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

IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2021-016-000003
[2022] NZDC 3110

NEW ZEALAND POLICE
Prosecutor

v

LUKIS WILLIAM RYLAND
Defendant

Hearing: 10 December 2021

Appearances: B Mills for the Prosecutor
M Terekia for the Defendant

Judgment: 28 February 2022

JUDGMENT OF JUDGE W P CATHCART

Introduction

[1] Mr Ryland faces two charges. First, the police allege that on 12 March 2021 at Gisborne Mr Ryland assaulted a constable acting in the execution of his duty by intentionally spitting at him, contrary to s 10 of the Summary Offences Act 1981. Arising from the same incident, Mr Ryland's faces a further charge that he intentionally damaged the door of a police patrol car, contrary to s 11(1)(a) of the Summary Offences Act 1981.

[2] Because the body of evidence tossed up potential legal issues, I allowed both counsel an opportunity to file submissions after the conclusion of the hearing on 10 December 2021. I have considered those arguments.

[3] As a consequence of my factual findings below, I considered it was not necessary for me to address all of the issues raised by the parties because their relevance logically rested on findings of fact.

[4] For the reasons noted below, I found the charge under s 10 proved. In contrast, the charge under s 11 was not proved and is dismissed.

Material findings of fact

Common ground: initial phase of the incident

[5] On the late shift on 12 March 2021, [Constable A] and [Constable B] responded to an alleged family harm incident involving Mr Ryland. When the constables arrived near the corner of Huxley Road, Gisborne Mr Ryland could be seen on the street. And [Constable A] received information through National Intelligence Agency checks that Mr Ryland was on bail with conditions, including not to threaten or offer violence.

[6] The officers exited the patrol vehicle. [Constable A] informed Mr Ryland he was under arrest for breach of bail. And here the defence concede that [Constable A] had good cause to suspect Mr Ryland was in breach of his bail and the officers were attending to the proper course of placing Mr Ryland under arrest.

[7] As both officers testified, Mr Ryland was highly intoxicated and aggressive when they approached him. And having been told he was under arrest, immediately took up a fighting stance with his fists clenched standing at a distance of four to five metres from the officers.

[8] Mr Ryland gave evidence and conceded the above facts. However, he maintained that, in this initial phase, he wanted to know the reason *why* he was under arrest. And he claimed the failure to provide that reason was why he ended up not

"cooperating properly", to use his words, at that time.[1] As noted later, I found that aspect of his evidence contradictory and implausible.

[9] Back to common ground. Because of Mr Ryland's aggressive stance, [Constable B] then engaged his police taser in the sense he "painted" laser dots on Mr Ryland's body at a distance of between five and 10 metres.[2] And Mr Ryland accepts the taser was pointed at him.

[10] [Constable B] said Mr Ryland then began to become more compliant. He described his body language changing. The fists were no longer clenched and the fighter stance dropped.[3]

Refusal to co-operate with arrest

[11] Notwithstanding that change, Mr Ryland was still not cooperating with the arrest. The officers constantly encouraged him to comply with arrest, but he repeatedly refused to do so. Mr Ryland refused to allow the officers to put handcuffs on him and continued to yell and scream.[4]

[12] At around this point, [Constable A] deployed pepper spray on Mr Ryland. It was a short burst of three to four seconds. It was administered about two to three metres away from Mr Ryland, although [Constable A] might have been closer.[5] The spray connected with Mr Ryland's face.

[13] In his evidence, Mr Ryland described the spray contacting with his face, mouth and nose. He said he was in pain, was struggling to breathe properly and felt "suffocated", all facts I readily accepted.[6] And he claimed to be an asthmatic.

[14] Having deployed the pepper spray, the officers took Mr Ryland to the ground and placed him in handcuffs.

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[1] Notes of Evidence (NOE) at 50.
[2] NOE at 28.
[3] NOE at 29.
[4] NOE at 30.
[5] NOE at 7.
[6] NOE at 52.

