do not accept. Somewhat unusually, the events have been recorded on the airport security cameras (though this is often at a distance and somewhat blurry or obstructed) and I also have the audio recording taken by the defendants, which has been synced with the airport video footage.

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<sup>1</sup> *R v Wanhalla* [2007] 2 NZLR 573 (CA) at [49].

*Elements of the charge – Assault*

[15] In relation to the charge of assault the prosecution must prove beyond a reasonable doubt that:

- (a) Ms Gunn applied force (or attempted or threatened to apply force) to the complainant, Ms Kolodeznaya; and,
- (b) That the application of force was deliberate; and,
- (c) That Ms Kolodeznaya did not consent to the application of force and Ms Gunn did not believe there was consent.

[16] The prosecution must prove each of these elements.

[17] It is accepted law that the slightest degree of the application of force is sufficient to satisfy the first element.<sup>2</sup>

*Analysis of assault charge*

[18] It is accepted by the defence that Ms Gunn reached out and touched Ms Kolodeznaya's upper right arm/shoulder area briefly. Further, both agree that the touch was for the purpose of attracting the complainant's attention.

[19] The defence submits, however, that Ms Gunn had an honest belief that there was implied consent for the touch. This has also been described as an exception to what otherwise amounts to assault for conduct which is acceptable in the ordinary conduct of daily life. In support of this argument the defence cited *Thompson v Police*<sup>3</sup>, where the Court relied on the statement of Lord Gaff in *Collins v Wilcock*. "Adams on Criminal Law" summarises the position as follows:<sup>4</sup>

“... subject to certain exceptions, consent is a common law justification, excuse, or defence to assault which is preserved by s 20 of the Crimes Act 1961. Moreover, a genuine belief in consent, even if there were no reasonable grounds for it, also provides a defence. If there is evidence making consent,

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<sup>2</sup> *Thompson v Police* [2012] NZHC 1500.

<sup>3</sup> *Thompson v Police* [2012] NZAR 741.

<sup>4</sup> Adams on Criminal Law, (online looseleaf ed, Thomson Reuters) at SO9.06.

or belief in consent, a live issue, the prosecution has the burden of proving its absence. ...

The exigencies of everyday life are such that everybody in public places is commonly exposed to the probability of bodily contact, such as jostling in a busy street, shop, or hotel bar, or being touched to attract one's attention. When there is such physical contact within a "reasonable and generally acceptable band" there is no assault, either because there is implied consent or (if that might sometimes involve a fiction) because there is a general exception to the prohibition of intentional touching (see [S09.03]) "which embraces all physical contact which is generally acceptable in the ordinary conduct of everyday life". ...

However, if the circumstances show that there was not in fact consent, even quite trivial force, such as gently pulling by the arm, might not be justified, or excused:".

[20] The defence submission that Ms Gunn had an honest belief that there was implied consent for the assault is not tenable for the following reasons:

- (a) While both Ms Kolodeznaya and Ms Gunn agreed that the touch was for the purpose of attracting the complainant's attention, that is in circumstances where Ms Gunn and the complainant had already spoken, and the complainant turned her attention to Ms Gunn's co-defendant, Mr Clark, to address him with regards to the alleged unauthorised filming at the airport which was continuing to take place. Similarly, the complainant then turned her attention to another person who was present, had taken her photo and/or filmed her without authorisation. Ms Kolodeznaya was addressing her immediate concerns towards the person or persons she believed required her attention. Ms Gunn's attempts to attract the complainant's attention away from the filmmaker and towards herself was entirely self-serving and for the purposes of engaging in an ongoing verbal confrontation with the complainant while capturing the encounter on camera. This is not a situation where one person is simply politely attempting to get the attention of another.
- (b) The interaction that had and continued to take place between the Ms Gunn and Ms Kolodeznaya could only be described as confrontational and hostile (on the part of Ms Gunn). I say that in circumstances where:

- (i) Ms Gunn was present at the airport with a camera similar to a one used by commercial media.<sup>5</sup> Ms Gunn’s evidence was that she has been a journalist for Radio New Zealand and TVNZ in the past. While at the airport she had interviewed two people prior to the arrival of the family they were waiting to greet. When considered from the perspective of airport staff, there was nothing to distinguish Ms Gunn from a commercial reporter. While Ms Gunn and Mr Clark seem to have not breached the airport bylaws (which prohibits commercial filming without consent), the initial challenge by airport staff to their filming was reasonable.<sup>6</sup>
- (ii) Prior to the complainant approaching and addressing Ms Gunn and the co-defendant, another airport employee had already spoken to Ms Gunn about the filming at the airport.
- (iii) Ms Gunn's questioning of the complainant and the legal basis for saying that filming could not continue was confrontational. Ms Gunn continued to film and record the interaction, and questioned the complainant as if she was being interviewed rather than engaging in a constructive two-way conversation. Ms Gunn was domineering and even overbearing in her tone and demeanour when speaking to the complainant, including speaking over her. Ms Kolodeznaya said that she “felt very intimidated because of the body language”, explaining that Ms Gunn’s “body language was like straight to my face and [I] even couldn’t you know say anything because she was like talking over me”. She described feeling “intimidated”.

