

CITATION: *Police v JS* [2007] NTMC 083

PARTIES: DAVID MOORE & ANDREW LITMAN  
v  
JS

TITLE OF COURT: YOUTH JUSTICE COURT

JURISDICTION: Criminal

FILE NO(s): 20717335

DELIVERED ON: 3 December 2007

DELIVERED AT: Darwin

HEARING DATE(s): 12 October 2007, 9 November 2007

JUDGMENT OF: Ms Sue Oliver SM

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Complainant: Mr Robertson  
Defendant: Ms Blundell

*Solicitors:*

Complainant: ODPP  
Defendant: NTLAC

Judgment category classification: B  
Judgment ID number: [2007] NTMC 083  
Number of paragraphs: 35

IN THE YOUTH JUSTICE COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20717335

[2007] NTMC 083

BETWEEN:

DAVID MOORE & ANDREW LITTMAN  
**Complainant**

AND:

JS  
**Defendant**

REASONS FOR DECISION

(Delivered 3 December 2007)

**Ms Sue Oliver SM:**

1. The defendant, JS, has pleaded not guilty to four charges being two counts of unlawfully assaulting a police officer in the execution of his/her duty contrary to section 189A of the Criminal Code, a count of disorderly conduct in a public place contrary to section 47(a) of the Summary Offences Act and a count of resist a police officer in the execution of his duty.
2. At the outset of the hearing Ms Blundell, Counsel for JS, advised that once the evidence for the prosecution was heard that she would be making an application on the voir dire to exclude all evidence that followed in time from the apprehension or arrest of a Robert Warrior by way of an exercise of the *Bunning v Cross* discretion on the basis that everything that occurred from that point flowed as a result of an unlawful or improper act.
3. Subsequent to the hearing of the evidence I received written submissions from both parties as to the exercise of the discretion, including an alternative proposition that if I were not satisfied that I should exercise the

discretion to exclude evidence following Mr Warrior's apprehension and/or arrest that I should nevertheless exercise it to exclude all evidence following the apprehension of the defendant JS on the same grounds, that is, that the alleged offending from that point in time flowed from an unlawful or improper act by police.

4. The defendant was one of four young men sitting at the Malak Shops in the early hours of the morning of 23 June 2007. They were not engaged in any criminal conduct. A teenage girl was later present though when she arrived is not clear either from her own evidence or that of the police witnesses. A general duties police patrol stopped and approached them. Each of the two constables on that patrol, Watson and Allen, gave evidence of what occurred next. Constable Watson's evidence was that she knew each of the boys by name. She appears to have approached them in a friendly manner asking them what was up and what they were doing out at that time. The boys appeared to be under the influence of an intoxicating substance. She described the defendant as mildly intoxicated as was another boy, Dennis Cooper. She did not make any mention of her observation of the level of intoxication of the other boys.
5. Whilst she was talking to them and putting some notes in her book, both Robert Warrior and the defendant left the group. She didn't know where the defendant went to. Constable Watson described Robert Warrior as walking off. When Constable Allen gave his evidence he said that Robert Warrior staggered off. Mr Warrior went to the nearby phone box. He appeared to Constable Allen to be making a call. He was yelling back to "fuck off and go away". Constable Watson described him as yelling and screaming and ranting and raving. She saw her partner move off towards him and assumed that he was going to speak to him. Constable Watson does not appear to have been overly disturbed or concerned by this activity. Indeed in cross examination she said that type of language was encountered on every shift and agreed that it was "water off a duck's back". It was after she finished

writing in her notebook, that she said she looked up and saw Constable Allen and Robert Warrior “having a bit of a wrestle in the garden area near the phone box”.

