

R/M

19/3/97

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 13/97

BETWEEN PETER VERON BAKER

Appellant

A N D THE POLICE

Respondent

Hearing: 12 February 1997

Counsel: No Appearance for or on behalf of Appellant
J H Eaton for Respondent.

Judgment: 19/3/97

JUDGMENT OF PANCKHURST J

The central issue raised by this appeal against conviction is whether a constable was at the relevant time acting in the execution of his duty. The appellant was convicted of assaulting Constable Price in the course of the latter's duty. An assault, albeit of a relatively minor nature, unquestionably occurred. This was inside the appellant's home at 68 Powells Road, Oxford. The more vexed question is whether Constable Price had any lawful authority to enter the house in the first place. If the officer acted in excess of his lawful authority, then he was not involved in the execution of his duty : *Williams v Police* [1981] 1 NZLR 108 and *Waaka v Police* (1987) 2 CRNZ 370.

Baker v Police 19/3/97

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The charge of assault was pursuant to s10 of the Summary Offences Act 1981 and related to events on 17 June 1996. The appellant and his wife had lived in a matrimonial home at 68 Powells Road, Oxford. In August 1995 they separated, but thereafter Mrs Baker returned to the matrimonial home for a period. As at 17 June 1996 she was living with her mother, but about to move to rented accommodation for which purpose she required furniture and effects from Powells Road. She made an arrangement to call at the property to uplift items. The appellant was insistent that she not bring a friend to assist her, as he said he was prepared to help out. Later in the day a teenage daughter went to the house to pack her personal effects. While there she telephoned her mother and reinforced that Mrs Baker should not bring a friend when she came to Powells Road.

Mrs Baker was concerned at her daughter's distressed state. She determined to take a friend and also arranged for a local constable to meet her at the house. She arrived to find Constable Price already there. The appellant was in the process of ordering the constable from the property in an abusive fashion. There was an aggressive discussion at the front gate. In the course of it Constable Price suggested that Mrs Baker invite him into the property so that he may oversee the removal of items of furniture and effects. This she did. Meanwhile the appellant continued to protest, including reference to the time-honoured phrase that his home was his castle.

The three then entered the house. Mr Baker went straight to the phone and indicated his intention to call a more senior police officer. Both men

spoke to a senior sergeant. It seems the discussion only served to reinforce Constable Price's belief that he was entitled to be in the house at the invitation of Mrs Baker. A short time later the constable moved into the hallway area in order to supervise the removal exercise. At this point he was assaulted, in that the appellant pushed Constable Price in the back. The constable arrested the appellant, an action which he had threatened on several occasions in the face of the appellant's actions. In the District Court the learned Judge said of the appellant's conduct on the day that he was "volatile, unreasonable and acting in a most inappropriate manner". Undoubtedly his actions warranted that assessment. The charge was defended on the facts; that is to say the appellant gave evidence in which he denied an assault of the kind alleged. He was disbelieved and a conviction was entered. The decision under appeal includes no reference to the issue whether Constable Price was acting in the execution of his duty.

The notice of appeal was filed in person and contained several grounds of appeal including "police do not come on property and push occupants around in their own dwelling. This is not the law". Although crudely put, I take this to be a challenge to the constable's right of entry into the house. The other grounds, essentially of a factual nature are devoid of merit. The appellant did not appear in support of the appeal, and accordingly I had only the advantage of submissions from Counsel for the Crown. However, in my judgment the case falls to be decided on a narrow, if important, legal basis. Two short points are determinative of whether the constable was entitled to enter and

remain in the house and was therefore acting within the general scope of his duty, namely whether Mrs Baker was in any position to extend a licence to the constable to enter or alternatively whether the constable was entitled as of right to enter to prevent a breach of the peace.

Powells Road was referred to in evidence as the matrimonial home and Mr Baker spoke of his paying the rates and mortgage. The parties had been apart for about 10 months but reconciled for part of that time. Although the evidence was not direct on the point I infer Mrs Baker was a part owner of the property, or at least had a beneficial interest in it.

The jurisprudence relevant to licences to enter private property is familiar. An extended discussion is not required. The starting point is *Entick v Carrington* (1765) 19 Howell Estate TR 129 in which Lord Camden, CJ held:

“Our law holds the property of every man so sacred that no man can set foot upon his neighbour’s close without his leave. If he does he is a trespasser though he does no damage at all; if he will tread upon his neighbour’s ground he must justify it by law.”

Two centuries on the Court of Appeal in *Rodson v Hallett* (1967) 2 QB 939 recognised the concept of an implied licence whereby a householder who elects to leave his garden gate unlocked, gives an implied licence to enter the property and to approach the door. Such an implied licence may be revoked by the occupier or his authorised representative, in which case the visitor enjoys a reasonable time within which to withdraw from the property : *MOT v Payn* [1977] 2 NZLR 50 (CA). Subsequent cases, many decided in the context of the

Transport Act blood alcohol regime, have considered and further clarified the limits of the implied licence doctrine.

