File

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. 617/84

BETWEEN A

APPELLANT

A N D POLICE

RESPONDENT

UNIVERSITY OF OTAGO
13 OCT 1987
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Hearing : 25th September 1984

Counsel : Mr. Binstead for Appellant
Mr. Jones for Respondent

Judgment : 2 October 1984

JUDGMENT OF SINCLAIR, J.

The appellant was convicted in the District Court at Warkworth on a charge laid pursuant to Section 23a of the Summary Offences Act 1981 in that he did, on 1st November 1983 at Wellsford, resist Kevin Donald Pugh a constable acting in the execution of his duty. Originally the appellant faced two charges, one of fighting and the present charge but the charge of fighting in a public place was dismissed after a defended hearing. It is necessary to review the facts and some of the evidence before considering the matters in issue.

The Constable, in his evidence, stated that he

received two telephone calls during the evening of 1st November 1983 to the effect that there was an incident then occurring within the precincts of the car park of the Wellsford Inn. On arrival the Constable stated that he saw a group of persons fighting with a member of the hotel staff, a Mr. P to be outside the group who were engaged in the fracas and on approaching the contestants the Constable stated that he asked the group in a loud voice to stop fighting. One of those involved, a Mr. H , the Constable said, walked away while the other two continued to struggle and throw punches at each other. He stated that he again asked them to stop but they did not take any heed of his request whereupon he arrested the present appellant for fighting.

At the time the Constable said thatnone of the persons involved was personally known to him except Mr. P whom he knew to be a member of the hotel staff. Upon arresting the appellant the Constable stated that Mr. A struggled violently and it was necessary, with the assistance of Mr. P , to place handcuffs upon him. To do that it was necessary to place the appellant upon the ground and his arms were handcuffed behind his back and he was then placed in the police car. During that episode the Constable stated the appellant was struggling violently at all times and resisted in every possible way.

Under cross-examination the Constable maintained that he asked all those involved to stop fighting twice and that he was certain that his voice was loud enough to be heard by all those concerned. It is notable that during the

course of the cross-examination the Constable was informed that the appellant would state in evidence that by the time the police arrived the fight had finished or finished immediately on the arrival of Constable Pugh. The Constable replied stating that that was not correct. It is apparent from the way the case was conducted that it was accepted that there had been a fracas of some sort in the car park but the real question at issue was whether this appellant was really involved.

One of those involved, Mr. H , stated that he had been drinking, as I understand the evidence, with the appellant and the appellant's brother and that on going into the car park he had some disagreement with the appellant's brother in relation to some money which he, Mr. H , owed to the A s. The sum total of his evidence was that at the time the police arrived the fracas was virtually over and that the appellant's brother was still wanting to engage Mr. H either in fisticuffs or in a debate and that the appellant was trying to prevent his brother from doing that.

Mr. P stated that when he got out in the backyard there was a scuffle going on and, according to his evidence, the episode lasted for approximately three-quarters of an hour. He stated that the scuffling stopped as soon as the Constable got out of his vehicle and that the present appellant told the Constable to leave his brother alone and that it was none of the Constable's business. It is notable that during the course of Mr. P 's evidence, in

reply to a question from the prosecutor, he stated that at the time the police arrived he was trying to get in between Mr. H and the appellant's brother, obviously with the intention of separating them. Under cross-examination, Mr. P re-affirmed that when the police arrived there was a scuffle but that upon the arrival of the police vehicles the fracas came to an end.

Mrs. P , for her part, stated that she was outside observing the incident for about ten minutes before the police arrived and that she saw Constable Pugh arrive and get out of his car and although she was aware of some conversation taking place she could not swear to its actual details. However, after the arrival of Constable Pugh Mrs. P r stated that the appellant seemed to get "stirred up about something, started waving his arms and was jumping up and down about something" and that Constable Pugh was trying to calm him down. At that time she states that the Constable then arrested the appellant. There is no doubt that at the time of the arrest the appellant was agitated and at page 15 Mr. P is recorded as saying that at or about the time the handcuffs were produced the appellant and the Constable were engaged in a scuffle and that it resulted in the appellant being placed on the ground with the handcuffs then being placed upon him.

With that background it was submitted by Mr. Binstead, on behalf of the appellant, that it had not been proved that the appellant resisted the Constable prior to his being arrested for fighting or, in any event, prior to the

Constable placing the handcuffs on the appellant and it was further alleged that at the time the handcuffs were placed upon the appellant the Constable was not acting in the course of his duty and further that it had not been proved that the Constable had good cause to suspect the appellant had committed an offence against Section 7 or Section 23 of the Summary Offences Act 1981.

In essence the appellant relied upon the provisions of Section 39(1) of the Summary Offences Act 1981 as constituting the basis of the attack on the conviction for resisting arrest. Section 39(1) of the above Statute provides as follows :-

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

The offence of fighting is created by Section 7 of the Statute and Section 23a relates to the offence of resisting a constable in the execution of his duty. Thus it was said that at the time when the Constable arrested the appellant for fighting he did not have good cause to suspect that the appellant had committed the offence of fighting and it was urged that the acquittal of the appellant somewhat highlighted that situation.

The power to arrest without warrant as contained in the Summary Offences Act 1981 is somewhat akin to the

provisions in Section 315 of the Crimes Act 1961. Sub-section 2(a) of Section 315 provides that the constable may arrest and take into custody without a warrant any person whom he finds disturbing the peace or committing any offence punishable by death or imprisonment. Section 32 of the Crimes Act 1961 also gives powers to a constable in relation to an arrest without warrant and that section provides as follows :-

> "Where under any enactment any constable has power to arrest without warrant any person who has committed an offence, a constable is justified in arresting without warrant any person whom he believes, on reasonable and probable grounds, to have committed that offence, whether or not the offence has in fact been committed, and whether or not the arrested person has committed it."