6. Constable Watson presented as a very calm and careful witness whose evidence of the events I would accept as reliable.
7. Constable Allen had followed Robert Warrior to the phone box. His evidence was that Robert Warrior was attempting to make a phone call, holding himself upright by using the walls of the phone box because he was very intoxicated. When he walked up to him, he saw a bottle of rum in his front pocket. He approached and asked if Robert Warrior was talking to him. Clearly this query must have related to the swearing not to the phone call Mr Warrior appeared to making. Robert Warrior said he was talking to someone else. He was then asked to take the rum from his pocket and give it to Constable Allen. Robert Warrior refused and attempted to walk away. Constable Allen then grabbed him by the arm, he swung towards Constable Allen and they both lost balance and ended up in the garden bed. Constable Allen said he got on top of him and restrained him, and he was able to do this because he was “fairly drunk”.
8. Constable Watson, quite understandably on turning and seeing her colleague in the garden bed, went to assist and it is from this point that matters deteriorated in a rapid and major way. At the end of the event all four boys had been arrested and taken into custody. Robert Warrior was picked up by the two constables and in a struggle on the walk back towards the van, punched Constable Watson in the nose. Constable Allen did not see this happen as he was focused on another of the young men, Dennis Cooper, who was remonstrating about the apprehension of Robert Warrior, raising his fists and feigning punches. Constable Allen pushed him away with his arm. Constable Watson also gave evidence of this occurring. Robert Warrior was

then arrested by Constable Watson for assaulting her. He was placed in the wagon that the two officers had driven in.

9. There is an inconsistency in the evidence of the constables in relation to what occurred on the walking of Robert Warrior back to the van. Constable Allen described the defendant as being present and along with Cooper “becoming quite aggressive towards us”. Constable Watson on the other hand said that as they walked Mr Warrior to the van, it was Aaron Sailor who was coming close with Dennis Cooper. When asked where Jessie was at this stage she said she didn’t know.
10. There is a further inconsistency in what occurred when Mr Warrior was placed in the van. Constable Allen said that after they secured him in the van “the couple of juveniles, Cooper and Jessie Sailor in particular became quite aggressive towards us”. Constable Watson said that after she closed the door of the van “Aaron and Dennis were still in the vicinity yelling out ‘What did he do? What did he do? Leave him alone.’” This response was given to a question as to whether she had heard from any of the boys, specifically Aaron, Dennis or Jessie whilst she was doing that (securing Mr Warrior in the van). Constable Allen however described the boys, Jessie and Dennis as continuing to jump around threatening to throw punches and that Jessie was feigning punches at Constable Watson.
11. At some point the defendant did re-appear. Constable Watson said that she was struck in the back of the hand which she raised when she saw out of the corner of her eye someone running towards her and then a fist coming in her direction. It was not a heavy strike. She then saw the defendant near her and he said “Lucky you moved I would have fucking hit your head”. Dennis and Jessie were then shaping up to them. The evidence of the swearing and shaping up is consistent with Constable Allen’s account of what occurred at this time. Constable Watson called for backup. Constable Allen was telling the boys to leave.

12. A backup patrol arrived and two of the boys, the defendant and Dennis Cooper ran off. They ran in the direction of the defendant's home, which was in a street adjacent to the shopping centre. Constable Allen took off after them and Constable Watson said she took off after Constable Allen. The defendant fell over and Constable Allen then restrained him on the ground. Constable Watson assisted to get the defendant up and they walked him to the van (the backup van) and placed him in it. The defendant's mother had arrived at the scene having been alerted to the apprehension of her son by Dennis Cooper, but the defendant was not released into her custody.
13. Subsequently, the defendant is alleged to have assaulted Constable Toohey by spitting on him from the inside of the van where he had been secured. Other incidents occurred involving the other boys, but not the defendant, for which they were then arrested.
14. The proposition is put by the defence that I should, by the exercise of what is known as the *Bunning v Cross* discretion, exclude all evidence of what occurred following the apprehension of Robert Warrior, on the basis that the conduct of police was either unlawful or at the very least, improper, or alternatively, that I should exclude all evidence following the apprehension and arrest of the defendant.
15. In relation to the first proposition, Constable Allen's evidence was that he was taking Robert Warrior into "protective custody". Although that term is not used in the legislation "protective custody" is the term used to describe the exercise of a discretion by police to apprehend a person without arrest pursuant to section 128 of the *Police Administration Act*. The requirements for such apprehension are:-
  - The person must be in a public place or trespassing on private property