[Constable A]'s reasons for deploying pepper spray

[15] [Constable A] said that under operational directions use of pepper spray was justified in response to a suspect considered by an officer to be "active resistant".[7] And as noted, he said he deployed the spray because Mr Ryland was making it clear he did not want to be arrested, was not allowing the officers to put handcuffs on him, all the while yelling and screaming.

[16] This was a *bona fide* judgement call in the agony of the moment. I found that [Constable A] had genuinely tactically assessed that because Mr Ryland was continuing to actively resist arrest in these circumstances that a threat of assault on the officers remained possible. And that [Constable A] deployed the pepper spray to minimise the occurrence of that scenario.

Post-arrest narrative

[17] Post arrest, the incident "turned to custard," in [Constable A]'s words.[8] It was common ground that after handcuffing Mr Ryland both officers escorted Mr Ryland to the police patrol car.

[18] [Constable A] said that Mr Ryland whilst being escorted spat in his face when he was holding him with his left arm standing just behind him. He said Mr Ryland "*turned around*" and spat in his face.[9] At that point, [Constable A] and Mr Ryland were "almost face to face".[10] However, the circumstances surrounding this phase were, in some material respects, disputed by Mr Ryland.

Mr Ryland's evidence that the spitting at the officer was non-intentional

[19] Because Mr Ryland had no onus upon him and was not required to give evidence, I needed to consider whether his narrative, to the extent to which it materially conflicted with the officers, was excluded by the prosecutor as a reasonable possibility.

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[7] NOE at 6.
[8] NOE at 7.
[9] NOE at 8.
[10] NOE at 8.

[20] Mr Ryland told me he was trying to spit out the pepper spray. He said he could not open his eyes and felt "very blurry". He conceded he had been pepper sprayed two or three times before and was aware of the experience. And he accepted he was spitting as he was being taken to the patrol vehicle. However, he told me he never had any intention to spit directly at any officer. He said he was just trying to get the spray out of his mouth. But conceded he was also "a bit uncooperative" in getting into the police car. And that he was angry with them.[11]

[21] Having heard his evidence, I rejected Mr Ryland's explanation that the spitting at [Constable A] was non-intentional. I found several aspects of his overall evidence implausible and fabricated.

[22] For instance, during his evidence-in-chief Mr Ryland claimed he did not know initially that the two men were police officers when he took up the fighting stance.[12] He claimed the officers "did not identify themselves or anything".[13] This was plainly fabricated. The officers were in uniform and there was a marked patrol vehicle at the very scene. Mr Ryland's notion he thought they were "just some randoms on the road" was plainly implausible. I found that when he adopted that fighting stance he knew he was doing it before two uniformed officers trying to arrest him for breach of bail.

[23] Another example was Mr Ryland's suggestion he was *never* told the reason why he was arrested. When pressed on that point he then said: "They did say [my] brother rung the cops, that's all they said." And then agreed he had therefore been told (albeit in his own new version) why he was being arrested before the use of the pepper spray.[14] Those answers contradicted the earlier assertion he was *never* told the reason. Also, it rendered other aspects of his evidence implausible. As noted earlier, he claimed that his *only* concern was understanding *why* he had been arrested. And yet, having been told an explanation—albeit his version—he could not answer why he thereafter actively resisted the officers.[15]

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[11] NOE at 54.
[12] NOE at 57.
[13] NOE at 57.
[14] NOE at 59.
[15] NOE at 59.

[24] For all these reasons, I rejected Mr Ryland's evidence that the spitting at [Constable A] was non-intentional.

Intentional act of spitting at officer

[25] It is common ground that Mr Ryland spat on more than one occasion after being pepper sprayed. But, on the evidence of [Constable A]—supported in material respects by [Constable B]—I was sure the suggested assault act occurred in the way [Constable A] described. And I inferred that Mr Ryland in deliberately "[turning] around" to face [Constable A] Mr Ryland intentionally spat directly at the officer's face. And had angry motive to do so.

