

CITATION: *Sally Nicholas v Jamian Bara Bara* [2017] NTLC 031

PARTIES: Sally NICHOLAS
v
Jamian BARA BARA

TITLE OF COURT: Local Court

JURISDICTION: Criminal

FILE NO: 21748187

DELIVERED ON: 19 December 2017

DELIVERED AT: Darwin

HEARING DATE(s): 13 & 24 November 2017

JUDGMENT OF: Greg Macdonald

CATCHWORDS:

Resist police - *Police Administration Act* - ss. 123, 127, 134 and 158 - *Criminal Code* - s26 and 27 - common law - “arrest” - “taking to custody” – “resist a member”.

REPRESENTATION:

Counsel:

Plaintiff: Ms E Colliver
Defendant: Ms M Hilder-Achurch

Solicitors:

Plaintiff: NAAJA
Defendant: DPP

Judgment category classification: B
Judgment ID number: [2017] NTLC 031
Number of paragraphs: 39

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21748187

BETWEEN:

Sally NICHOLAS

Complainant

AND:

Jamian BARA BARA

Defendant

REASONS FOR JUDGMENT

(Delivered 19 December 2017)

Judge Macdonald:

Background

1. Defendant Jamian Bara Bara was charged that on 10 October 2017 he did “resist a member of the police force in the execution of his duty” contrary to s 158 of the *Police Administration Act* (Act). Mr Bara Bara pleaded not guilty to the charge on 13 November 2017, with the contested hearing ensuing that day. Constable Daniel Hopkins and Sergeant Damien Barbe gave oral evidence. Mr Bara Bara was not called to give evidence.
2. The only material witness was Constable Hopkins, so his evidence must be approached and scrutinised with the caution and care referred to in *R v Murray* (1987) 11 NSWLR 12. Constable Hopkins’ evidence was frank, direct and honestly given, and I accepted that evidence in total. That included his concession that at no time prior to Sergeant Barbe subsequently apprehending Mr Bara Bara in Mitchell Street did he inform Mr Bara Bara

that he was “under arrest”, or of his purpose at the relevant time to ‘take him into custody’ or ‘place him under arrest’, or of the particular offences for which he was to be arrested.

3. On 24 November 2017 Mr Bara Bara was found guilty as charged, at which time brief oral reasons were given, with written reasons to be published.
4. On the basis of the oral evidence given by Constable Hopkins on 13 November 2017, I found to the necessary standard as follows:
 - (i) On the evening of 10 October 2017 NT Police Constables Hopkins and Lymbery received a radio communication reporting an incident of physical violence against an Aboriginal woman by a male at the corner of Daly Street and The Esplanade in Darwin City. The officers were mobile and drove towards the reported location. Close to the intersection with Daly Street they came across a group of people, one of whom was an Aboriginal woman with a bloodied mouth or blood on her chin. Another of the group was Mr Bara Bara.
 - (ii) Constable Hopkins knew Mr Bara Bara through having taken him into custody the night before and, also due to that contact, was aware Mr Bara Bara had a Domestic Violence Order (DVO) in place in relation to his partner, Ms Benisha Rankin.
 - (iii) Mr Bara Bara fled on seeing approaching police. At that point Constable Hopkins ascertained the identity of the injured woman as Ms Rankin, then pursued Mr Bara Bara. That was on the belief that Mr Bara Bara had committed offences of ‘aggravated assault’ and ‘breach DVO’.
 - (iv) Constable Hopkins pursued Mr Bara Bara on foot, without success. Further patrols were then conducted and sometime later Mr Bara Bara was located, again in the company of Ms Rankin. On seeing the officers Mr Bara Bara took flight a second time, and was again

pursued on foot by Constable Hopkins, alone. That pursuit concluded with Constable Hopkins locating Mr Bara Bara crouching down, hiding behind a vehicle in the car park of nearby apartments.