- The police member must have reasonable grounds for believing that a person is intoxicated with alcohol or a drug
  - "Intoxicated" is defined to mean "seriously affected apparently by alcohol or a drug".
16. It is a general principle of law that where a discretion is conferred by statute on an office holder, the discretion must be exercised for a proper purpose and in accordance with the public policy for which the discretion is conferred. It is not a discretion at large but one that must "be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office; ought to confine himself": see *R v Anderson* 113 CLR at 177 at 189. In *Doolan v Edgington* 110 A Crim R 19 the then Chief Justice (BF) Martin took the view that although the word "protection" or the like was not used in the legislation, the power of search and removal of items that might cause harm to the apprehended person conferred by section 128 (3) (a) and (b) of the *Police Administration Act* pointed to the concern of the legislature that an intoxicated person might cause harm to himself and was conferred to enable police specifically to act to reduce that prospect.
17. It is not an offence in the Northern Territory to be drunk in a public place. The apprehension of an intoxicated person pursuant to s128 of the *Police Administration Act* is confined to those persons **seriously** affected by alcohol or some other drug. The purpose seems abundantly clear, it is to prevent the person either harming themselves or causing some public harm due to the level of their intoxication.
18. Constable Allen's evidence as to the circumstances surrounding his apprehension of Mr Warrior does not in my view provide a proper basis for the exercise of the "protective custody" power so as to amount to a lawful apprehension under s128 of the *Police Administration Act*. Constable

Allen's first question on approaching Robert Warrior was to ask whether he was talking to him. This query had to be in relation to the bad language which was being directed at police. He did not further engage him in conversation, as might be expected in order to ascertain the level of his intoxication and matters relevant to the need for a "protective" custody. Robert Warrior was seen to be attempting a telephone call. There was no enquiry as to who he was calling. There was no enquiry as to where he was next planning to go or whether he lived in the near vicinity.

19. What Constable Allen did next was to ask him to hand over the bottle of rum. He did not have the bottle in his hand but in his pocket. It was not open but had a lid on it. The prosecution says that I should regard this as a mere request, but I think that this underplays the nature of the engagement between Constable Allen and Robert Warrior. Constable Allen was a person in authority. When Robert Warrior refused to hand over the bottle, he was immediately grabbed by the arm. There was, therefore a very limited engagement with Robert Warrior in terms of the requirement to ascertain the need for protective custody. Nor in my view was there anything in this limited engagement that would provide grounds for the belief that is required for the seizure of alcohol pursuant to section 45H of the *Summary Offences Act*. The boys were not seen to be drinking alcohol and no evidence of any conversation with them that would found a belief that they had been drinking within 2 kilometres of licensed premises.
20. It is said by the prosecution that Constable Allen formed his view of Robert Warrior's intoxication, sufficient for the purposes of the *Police Administration Act*, because Robert Warrior staggered to the phone box and leant against it. As I have observed earlier, this account is not consistent with that of Constable Watson, whose description was simply that Robert Warrior walked away. She gave no evidence of any observation of Mr Warrior's level of intoxication. Indeed, she was not concerned about him, even though he was swearing, to even look up from her notebook. The



prosecution submitted that the aggressive behaviour on Mr Warrior's part was evident both before and after Constable Allen's approach was a matter that the officer took into account in forming the appropriate opinion as required by s128. I do not accept that submission. Whilst aggressive behaviour might well in many circumstances provide grounds for forming a belief that a person needs to be taken into protective custody, for example where police happen on a situation where threats are being made to another or there is generally a volatile situation amongst a group, which was not the case here. In my view the inference to be drawn from the evidence is that Constable Allen was more interested in pursuing Robert Warrior, to challenge him about the language that he was using, than to make a bona fide assessment of any need to take him into protective custody. It was Robert Warrior's refusal to hand over the bottle of rum that prompted Constable Allen to grab him not any concern for Mr Warrior's safety or that of others. In my view the evidence points directly to Constable Allen being affronted by the abuse directed at him by Robert Warrior and "grabbing" him for that reason.