[26] And the assault stung. The spittle connected with [Constable A]'s "eyes, nose and mouth area" and because Mr Ryland had pepper spray in his spit the officer's own face was "burning".[16] I was sure Mr Ryland intentionally assaulted [Constable A] and spitefully so. And it obviously occurred while the officer was effecting arrest.

The reason for use of the spit hood

[27] Mr Ryland accepted the officers then placed a spit hood on him in response to the claim he had spat directly at [Constable A]. When being told that by [Constable A], Mr Ryland said he responded, "Oh sorry bro I didn't mean to". As mentioned, I rejected Mr Ryland's evidence the spitting was non-intentional.

[28] Both officers then walked Mr Ryland the rest of the way to the patrol vehicle and placed him in the rear seat. The officers managed to shut the rear door, but Mr Ryland repeatedly kicked at it while handcuffed and lying on his back.

Mr Ryland's conduct inside the vehicle

[29] On a scale of force between one to 10, [Constable A] said the kicking was at around "a six or seven".[17] [Constable B] described the kicking as "pretty forceful".[18]

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[16] NOE at 8.
[17] NOE at 10.
[18] NOE at 33.

It got to the point where the officers became concerned Mr Ryland may kick the window out. Accordingly, they removed Mr Ryland from the patrol car so he could be transported by prison truck which obviously did not have any windows.[19] And it is common ground Mr Ryland's kicking caused damage to the inside of the door, as depicted in the photographs.

[30] Mr Ryland told me that with his hands cuffed behind his back and his face fully covered by the spit hood, he could not breathe. He told me he was "screaming out" and repeatedly told the officers he could not breathe. He said no-one was "coming to [his] aid and [he] felt like [he] was suffocating." And that is when he said he "started kicking out the door".

[31] Mr Ryland's precise words there infer the kicking of the door was deliberate ("kicking out the door.") And he did so repeatedly. And even on his evidence it must have been deliberate acts because he would have known his feet was connecting with the door. His purpose was to kick the door "out" as he conceded.

[32] And when that concession was further pressed upon him, he said he knew he was kicking out at a closed door. But then immediately contradicted himself by suggesting he could not see anything and he could not "actually be definite on that answer". I rejected that late shifting position as likely fabricated. And I inferred he deliberately changed his story there because it had dawned on him he had earlier admitted the deliberate act.

[33] Also, I inferred Mr Ryland intended to damage the door. That conclusion follows from the deliberate repetitive "kicking out" at it. Whilst damaging the door may not have been his motive, I inferred that that result was part of his aim or purpose by way of intent. And ordinarily a person will be seen as intending a result that he decides to bring about.

[34] For all these reasons I was sure Mr Ryland intentionally damaged the door and caused that damage.

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[19] NOE at 8–9.

The inappropriate use of the spit hood

[35] However, the use of the spit hood in the circumstances raised an obvious question about whether during the period of Mr Ryland's detention in the vehicle he was treated with humanity and with respect for his inherent dignity, as per his fundamental right.

[36] In the end, it was common ground both officers had breached police operational directions by placing a spit hood on Mr Ryland in circumstances where he had just been pepper sprayed.[20] The purpose behind the police direction is obvious. A spit hood only allows a suspect to breathe out of the nose and if a suspect has been pepper sprayed it might be really hard for him or her to breathe from the nose.[21]

[37] I found that between the points when the spit hood was placed on Mr Ryland's head and when he was removed from the vehicle his detention was excessive and demeaning in the circumstances. And I found this period of detention had a real and substantial connection to the intentional damage conduct. As noted later, this finding led to legal consequences.

[38] It was also common ground that both officers took Mr Ryland out of the police vehicle but only because of the perceived risk that further damage to the police vehicle may occur. And having done so, [Constable A] pulled the spit hood off Mr Ryland's mouth so he could get "fresh air in".[22] And did this after obtaining from Mr Ryland an assurance he would not spit at them.