The present of course is not an implied licence case. The issue of the officer's entitlement to enter 68 Powells Road was debated at the front gate. The appellant occupier made it perfectly plain the constable was not welcome to enter the property. On the other hand, Mrs Baker was asked, and purported, to extend a licence to Constable Price to enable him to oversee the situation whilst she gathered and removed effects. Did she, a non occupier but a person with a legal or beneficial interest in the property, have the authority to issue an express licence?

In the context of implied licences a related issue has been considered : namely who has the power to revoke the licence. In *Edwards v MOT* (A203/83 Wellington Registry, 24/4/86) Eichelbaum J, as he then was, held that the appellant, being a visitor to private premises as a friend of the occupier's son, had no power to revoke a traffic officer's implied licence. Revocation lay with the occupier himself, or someone authorised expressly or by implication on his behalf, not a casual visitor. This approach reflected the common law view of a licence, being a permission granted by the occupier of land to a person to do something on that land which would otherwise be a trespass : *Thomas v Sorrell* (1673) Vaugh 330. Likewise, the gist of the tort of trespass to land is the protection of possessory rights, rather than rights of ownership. Accordingly the person ordinarily entitled to sue is the person in possession of land at the time of the trespass : *Shattock v Devlin* [1990] 2

NZLR 88. In New Zealand an occupier's rights are further underscored by the provisions of the Trespass Act 1980 whereby it is an offence to not leave any place after being warned to do so by the occupier (s3(1)). The "occupier" for the purpose of the Act being the person in lawful occupation of the place or land or an employee or agent of that person (s2).

Against this background and with some hesitation, I am driven to the conclusion that Mrs Baker did not have authority to extend a licence to the constable to enter the premises. My hesitation is borne of several factors. As already noted, Mrs Baker was part owner or had a beneficial interest in the property. Moreover, she had a legitimate reason to enter the premises in order to uplift items of furniture and personal effects. She had the agreement of the appellant, albeit qualified, to enter the premises for that purpose. Further, Mrs Baker on the basis of the general situation and her daughter's phone call had every reason to hold concerns about the visit and to want the presence of a peacemaker. In these circumstances, it might be asked, what more responsible step could be taken than to engage the assistance of a constable in such role. It may be arguable that a person, being a part legal or beneficial owner of land, should be entitled to extend a licence of limited duration and as reasonably required by the exigencies of the particular situation to another to enter. Individual cases would fall to be considered on their own particular facts; it being a question of fact and degree whether a temporary licence was reasonably granted by the part owner.

On reflection however I am not prepared to extend the boundary in this way. To do so in the absence of full argument upon the issue, would be unwise. The more so in an area of basic rights such as the present case raises. In this vein Woodhouse J (as he then was) in *MOT v Payn* at p62 said:

"In a matter of this quality, involving as it does claims made on behalf of officials that they are entitled to encroach upon fundamental civil liberties and the peaceful enjoyment of private property, I think it is of the greatest importance that all concerned should know exactly where they stand."

And a little later:

"... it has long been recognised that if there is to be any derogation from the liberties enjoyed by individuals in favour of powers given to an official it is essential that the change should be authorised and clear in definite terms. It may be that where the language of the statute is free from all uncertainty and the need for change is obvious and compelling the Courts will act even in this sensitive area upon what would then seem to be specific and unmistakable implication : but the issue would need, in my opinion, to be quite clear cut."

Admittedly these observations were made in the context of considering whether a traffic officer had a power to enter private property other than pursuant to an implied licence, by virtue of the blood/alcohol provisions of the Transport Act. The issue was therefore one of interpretation, or necessary implication in a statutory context. Even so, in a common law context I see the emphasis upon the need for clarity where important personal rights are at stake, as a value of equal importance.

In my view the only other possible basis for the constable's entry onto the appellant's premises, was to prevent a breach of the peace. The preservation of the peace is defined as the first duty of any constable: Halsbury (4th ed, vol 46, at paras 319-320). Where a constable reasonably apprehends that the action of any person may result in a breach of the peace, it is his duty to prevent that action. The duty extends to the protection of both life and property. Despite the primacy of the duty, examples of its exercise are not numerous. In *Rodson v Hallett* itself, Diplock LJ (at p414) held in relation to constables who witnessed their sergeant being assaulted as he endeavoured to leave private premises, that:

"... once a breach of the peace was taking place under their eyes, they had not only an independent right but a duty to go and stop it. and it matters not from that moment onwards whether they started off on their journey to stop it from outside the premises or from inside the premises. They were entitled, once the breach of the peace occurred, to be on the premises for the purpose of preventing it or stopping it."