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<sup>5</sup> Ms Gunn held a Bluetooth microphone in her hand separate to the high-resolution camera held by her co-defendant. This was held towards the face of the complainant during the interaction and the complainant described Ms Gunn as a “reporter”.

<sup>6</sup> I have not had to determine whether the filming and recording breached the Airport’s Bylaws. On the face of it, because the filming was not “commercial” it would appear not to be prohibited. However, it was clearly for a political purpose and included interviews. I surmise that the bylaws may not be fit for purpose and may need to be reviewed to avoid a similar situation in the future.

- (iv) Ms Gunn was rude and inappropriate when she asked Ms Kolodeznaya (who had an accent) where she was from, then explaining the relevance of that question with the reference to the development of fascism in Germany prior to the Second World War.<sup>7</sup>

[21] In summary, Ms Gunn was arrogant, rude, overbearing, and offensive in her manner in dealing with the complainant. The touch of the complainant's arm in those circumstances, and where Ms Gunn was trying to divert the complainant's attention from her co-defendant (who continued to film the interaction) was a hostile act.

[22] The complainant's evidence was that that the touching (which she agreed was not hard and was momentary) caused her pain at a level she described as five out of ten (ten being the highest level of pain) because of an injury to her arm. The complainant's reaction was immediate and was physical (flinching or pulling away) and saying, "do not touch me".

[23] In the above circumstances, Ms Gunn cannot have had an honest belief that there was implied consent for the touch, and to suggest that she did is, in my view, disingenuous. My view is further confirmed by the fact that notwithstanding the complainant had clearly stated "do not touch me", Ms Gunn then touched her again a second time a short time later in the interaction.

[24] I do not accept that Ms Gunn had an honest belief that there was implied consent for the assault. To the contrary, she acted with complete and total disregard for social norms and for Ms Kolodeznaya.

[25] It follows that the elements of the charge are satisfied, and as a result that Ms Gunn is guilty of assault, notwithstanding that the assault was clearly at a very low level.

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<sup>7</sup> Ms Gunn made racist comments which were recorded and were part of the evidence. Ms Kolodeznaya's evidence (which was not challenged) was that following Ms Gunn's arrest and outside the terminal with the Police, Ms Gunn said "New Zealand only for New Zealanders." Ms Kolodeznaya understood this to be directed at her because Ms Gunn had questioned her nationality in the terminal.



*Elements of the charge – Resisting a constable in execution of their duty*

[26] In relation to the charge of resisting a constable in execution of their duty the prosecution must prove beyond reasonable doubt that:

- (a) The defendant resisted the police constable in their course of action; and,
- (b) At the time of the resistance the police officers were acting in execution of their duty; and,
- (c) At the time the defendants acted they either knew that the person resisted was a police officer who was acting in the execution of his duty or was wilfully blind or indifferent to that fact.

[27] The Court of Appeal in *Waaka v Police*<sup>8</sup> held that the *mens rea* (intent) must go to all the elements or ingredients of the offence. The prosecution must prove that the defendant knew that the person assaulted was a police officer and knew that they were acting in the execution of their duty; or that the defendant was wilfully blind to those possibilities or indifferent to whether they were the truth. However, knowledge may be inferred or assumed unless there is a foundation in the evidence for a contrary view.

[28] Where the defendant lays an evidential foundation for the existence of an honestly held belief, it is for the prosecution to refute that reasonable possibility.<sup>9</sup>

*Analysis of obstructing or resisting police*

[29] The defendants submit that at the relevant time the Police officers were not acting in the execution of their lawful duty and, that there was no intention by the defendants to resist the constables.

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<sup>8</sup> *Waaka v Police* [1987] 1 NZLR 754

<sup>9</sup> *R v Thomas* [1991] 3 NZLR 141 (CA); and *Clarke v Police* HC Wellington CRI-2003-485-28, 18 November 2003.