Legal principles

[39] Before framing specific issues, a review of basic legal principles is helpful. First general principle. In *Mackley v Police*, the High Court held: [23]

> For a police officer to be acting in the execution of his duty it is not necessary that he be doing something which he has a strictly legal duty to do. It is sufficient if he is doing something which he has the legal power to do,

[20] NOE at 20.
[21] NOE at 20.
[22] NOE at 21.
[23] *Mackley v Police* [1994] 11 CRNZ 497 at 499.

> provided he is doing so in a reasonable manner and provided also that the exercise of the power is reasonable in the circumstances.

The excessive force principle

[40] In simple terms an officer may exceed the scope of authority by using excessive force. Because use of excessive force logically takes the constable outside the scope of his or her duty and a defendant would lack the intent if he or she had an honest belief the officer was using excessive force in effecting an arrest for example. And here the excessive force issue arose under the assault charge to the extent it related to police use of pepper spray.

The right to be treated with humanity and with respect for inherent dignity

[41] For the purposes of this case, the relevant legal principles here are settled. Section 23 of the Bill of Rights provides that:

> Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

[42] In *Kelly v Police,* Collins J considered the parameters of s 23(5) in an appeal against conviction for driving with excess breath alcohol.[24] Kelly was arrested after fleeing the scene. He refused to undergo breath-screening and was subsequently taken to Nelson Police Station. On the way he repeatedly complained of leg pain and asked to be taken to the hospital. Kelly was processed and taken to his mother's house. He subsequently went to hospital where it was discovered he had a fractured ankle.[25]

[43] The issue before the High Court was whether the trial judge had erred in admitting the evidential breath-screening result.

[44] As to the parameters of s 23(5), Collins J held:[26]

> [28] From these authorities I deduce that the right to be treated with humanity and respect ins 23(5) of the NZBORA is engaged where agents of the state treat persons who are arrested or detained in ways that are excessive and/or demeaning but which fall short of the high threshold required to establish a breach of s 9 of the NZBORA. On the basis of *Attorney-General*

[24] *Kelly v Police* [2017] NZHC 1611.
[25] At [1]-[7].
[26] At [28]-[29]. Footnotes omitted.

> *v Udompun,* referred to in paragraph [27(3)] above, inadvertent conduct by a detaining or arresting officer may lead to a breach of s 23(5) of the NZBORA…
>
> [29] The failure of the officers responsible for Mr Kelly's arrest and detention to treat his complaints of injury seriously and take him for a medical examination was excessive and demeaning and therefore constituted a failure to treat him with humanity and respect. I therefore agree with [the lower court's] finding that there was a breach of s 23(5) of the NZBORA.

[45] Other examples of breaches of s 23(5) appear in the case law. For example, effecting the arrest in a high-handed and rough manner (including handcuffing, pushing onto the road, injuring a defendant's nose, frog marching the defendant into the police station);[27] inappropriate use of pepper spray;[28] failure (albeit inadvertent) to provide a female immigration detainee with sanitary products and with the opportunity to change her clothes and have a shower;[29] ignoring a suspect who requested to use a bathroom whilst subject to the breath/alcohol testing procedure leading to the suspect soiling himself and remaining in that state until an evidential sample of his blood was taken.[30]

The issues

[46] My above findings of fact delimited the relevant issues bearing in mind that the police carried the onus and standard of proof. Two issues required determination under the assault charge. First, was I sure Mr Ryland intentionally spat at [Constable A]? My findings answered that question "yes". No more need be repeated here. Second, had the police excluded the reasonable possibility [Constable A]'s use of the pepper spray during the arrest of Mr Ryland was excessive force? I deal with that later.

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[27] *Ministry of Transport v Entwisle* [1990-92] 1 NZBORR 374 (DC).

