IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

Ap.205/87

NOT RECOMMENDED

BETWEEN HARVEY

Appellant

A N D THE SUPERINTENDENT OF POLICE

Respondent

Hearing: 19 November 1987

Counsel: G.R. Lascelles for Appellant
R.E. Neave for Respondent

Judgment: 1 DEC 1987

JUDGMENT OF HARDIE BOYS J.

This appeal arises out of an incident in which it is alleged that the appellant assaulted a police officer, Constable Bryant. The appellant was originally charged with assaulting the constable whilst he was acting in the execution of his duty but at the end of the prosecution case the Judge held that on one of the two different versions of the facts given by the prosecution witnesses, the constable could not have been acting in the execution of his duty at the time of the incident and he therefore reduced the charge to one of common assault. The appellant then gave his evidence but the reduced charge was sustained and the appellant convicted. It is against that conviction that he now appeals.

The incident began when a taxi driver, Mr Stuart, saw two men running across Bealey Avenue from the Carlton shops to the Church opposite, and apparently hide in bushes there. It was 2a.m. and he was suspicious and so he arranged for the police to be called. He then saw the two men emerge from their hiding place and run along Bealey Avenue. He

followed them; one went up a drive into a private house, the other, who was the appellant, finally came to Clare Road where a police car arrived at about the same time as the taxi driver. He said he saw a policewoman, who was Constable Hill, approach the appellant but the appellant, who he thought may have pushed past her, kept on walking. Then another police car arrived and from it came a police dog and its handler, Constable Bryant. The constable and the dog approached the appellant. At that point Mr Stuart drove off with Constable Hill in order to investigate whether there had been any break-in, presumably at the Carlton shops. They found nothing. They were away about ten minutes. When they returned, Mr Stuart said, the dog was back in the car and Constable Bryant was talking to the appellant. The two men were facing each other. He then saw the appellant punch the constable in the head. At this the dog went berserk and tried to get out of the car, but could not, and other police officers, who had apparently been standing back, then rushed across and after a struggle were able to subdue the appellant and handcuff him.

Constable Bryant's account was that he came with Constable Hill. When he got out of the van he took his dog with him in case it was required and then called for further staff on the radio because the appellant was becoming very aggressive, presumably to Constable Hill. He then put his dog back in the van and went and spoke to the appellant himself. He asked him where he had come from and the appellant declined to tell him. He said that the appellant began to walk away and he stepped forward and asked him to remain. Thereupon the appellant raised his fist and took a swing at him but the

constable ducked and the blow missed. "At this point", the constable concluded, "my dog Sultan came out of the van and bit the appellant on the buttock. Other police staff arrived and subdued the defendant and I then put my dog back in the van."

This extraordinarily sparse account of what occurred makes no allowance for the fact that according to Mr Stuart ten minutes elapsed between the time Constable Bryant took the dog out of the van and the time the blow was aimed at him, and of course, according to Mr Bryant, the dog's attack on the appellant must have taken place well before the assault.

Cross-examined, Constable Bryant acknowledged that he heard the appellant tell Constable Hill that he did not want to remain to answer questions and that he said the same thing to him on more than one occasion. He was quite evasive in responding to questions designed to establish that he was in fact blocking the appellant's path so that he was unable to move away, as he had made it so clear he wished to do. The constable did however acknowledge that the two men were standing face to face and that when the appellant began to move away, he moved with him. He denied having touched him, or interfered with him, but said "I moved across with him" and later "I moved with his line of intended travel" and again "He could quite easily have kept walking across the road". The Judge took these answers to mean that the constable moved in a parallel course with the defendant, by which I understand that the constable walked alongside the appellant as the latter endeavoured to walk away. But with respect, that is not really what the constable said, and it certainly is not consistent with the evidence of both the constable and taxi driver that the two men were face to face. It appears clear to me that the

constable was in fact placing himself in front of the appellant so that the appellant could not leave, and if the taxi driver's estimate of time is correct, the constable was doing this for upwards of ten minutes.

For some unexplained reason Constable Hill did not give evidence, nor did more than one other member of the police party and his evidence was of no help because he did not see the scuffle.

The appellant's version was different again. He said that the two police vehicles arrived at the same time and that when Constable Hill approached him first, she seized him by his jacket, put a hand inside his pocket "and was sort of searching me". He said he grabbed her wrist, took her hand from his pocket and asked what was happening. He gave his name and address when requested but obtained no response to his request for an explanation as to why he was being questioned. He said that several policemen came towards him at once and were "jostling me verbally with questions for a few minutes". Then, he said, he decided he had had enough and started to move away, but Constable Bryant blocked his progress and demanded that he get in the car; he said he would not and that he wanted an explanation; but the constable grabbed him by the neck and started pulling him towards the vehicle. He said he then drew his arm back as if to punch the constable, but restrained himself from doing so, instead taking hold of his wrist and attempting to remove the grip from his neck. Then he was jumped on by several officers, forced up against the fence and the dog was then brought around and seized him. It appears that his clothing was quite badly damaged and he had to have four stitches in his buttock. He was taken to the police

station where an interviewing detective insisted he had committed a crime or was about to commit a crime and he was interrogated "fiercely" by two groups each of three police officers. He was strip searched on two separate occasions and it was some time before he was able to persuade someone to call a doctor.