21. I am satisfied that there was not a proper exercise of the power to apprehend Mr Warrior pursuant to s128 of the *Police Administration Act* and his apprehension was therefore unlawful.
22. Submissions have been made that the apprehension was not a lawful one in relation to an arrest for disorderly conduct however, in my view I do not need to consider this because Constable Allen did not suggest at any point that he was arresting Robert Warrior for that offence. To embark on a consideration of whether an arrest for disorderly conduct might have been justified would be artificial there being nothing in the evidence to suggest that such a power was exercised. If it was not purported to be exercised at the time, it cannot later be relied on as a grounds for justifying an apprehension.

23. Evidence may be excluded by the exercise of a public policy discretion generally referred to as the *Bunning v Cross* discretion (though having its origins in *R v Ireland* (1970) 126 CLR 321). It can apply to both confessional and non confessional evidence: *Ridgeway v R* (1995) 184 CLR 19. The discretion to exclude evidence is not enlivened however simply because there has been unlawful (or improper) conduct by police, the unlawful conduct must also be such as to procure the commission of an offence. In *R v Lobban* (2000) 77 SASR 24 at 30 Martin J (as he then was) said

“27... In *Ireland*, the Chief Justice spoke of the principles in the context of “[e]vidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts ...”(p 334). The joint judgment in *Bunning v Cross* specifically observed that the discretionary process called for in *Ireland* applied “only when the evidence is the product of unfair or unlawful conduct on the part of the authorities”.

28. A natural extension of the circumstances in which the public policy discretion is enlivened occurred in *Ridgeway v The Queen* (1995) [184 CLR 19](#). It was held to apply to circumstances in which law enforcement authorities engage in unlawful conduct, not just to obtain evidence, but to procure the commission of the offence for which the accused is later prosecuted. As Brennan CJ pointed out in *Nicholas v The Queen* [1998] [193 CLR 173](#) at 197, the court has a duty to ensure that it does not exercise its discretionary powers to achieve an objective which “flagrant and deliberate breaches of the law” are designed to achieve. The majority in *Ridgeway* (p 32) cited with approval the statement by Deane J in *Pollard v The Queen* (1992) [176 CLR 177](#) at 203 which emphasised the need for the courts to ensure that they are not “demeaned by the uncontrolled use of the fruits of illegality in the judicial process”. Their Honours concluded (p 35):

“At this stage, it suffices to say that, for the reasons given above, it should be accepted that a trial judge possesses a discretion to exclude, on public policy grounds, evidence of an offence or of an element of an offence in circumstances where its commission has been brought about by unlawful conduct on the part of law enforcement officers.”

24. The type of evidence that may be excluded in an exercise of that discretion can be that of acts that comprise alleged offences. See for example *DPP v Carr* 127 A Crim R 157; *Robinett v Police* [2000] SASC 405. In the latter case the question in relation to procurement was put more simply at [56] as to “whether the conduct caused or contributed to the commission of the offence.”
25. In each of those cases however, evidence of the acts excluded arose on the basis of improper or unlawful conduct which was directed at the defendant himself. In terms of the first proposition put by Ms Blundell, that is excluding all the evidence following the unlawful apprehension of Robert Warrior, it is clear that the evidence that would be excluded is in relation to acts of JS, the defendant in this matter and not in terms of acts committed by the person unlawfully apprehended, that is, Robert Warrior. I was not referred to and I have not been able to find any authorities in which the discretion has been used to exclude evidence of the acts of another.
26. However, as the discretion is based on public policy grounds, it is helpful in determining whether the discretion may be extended in the way that it has been suggested to me by looking at the underlying rationale of the policy.
27. In *Question of Law Reserved (No1 of 1998)* 70 SASR 281 at 287-288 the South Australian Court of Criminal Appeal considered the rationale for the exercise of the discretion.