[28] *Falwasser v Attorney-General* [2010] NZAR 445 (HC). *Falwasser* is a dissimilar extreme case involving serious police misconduct. Falwasser was assaulted by a group of police officers using weapons comprising batons, shields and pepper spray. The police conduct continued over a 20-minute period. It was led by two of the most senior police officers present. And the most excessive and shocking aspect of the incident was the repeated use of pepper spray, particularly after Falwasser had received a head injury. Stephens J readily found the police breached s 23(5) because the conduct lacked obvious humanity.

[29] *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [141]-[147].

[30] *S v Police* [2018] NZHC 1582.

[47] On the intentional damage charge, three issues arose. First, was I sure Mr Ryland deliberately kicked at the door of the patrol vehicle with the intention of damaging it? My findings answered that question, "yes". Second, whether the manner of Mr Ryland's detention between the time he had the spit hood placed over his head up to point he was removed from the police car breached Mr Ryland's rights under s 23(5) of the Bill of Rights. Because my answer to that issue was "yes", I was required to address a third issue. Because of the violation of Mr Ryland's rights should I rule the evidence relating to his intentional damage inadmissible under s 30 of the Evidence Act 2006? I ruled the evidence inadmissible.

[48] My reasons follow.

Had the police excluded a reasonable possibility that [Constable A]'s use of the pepper spray during the arrest was excessive force?

[49] It was important not to conflate issues here. The use of the spit hood arose *after* Mr Ryland deliberately spat at [Constable A] and thus had no factual link to the assessment of the assault charge. Thus, the issue here focused on [Constable A]'s use of pepper spray on Mr Ryland whilst effecting his arrest.

[50] As noted, I found Mr Ryland was, as he appeared to the officers, highly intoxicated and very aggressive. He adopted a fighting stance with his fists up from a distance of about four to five metres while yelling and swearing at the officers. His demeanour softened only to the extent the officer was able to, having presented his taser (without firing), put it away again. But, as found, Mr Ryland continued to actively resist arrest, telling the officer that he was not under arrest. And not allowing the officer to put handcuffs on him all the while yelling at them.

[51] Claims about excessive force should not be examined in too fine a balance but with an air of reality. In the circumstances presented to [Constable A], he rightly held the view that Mr Ryland's active resistance required he be subdued. The possibility of assault on the officers was still alive. And here the pepper spray was deployed in a short burst for a few seconds, maybe three to four seconds, in *response* to that behaviour. This was no pre-emptive strike.

[52] For the reasons, I was of the clear view the use of pepper spray did not constitute excessive force during arrest. The reasonable possibility it was excessive force was excluded.

[53] My conclusion here was supported by a similar position reached by the Court of Appeal in *R v Ropiha.*[31] Ropiha was not physically aggressive but failed to comply with a full custody search. He was told several times if he did not comply, he would be pepper sprayed if necessary. He subsequently became violent with four police officers. He continued to refuse to undergo a full search, was sprayed twice, became physically violent and was restrained by four police officers.

[54] The Court of Appeal concluded on that evidence that they were:

> [17] …not persuaded that, in the circumstances … any unreasonable or excessive force was used or that there was any breach of the New Zealand Bill of Rights Act in consequence. Given [Ropiha's] confrontational behaviour and his consistent refusal to submit to a full search, the police were justified, after repeated warnings, in using force to carry out the search. There is no evidence that any of the physical force used for that purpose was excessive…

[55] That conclusion mirrors the similar present case. I accept the Court of Appeal expressed concern about cases where pepper spray might be used in a "pre-emptive way" rather than using it to subdue a suspect or arrest a person after he has displayed physical aggression or at least threatened it. The pre-emptive strike factor did not arise here.

[56] Charge 10 was proved.

Was Mr Ryland's detention between the time the spit hood was placed over his head up to his removal from the police car in breach of his rights under s 23(5) of the Bill of Rights?

[57] As with all rights under the Bill of Rights, intent to breach the s 23(5) right is not required to establish infringement because even inadvertent breach is sufficient. The focus is on whether the right was in fact infringed not on whether the infringer intended that breach. Here, the deployment of the spit hood was not done with the

[31] At [16].

intent to inflict demeaning or excessive conduct. However, having considered the totality of circumstances, I found that it had that *effect* on Mr Ryland.