The police, of course, have no right to detain a suspect in order to question him: Blundell v Attorney-General [1968] NZLR 341. It is in recognition of this principle that the Judge reduced the charge; because if the taxi driver's evidence was right, the constable had been detaining the appellant for ten minutes. The charge having been reduced, the question was no longer whether the constable was acting in the course of his duty, but simply whether the appellant in fact committed an assault. The taxi driver's obvious error in thinking the appellant's blow connected is not material as to whether or not there was an assault, because the attempt to strike the constable which the latter described would equally constitute the offence. An assault is "the act of intentionally applying or attempting to apply force to the person of another": Crimes Act 1961, s.2(1). The Judge appears to have seen the issue as being whether he should accept the constable's evidence that the appellant attempted to hit him or whether he should accept the appellant's evidence that all he did was draw back his arm without actually commencing to strike a blow. He resolved that issue in favour of the constable. He said:

> " The defendant was a voluble, fast speaking witness, who I thought was initially plausible but as his evidence went on the conviction grew that he was a man who was carried away by his imagination. I found him to be untruthful. I

> reject his evidence. I accept Constable Bryant's evidence supported in many respects by the taxi driver and find it proved beyond reasonable doubt that while the constable was talking or attempting to talk to the defendant, the defendant attempted to apply force by swinging a punch at the constable and that attempt amounted to an assault."

Thus the Judge also rejected the appellant's evidence that he was simply reacting to an assault by the constable. Plainly had he accepted that the constable had taken hold of the appellant, as the latter claimed, there would have been every justification for the appellant to strike at the constable in order to free himself.

Mr Lascelles attacked this finding of credibility, pointing out that volubility and fast speaking are not tests of untruthfulness, and that in a great many respects the appellant's evidence was consistent with the prosecution evidence: except of course on the crucial issue of the striking of the blow; and further as to the manner in which he was treated by the police not only at the police station but also at the scene, but his evidence about that was not really challenged.

For obvious reasons this Court is reluctant to disturb findings of credibility made by a trial Judge who has had the advantage of seeing and hearing the witnesses. It should interfere only when it is plain that the Judge has not taken appropriate advantage of the particular opportunity he has. That cannot be said in this case. The evidence of the constable that a blow was struck is supported by the taxi driver, even if the latter erroneously thought that it connected. The evidence of both of them is in conflict with the appellant's evidence that he simply drew back his fist. And of course it is also in conflict with his evidence that he

did that only after the constable had seized him and begun to drag him towards the car. In view of this I conclude that the Judge was entitled to accept the constable's evidence as to what actually occurred in relation to the striking of the blow. The inconsistencies between the evidence of the constable and that of the taxi driver, do not affect this particular point.

The Judge appears to have taken the view that that was the only issue, but it plainly is not. For there is also the question of whether the appellant was justified in attempting to strike the constable as he did. It is to be remembered that provocation, no matter how severe, is no defence to a charge of assault. To justify an assault, a person must show that he acted reasonably in his own self-defence. In the circumstances of this case, as I must take them to be in view of the findings of fact already set out, the question is whether the appellant was entitled to strike at the constable because the constable was preventing him walking away along the footpath. The test is whether what he did was a reasonable response to the situation with which he was confronted. The fact that the complainant was a police officer is really beside the point. The same test applies where any person's progress along the footpath is deliberately blocked by another person without justification, whoever she or he may be.

I do not think that the appellant's response was a reasonable one. He had doubtless become very frustrated. His liberty was under restraint. He would have been entitled to push past the constable, to push the constable away to clear his path, if he could not otherwise get past, even to strike

the constable if the constable had applied force to him. But he was not entitled to take a swing at the head of a man who was not touching him, but was simply standing in front of him and blocking his path. By doing that - and the matter must be approached on the basis that that is what he did - the appellant was in my judgment guilty of an assault.

The case nonetheless gives cause for concern. The appellant was plainly unco-operative if not boorish in his behaviour. He refused to give an explanation. He has only himself to blame for arousing the suspicions, even the resentment of the police officers at the scene. The quiet word usually turns away wrath. The offensive word is likely to incite it. The appellant chose the offensive. On the other hand, difficult though at times it may be, the police must exercise restraint, and refrain from submitting suspects to unnecessary indignities. It was wrong for Constable Bryant to have sought to detain the appellant on the street. And when he became violent, there were several constables present well able to subdue this unarmed man. There was no justification at all for allowing the dog to join the fray. Nor, at the Police Station, was there any justification for twice strip-searching the appellant. The explanation that the watchhouse-keeper had to be satisfied, and he was not present on the first occasion, is quite unacceptable. The search should not have been undertaken until he was present. The appellant made other allegations about his treatment at the police station, notably that whilst he was stripped he was directed to bend over, and that he was hit on the head several times. I understand that these, together with those other matters I have mentioned which were acknowledged in the evidence, are the subject of a formal complaint, and so I say no more

about them. But even putting them to one side, the appellant was subjected to a gross over-reaction on the part of the police personnel concerned.

The Judge took some of these matters into account in fixing the penalty he imposed - a fine of $100. With respect, whilst that might give recognition to the degree of provocation involved, it does not mark any disapproval of the acknowledged excess of police power to which this man was subjected. The Court is entitled to do that, and it should do it in an appropriate case. This I think is an appropriate case. The appellant, who took the morning off work to be present during the appeal, plainly suffers a great sense of injustice at being punished by the Court as well as by the police. The law deserves greater respect than he can have for it.

I therefore allow the appeal, quash the conviction and the fine, and direct that the appellant be discharged under s.19 of the Criminal Justice Act.

Solicitors:

Crown Solicitor, Christchurch, for Respondent