Thus, the constable restraining the person arrested must have a belief that the person so arrested has committed a specific offence for which there is statutory authority to arrest him without warrant. See Blundell v Attorney-General [1968] N.Z.L.R. 341.

Whether the person arrested is subsequently convicted matters little so long as the person affecting the arrest has the belief based on reasonable grounds that an offence has been committed. Thus, it is necessary to have a look at the situation as was described by the Constable when he arrived at the scene and then to examine what he said he saw in the light of the surrounding evidence. The Constable did not know any of the participants personally at all and he came upon a scene where there had been a fracas

going on and he stated in evidence that it was still going on at the time he arrived. While the charge of fighting was dismissed on the basis that the other civilian witnesses stated that the fighting had ended when the Constable arrived there is no finding from the District Court Judge on the question of credibility and when one has a look at the judgment of the District Court one can see quite plainly that the District Court Judge was left in some doubt as to whether or not the appellant was a willing protagonist in the affray when confronted with the evidence from lay witnesses. Accepting that particular finding there is no finding whatever that the Constable was unjustified in intervening when he did nor is there any finding that the Constable was not a credible witness. At best it can be said there was a finding that in relation to the fighting charge the onus of proof had not been discharged. There was still the undisputed evidence of a disturbance in the car park in which the appellant was involved.

Turning to the question of good cause to suspect I was referred to two authorities, the first being Police v Anderson [1972] N.Z.L.R. 233 which was a decision of the Court of Appeal in relation to the blood alcohol provisions of the Transport Act 1962. Page 242, North P. had this to say :-

> "In principle, I can see no reason at all why a Court should require anything more than the ordinary standard of proof in judging the evidence of the traffic officer that the objective facts observed by him justified him requiring the driver to submit to a breath test. All that is required, in my opinion, are circumstances showing that the traffic officer had reasonable grounds for suspecting that the person he was interviewing was the worse for liquor. Common sense requires that in

judging that from his physical senses alone, the officer is entitled to be influenced by the conduct of the suspect and in particular the way he has observed him to drive. The test of course is an objective one, but I do not for a moment accept the view that the evidence must reach a 'high standard' of proof. This would only be justified (if at all) if this condition precedent be elevated into the position of forming an essential ingredient in the offence. For my part, in spite of the observation of Lord Diplock, (which I very much doubt that he intended to be taken too literally) I am certainly not prepared to treat this condition precedent as being an essential ingredient of the offence, even if it was proper, (which I doubt), so to regard the statutory procedure surrounding the taking of a breath test and later of a blood test prior to the passing of the 1970 amendment. I would add in this connection, that I have always understood that a police officer could take into account hearsay reports as part of the material upon which he based his statement that he had good cause to suspect that a person had committed a breach of the peace or some other offence punishable by imprisonment so that the police officer could arrest him without warrant. It would, I suggest, be preposterous if the law required a more stringent standard of proof of the existence of a 'reasonable suspicion' in this class of case than is required in cases where the right of a constable to arrest a person without warrant is challenged."

To the same effect are the observations of Hardie Boys J. in Williams v Police [1981] 1 N.Z.L.R. 108 when at page 113 this was said :-

"In the usual type of situation, the Court would not approach its consideration of good cause with too much nicety. The police must be enabled to pursue their duty without the hindrance of an over-zealous ex post facto examination of the reasonableness of their actions (cf Wiltshire v Barrett [1966] 1 QB 312, 321; [1965] 2 All ER 271, 274, per Lord Denning MR). Thus where a constable is acting on a complaint, he is not required to satisfy himself that the complaint is validly made, provided that in other respects he acts reasonably. But where as here the constable makes the arrest as a result of his own assessment of a situation in which he is himself a direct and active participant, I think the position is

> a little different. Here, by his own actions the constable precipitated a confrontation. He wrongfully interfered with the rights of a citizen and thereby gave rise to an altercation. In these circumstances, he cannot in my opinion claim to have reasonable cause to believe that an offence had been committed. Had he stopped to think about it, he would I am sure have realised that it was he and not Williams who was at fault. I do not blame him for not stopping to think. The circumstances hardly permitted that. But it was he who had created them."

In the instant case Constable Pugh arrived at a scene where there was an incident already in progress and it was not one which he precipitated in any way or exacerbated or provoked. He made an assessment of the situation and, viewed by any objective standards, it seems to me that he was justifiably entitled to intervene. It has been observed more than once that it is the duty of a police officer to prevent reasonably apprehended breaches of the peace; see Pounder v Police [1971] N.Z.L.R. 108; and that was precisely the scene with which the Constable in this case was confronted.

There is no argument that all knew that the Constab was in fact a constable and it seems to me to be plain that in the circumstances existing at the particular time he was acting in the execution of his duty. The evidence from the witnesses discloses that there was resistance from the appellant both at the time of his arrest and thereafter which necessitated his being handcuffed and being placed on the ground to enable the handcuffs to be applied. He resisted the Constable within the ordinary meaning of that word as defined in the Concise Oxford Dictionary where the word is

defined, inter alia, as to strive against, oppose, try to impede, refuse to comply with.

In all the circumstances I am of the view that having regard to the legal principles involved and the circumstances of the case the appellant was properly convicted of the offence of resisting. Accordingly, the appeal will be dismissed with costs of $200 to the respondent

Solicitors :

Appellant	:	Torrance, Corboy & Riley, Wellsford.
Respondent	:	Crown Solicitor, Auckland.