[58] [Constable A] breached operational directions by using the spit hood following use of pepper spray. Whilst in his own mind it was a *bona fide* tactical decision, it led to Mr Ryland suffering serious problems with his breathing. And materially speaking that suffering occurred from the moment the spit hood was placed on him up until the point he was taken out of the patrol car. Overall, it was clearly excessive and demeaning and constituted a failure to treat Mr Ryland with humanity and respect. That finding was sufficient to justify a material breach of s 23(5) relevant to admissibility remedy.

Should the evidence about Mr Ryland's intentional damage of the door be ruled inadmissible?

[59] Because of the above finding the issue arose as to whether this evidence was obtained "in consequence" of the breach of s 23(5). This language in s 30(5)(a) of the Evidence Act 2006 requires a sufficient causative link between the breach and the evidence. Whilst there are different judicial views about what "in consequence" might entail here, I was satisfied that regardless of what test was applied the breach of s 23(5) was *operative* during the material period.

[60] In my view, there was an obvious real and substantial connection between the evidence about Mr Ryland's intentional damage of the police vehicle during a period of detention that failed to treat Mr Ryland with humanity and respect. Accordingly, I found the crucial evidence was "improperly obtained" under s 30 of the Evidence Act.

[61] However, the narrative *after* Mr Ryland was removed from the police—whether a continuous breach of s 23(5) or not—had no causative link or real or substantial connection to the evidence liable to be ruled inadmissible. Because, for obvious reasons, the evidence under the intentional damage charge related to Mr Ryland's conduct whilst *inside* the vehicle, not afterwards. Moreover, determination did not require any wider assessment of the scope of s 23(5).

[62] Under s 30 of the Evidence Act 2006, I was required to exclude any improperly obtained evidence if, in accordance with the s 30 balancing process, I determined its exclusion was proportionate to the impropriety.

[63] My findings controlled parameters here. The infringement of the s 23(5) right here was serious. As noted by Collins J in *Kelly*, "…It is a hallmark of civilised societies that those who are arrested or detained are not treated inhumanely or disrespectfully."[32]

[64] The defence properly concede there was no bad faith here on the part of the officer but argued it was reckless conduct. I concluded that the officer's conduct was very careless. It was contrary to police operational directions. And what occurred cannot rest entirely on failure to observe protocol or an inadequate training plea. Any objective observer would have drawn the conclusion that this suspect, albeit belligerent, uncooperative, intoxicated and spiteful, was already suffering from use of the pepper spray and would have had serious difficulties in breathing, as he did, through subsequent misuse of the spit hood.

[65] The intentional damage offence with which Mr Ryland was charged was not particularly serious. And it would have been feasible for the officers here, if concerned Mr Ryland may continue spitting at them, to simply keep him outside the vehicle at a distance without the spit hood and call for the police van to arrive—the strategy ultimately deployed.

[66] There was here too no realistic alternative to excluding the evidence. This is not a case where any other practical remedy applies. And the impropriety here was not necessarily to avoid any immediate risk of physical danger to the officers given the alternative strategy. Nor was there any real urgency in getting Mr Ryland into a police vehicle as opposed to a police van.

[67] In the end, I found the impropriety here was serious and substantial. The officer was very careless. And it was an unnecessary disregard of Mr Ryland's fundamental rights. Whilst an effective and credible system of justice has the potential

[32] *Kelly v Police*, above n 29, at [36].

to cut both ways here, I found there is a need for effective vindication of the infringement of the s 23(5) right warranting exclusion of the evidence.[33]

[68] For all those reasons, the evidence was ruled inadmissible and the charge under s 11 was dismissed.

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Judge W P Cathcart
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 25/2/2022

[33] *Hamed v R* [2012] 2 NZLR 305 at [251].