*Were the constables acting in execution of their lawful duty?*

[30] The defence say that the constables were not acting in execution of their lawful duty because:

- (a) At the time the police went to the arrivals area it was their intention to get the defendants to leave, but not to arrest the defendants.
- (b) That only when Constable Postlethwaite pushed Mr Clark's camera away, and Constable Luong then put his hands on the Mr Clark's shoulders and pushed him away did matters escalate. That escalation happened quickly and within 17 seconds both defendants were on the ground and in the process of being arrested.
- (c) Constable Luong's evidence was that he used force to stop Mr Clark from filming because he believed that it was in breach of the Auckland International Airport By-laws Approval Order 1989. Even if Mr Clark was in breach of those bylaws, they do not create an offence which permits the use of force.

[31] It seems that at the relevant time the police were under the misapprehension that the filming at the airport was being done in breach of the Auckland International Airport By-laws Approval Order 1989 (which require permission for commercial filming). Further, the Police also understood that the defendants had been asked to leave the property by airport staff prior to their arrival which had not occurred. As detailed above, I dismissed the charges of trespass on the basis that the defendants were not given a reasonable opportunity to leave, after having been warned to do so.

[32] Notwithstanding that, I find that the police were acting in the course of their duties at the relevant time. They had been asked to attend an incident where the airport staff believed that filming continued in breach of the airport bylaws despite the intervention of two airport staff prior to the arrival of police. Further, the police had been advised that one of the airport staff members had been assaulted.

[33] The defendants' response to the police on their arrival contributed to the rapid escalation of events. Ms Gunn challenged Constable Postlethwaite in such a way that she appeared to be interviewing him while Mr Clark attempted to video the interaction. These were not the actions of people who were there to simply meet family or friends from the airport as they had explained to airport staff. To the contrary, Ms Gunn was reporting (in her personal capacity) on a political issue. She then chose to make the airport's response to her reporting a separate issue, which justified her taking and "holding" a line about that.

[34] Having said that, I am by no means uncritical of the police. The very rapid escalation of events which occurred over only 18 seconds may have been avoided had the police engaged in constructive communication or attempted to explain the position further to the defendants.<sup>10</sup> Instead, Constable Luong removing Mr Clark from the immediate vicinity resulted in Ms Gunn turning and taking steps towards him and immediately being arrested by Constable Postlethwaite. During this event, both Ms Gunn and Mr Clark fell to the floor. It is unclear exactly what caused Mr Clark to fall to the floor, but it is clear that he was endeavouring to protect his camera and at one stage is seen leaning forwards. It is likely that in the melee that occurred he lost his balance.

[35] Mr Clark was advised he was under arrest while on the floor and he did resist police from that point in time. Similarly, Ms Gunn was informed she was under arrest

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<sup>10</sup> Prior to the start of the trial, I ruled that the defence may call "expert evidence" from a Mr Cobb who was a former police officer. I granted that application with some hesitation and noted that I shared the concerns raised by the Police with regards to "expertise" of Mr Cobb who had retired from the Police in 1996, as a Senior Constable (except for temporary assignments), and who had no experience in training or policy. I have been able to consider and determine the charges without reference to his evidence or the exhibits the defence submitted relating to Police policy and training. I note, however, that last week I received correspondence from Mr Cobb. Because of the way the delivery was addressed (handwritten and marked personal and confidential) I was cautious in opening this and quickly noted it was from Mr Cobb. Had Mr Beveridge not been on leave at present I would have raised this issue with counsel. However, I record:

- (a) I have received and not read a communication from Mr Cobb. I will read it after issuing this judgment and I will then release a copy to counsel.
- (b) I regard it as highly inappropriate that a witness (and especially an expert witness who has confirmed he has read and understood the Code of conduct for expert witnesses set out in the High Court Rules) has attempted to communicate with me after the hearing and prior to my judgment. This is particularly concerning given the "expertise" is as a Police officer who should simply know better, notwithstanding the time since he has been a sworn officer.
- (c) Notwithstanding my concerns about the actions of a defence witness, this issue has had no impact on my consideration of the issues or my judgment.

at the time that Constable Postlethwaite took hold of her hand and “put her into an arm lock to gain control of her”. She responded instinctively to what was occurring, but did not deliberately resist police.

[36] In relation to each defendant, the police used a degree of force in the seconds prior to them being told they were under arrest. I accept the evidence of both defendants that they did not initially understand what was happening to them during the arrest. The video and audio of the incident confirms it was a quick and chaotic sequence of events. Within 18 seconds the defendants complied with police and were then taken from the area outside the terminal.

[37] In those circumstances I am not satisfied that there is evidence of any intention to resist the police or evidence which supports an adverse inference of intent being drawn.

[38] For those reasons, the resisting police charges have not been proven and the defendants are acquitted of those charges. I am not required to go on and consider the issue of self-defence.

### *Conclusion*

[39] For the reasons outlined above I have found Ms Gunn guilty of the charge of assault. Mr Clark and Ms Gunn are not guilty of obstructing or resisting police.

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Judge J Forrest

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 21/05/2024