Likewise the House of Lords in *Albert v Lavin* (1981) 3 All ER 878 found that an off duty constable was acting in the execution of his duty by intervening to prevent an imminent breach of the peace when the appellant attempted to jump the queue at a bus stop. In New Zealand, *Minto v Police* [1987] 1 NZLR 374 (CA) provides a recent example of an instance where a police officer may have acted in the execution of his duty to prevent a feared breach of the peace by seizing a loud hailer from the appellant who was in the process of using it to disrupt play at an international tennis tournament for political purposes. The matter was referred back to the District Court for a charge of obstruction of the

officer to be further considered. The Court recognised as matters for the District Court's consideration the duty to prevent a breach of the peace and the right of the officer to impound personal property as a temporary measure in such circumstances.

In each of these cases a breach of the peace was either unfolding or imminent. On that aspect Cooke P in *Minto* (at p377) said:

*"(Counsel) has stressed that the powers of the police to take steps to prevent threatened breaches of the peace should be confined, in her submission, to situations where an immediate or imminent breach is apprehended. That is inherent or implicit in what Lord Diplock said (in **Albert v Lavin**). Obviously immediacy is in part a question of degree. It would be going too far to say as a matter of law that the powers of the police at common law can be exercised only when an instantaneous breach of the peace is apprehended, but the degree of immediacy is plainly highly relevant to the reasonableness or otherwise of the action taken by the police officer. What Lord Diplock spoke of was reasonable steps and a breach being committed or about to be committed. So his proposition has its own inbuilt limitations."*

Thus the issue whether there was a duty to intervene is very much one of fact and degree.

In my view the most difficult point in the present case is whether it can be said the constable was entitled, indeed required, to enter the premises to prevent a breach of the peace when at the time he plainly considered he required an express licence to do so. Again after some hesitation I am forced to the conclusion that on the evidence this was not a case where the constable acted within the course of his duty to prevent a breach of the peace. A short

time earlier Constable Price was ordered from the premises by the appellant and a heated discussion ensued at the front gate which culminated in the purported grant of an express licence by Mrs Baker. It was on that basis the constable entered the property despite the appellant's protests. I would have no hesitation in characterising the appellant's actions within the house as constituting a breach of the peace were it not for the complication that in large measure what the appellant did and said was in direct response to the constable's presence, which Mr Baker thought was unlawful. Had the constable arrived at the property a little later and found Mr Baker acting in a threatening way towards his wife, there may have been reasonable grounds for intervention to prevent a breach of the peace. However, that was not the case. The conduct capable of constituting a breach of the peace was by way of reaction to the constable's entry, rather than conduct directed at Mrs Baker.

For completeness it is necessary to mention s317 of the Crimes Act. That section empowers police officers to enter premises in hot pursuit of a suspect, or to prevent immediate and serious injury to person or property. In *Shattock v Devlin* Wylie J concluded that the section was a codification of the rights of police officers to enter private property, and therefore excluded the common law right to enter premises to prevent a breach of the peace. In *Edwards v Police* (1993) 11 CRNZ 271, Tipping J doubted that conclusion. He observed that while s317 may represent a codification, it left extant at least entry by implied licence and entry justified by necessity to preserve human life or health. In view of the factual conclusion reached it is not necessary to

choose between these competing views. However, it is to be noted that in *Minto Cooke P* observed that Counsel for the appellant had not contended that the common law powers and duties of constables did not attach to members of the police in New Zealand. At p378 he said:

*"In principle and in the light of such cases as **Burton v Police** [1940] NZLR 305 such a suggestion would scarcely be seriously arguable. The common law powers and duties are important. It is of interest that, although in the United Kingdom the Public Order Act 1986 has strengthened the statutory powers of the police, the common law has been left intact as a residuary safeguard, because of the advantage of flexible powers defined by the Courts ..."*

Resolution of the debate must await another day.

To summarise, I find that Mrs Baker lacked the ability to extend an express licence to the constable to enter, nor did he enter to prevent a breach of the peace, and accordingly the officer was not acting within the course of his duty when assaulted. The conviction of the appellant for assaulting a police officer must therefore be quashed. It is not a case where it would be appropriate to substitute a conviction for common assault. This result should not be taken as any reflection upon the actions of Constable Price on the relevant day. It is obvious that he acted thoughtfully and with considerable restraint. It is regrettable that the conduct to which he, and others, were subjected should not have produced a more appropriate response, but for reasons which I have endeavoured to explain the case is one which raises issues of general importance which transcend the immediate and particular circumstances of this case.



Solicitors:

No Appearance for or on behalf of Appellant

Crown Solicitor, Christchurch, for Respondent