“The rationale underlying the exercise of the discretion to exclude evidence, if the discretion is so exercised, is that considerations of public policy may require the court to prevent the prosecution from gaining “curial advantage” by using improperly or unlawfully obtained evidence, and may require the court not to appear to approve of the illegality or impropriety by which the evidence was obtained, by allowing the use of the evidence as part of the prosecution case. When the court exercises the discretion, it declines to allow the prosecution to make use of evidence obtained through illegality or impropriety, because to do so would be to allow it to benefit by its own wrong doing, and would give the appearance of approving of the relevant illegality or impropriety. Of course, as the cases make quite clear, the court has to put into

the scales as well the importance of securing the conviction of those who commit criminal offences.

Authority for what I have said is to be found in the manner in which the discretion is described, and the explanation given for its existence and exercise. I refer in particular to *Bunning v Cross* (1978) [141 CLR 54](#) at 74-75 and 77-78, Stephen and Aickin JJ; to *Ridgeway v The Queen* (1995) [184 CLR 19](#) at 30-32 Mason CJ, Deane and Dawson JJ, 48-49 Brennan J, 56 Toohey J, 74 Gaudron J and 82-83 McHugh J; *Nicholas v The Queen* (supra) at [32]-[35] Brennan CJ.

If the evidence in question was not obtained by unlawful or improper means, this discretion does not arise. It does not arise simply because the discretion is directed to preventing the curial advantage that would be gained from the use of the evidence, and from avoiding the appearance of approval by allowing the use of the evidence.

The discretion is a broad one. It is founded upon the need to preserve the integrity of the administration of justice and the need to protect the processes of the courts of justice: *Ridgeway* (supra) at 30-32 Mason CJ, Deane and Dawson JJ. An object of the exercise of the discretion is to discourage illegal or improper conduct by the law enforcement authorities; *Ridgeway* (supra) at 32, *The Queen v Swaffield* (supra) at [22] Brennan CJ.

But the foundation of the discretion, and its object, do not give the courts a roving commission to search for illegality or impropriety by those responsible for the enforcement of the law. The discretion does not give a power to exclude evidence whenever there is some association between that evidence and illegal or improper conduct, or whenever an attempt is made to bolster prosecution evidence by resort to illegal or improper conduct. To exercise the discretion in that fashion would be to use the exclusion of evidence as a means of punishing wrongdoing by those responsible for the enforcement of the law. That is not the responsibility of the courts. Or, to be more precise, the exclusion of evidence is not the means by which wrongdoing is to be punished by the courts. As the majority said in *Ridgeway* (at 37) with reference to improper conduct by law enforcement officers in the course of investigating criminal activity:

"A finding that law enforcement officers have engaged in such clearly improper conduct will not, of course, suffice of itself to give rise to the discretion to exclude evidence of the alleged offences or of an element of it. As with the case of illegal conduct, the discretion will only arise if the conduct has procured the commission of an offence with which the accused is charged."

In other words, the discretion arises when the improper or illegal conduct has procured the commission of an offence or has enabled the prosecution to obtain the relevant evidence.

As I have already said, it is when the illegality or impropriety is the means by which the evidence is procured that the discretion arises for consideration. It arises then because allowing the use of the evidence, obtained in this fashion, may appear to condone illegal or improper conduct, and may compromise the court's commitment to the upholding of the law.”

Per Doyle CJ with whom Cox and Matheson JJ agreed

28. I have not been able to find any authority to suggest that the discretion is limited to cases in which the unlawfulness is directed to a particular person and to the acts of that person only. Indeed this would seem inconsistent with the rationale that is expressed in the passage I have referred to above. The rationale for the discretion lies in not condoning illegal or improper conduct by the use of evidence, including evidence of conduct caused or contributed to by the illegal or improper conduct. I proceed therefore on the basis that the discretion may, if I am satisfied that illegal conduct procured the offences in question, be exercised to exclude evidence of the conduct in issue in relation to the alleged offences.
29. The question is did the unlawful apprehension of Robert Warrior procure the commission of offences by the defendant? The offences which are alleged to have directly followed the apprehension of Robert Warrior are disorderly conduct and an assault on Constable Watson. The boys were together, they were not engaged in unlawful conduct, the police arrive and almost immediately, Robert Warrior, although he walks away, is apprehended. He is seen to be put on the ground in the garden bed by both police officers and then he is put in the van. The officers do not leave at this point, which they might well have done. Robert Warrior had been arrested for assaulting Constable Watson, he was secured in the van, and the other boys to this point of his apprehension had done nothing wrong, but are now remonstrating with police. It is clear from the evidence of what they were saying that they strongly disagreed that the police had acted lawfully in apprehending Robert Warrior. Constable Watson knew who they were and if she thought that charges of disorderly conduct should apply to their conduct

the police might well have immediately left with Mr Warrior once they had secured him in the van. She knew at least that the defendant was a youth. They chose not to do so, but instead called for backup. The continued presence did not calm matters down rather it exacerbated them.

30. Absent Constable Allen's actions with Robert Warrior the other boys would not have acted in the way they did. There was nothing aggressive in their conduct with Constable Watson while she was talking to them and taking notes, indeed the defendant had simply walked off. The subsequent actions including that of the defendant were a direct result of the apprehension of Robert Warrior which they appear to have correctly perceived as unlawful.
31. I am satisfied that the offences alleged to have been committed by the defendant were procured by the unlawful conduct in relation to Mr Warrior. I agree with the submission of Ms Blundell that "the arbitrary apprehension and consequential arrest of Robert Warrior created a volatile and entirely avoidable situation. In effecting the apprehension and arrest of Robert Warrior no valid public policy or criminal law objective was achieved. The community was not protected from any offensive behaviour or criminal conduct. Instead, the community was subject to highly inappropriate police behaviour. The community in this instance, Robert Warrior, Jesse Sailor, Aaron Sailor and Dennis Cooper reacted to that behaviour exactly in the way that Smart AJ might have predicted".
32. That of course is not the conclusion of the matter. I am required to consider, having concluded that there was unlawful conduct that procured the commission of an offence whether it is an occasion that calls for the exercise of the discretion to exclude the evidence. It is not a question of fairness to the defendant but rather a balancing exercise between ensuring proper standards of conduct on the part of law enforcement authorities and bringing to justice those who commit offences. In *Bunning v Cross* Stephen and Aicken JJ outlined criteria to guide the exercise of the discretion.

- i. Whether the unlawfulness was deliberate or the result of some mistaken assessment.
- ii. Whether the cogency of the evidence is affected by the illegality,
- iii. The ease with which the law might have been complied with in procuring the evidence in question
- iv. The nature of the offence charged; and
- v. The limitations which the legislature has placed on the exercise of the power said to have been breached

33. As I have said I am satisfied that Constable Allen's actions in apprehending Robert Warrior were not a bona fide exercise of the protective custody power. The power is not at large, it must be guided by a proper assessment of the situation and of the need for protective custody because as these facts illustrate, use of the power improperly can so easily lead to an escalation of events rather than a keeping of the peace. The offences charged against the defendant, although assault police charges are serious in themselves, are not in my view at the upper end of objective seriousness for that offence, particularly what is alleged in relation to Constable Watson. The other charges are disorderly conduct and resist arrest, again neither being in the upper scale for those offences on the evidence. There are also special considerations at play when police deal with young persons, both in terms of the matters set out in the *Youth Justice Act* that are directed to the apprehension of young persons and also in terms of understanding the volatility of situations that involve groups of young persons.

34. I should say that my assessment of the evidence in relation to what occurred subsequent to the arrival of the second police van is that the apprehension of the defendant following his running from the scene was likewise unlawful or at the very least improper. He and the others were directed to leave and when the second van pulled up they ran off. The defendant was chased by

Constable Allen and he fell and was “ground stabilised” by him. In my view the pursuit was not a reasoned pursuit to arrest him for disorderly conduct (Constable Allen did not witness the alleged assault on Constable Watson) but arose out of “the heat of the moment”. In essence Constable Allen agreed with this assessment of the situation in cross examination.

35. Balancing each of these matters I am of the view that the evidence of all acts of the defendant subsequent to the unlawful apprehension of Robert Warrior should be excluded.

Dated this 3rd day of December 2007.

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**Sue Oliver**  
STIPENDIARY MAGISTRATE