- (v) At that point Mr Bara Bara then, at a distance of at least a couple of metres, stood up and adopted “a bladed stance” with “clenched fists” in relation to Constable Hopkins. Mr Bara’s stance was also described as a “fighting” one.
- (vi) Also at that point Constable Hopkins directed or ordered Mr Bara Bara to “Stop” and “Get on the ground” or ‘get on your stomach’. Those directions were given loudly and in a clear fashion on at least two occasions.
- (vii) Mr Bara Bara did not immediately comply, which prompted Constable Hopkins to draw and discharge his Taser at Mr Bara Bara. The electrodes did not find their mark and Mr Bara Bara fled for a third time.
- (viii) At no time up until that point did Constable Hopkins inform Mr Bara Bara that he sought to arrest him, or that he was ‘under arrest’.
- (ix) Mr Bara Bara was then, following the third pursuit, apprehended in Mitchell Street by Sergeant Barbe and ultimately placed formally under arrest by Constable Hopkins, including by informing Mr Bara Bara that he was under arrest and the grounds for this.

Lawful execution of duty

5. Although the events in the car park might be seen as separate and discrete from the pursuits, it is necessary to consider the whole of the scenario which unfolded on the night of 10 October 2017 in order to determine the charge. A threshold issue exists concerning whether, in his initial and subsequent pursuits of Mr Bara Bara which culminated in the interaction in the car park

and became the subject of the ‘resist police’ charge, Constable Hopkins was factually and legally justified in doing so. It was the unsuccessful pursuit together with the subsequent second pursuit which collectively provided the foundation for the incident which then led to the charge to which Mr Bara Bara pleaded not guilty.

6. Constable Hopkins’ evidence was that, on the basis of what he believed, he commenced the first pursuit intending to arrest Mr Bara Bara for ‘aggravated assault’ and ‘breach DVO’. That belief and intention persisted on commencing the second pursuit and, to the extent it may be relevant, the third pursuit. If pursuit was not justified, what followed was, at the least, attended by a reasonable doubt; see *Coleman v Power* [2004] HCA 39 at [117] to [127], and authorities cited.
7. The prosecution is bound to prove beyond reasonable doubt that Constable Hopkins was at all times acting lawfully in the execution of his duty. In this case that includes to exclude to that standard that Constable Hopkins acted outside the duty and limitations prescribed by the Act and the common law. The court must therefore determine whether the officer’s relevant powers were properly exercised or, alternatively, exceeded; *R v Howell* [1982] 1 QB 416, *Innes v Weate* (1984) 12 ACrimR 45, *Gardiner v Marinov & Anor* (1998) 7 NTLR 181, *Cintana v Burgoyne* [2003] NTSC 106 at [6] to [14] and *Wilson v Brown* [2015] NTSC 89 at [54] and [55]. Any apprehension, purported restraint or detention of Mr Bara Bara would be unlawful unless authorised or justified by law; *Majindi v Northern Territory Australia & Ors* [2012] NTSC 25 at [44].
8. The common law entitles people to go about their business freely and, without more, no person is generally under legal compulsion to stand and remain in the presence of a member of police; *Rice v Connolly* [1966] 2 QB 414, *R v Grimley* (1994) 121 FLR 236 at 253, *DPP v Hamilton* [2011] VSC 598 at [24] to [34], and *Majindi* (supra) at [50] and [51]. That position is

qualified in any circumstance where s 134 of the Act is activated, by a member of police requesting a person's name or address. However, Mr Bara Bara gave no opportunity for that enquiry to be made and, at most, Constable Hopkins could only have requested his address. Constable Hopkins well knew Mr Bara Bara's name through their interactions the previous night.

9. The sworn duties of a member of NT Police are set out in the Schedule to the Act, although not expressly referring to the apprehension of offenders. Section 5(2) of the Act also provides that a "core function" of a member of NT Police is to "prevent, detect and prosecute offences". The arrest and taking into custody of Mr Bara Bara was necessary in order to further the duties and functions Constable Hopkins is obliged to provide.
10. Although primarily directed to criminal liability, I also note that an act or event is authorised if done "in the exercise of a right granted or recognised by law" or "in execution of the law or in obedience to, or in conformity with, the law", and application of force is justified to "make any arrest"; s 26(1)(a),(b) and s 27(a) of the *Criminal Code* respectively. Those authorities are subject to the force applied not constituting "unnecessary force", as defined by s 1, which is in turn informed by common law.
11. Section 123 of the Act provides the power of arrest to members of NT Police and, to that extent supplants the common law. That power is relevantly restricted to situations where the member "believes on reasonable grounds that the person has committed ... an offence". The applicable test is provided by *George v Rocket* (1990) 170 CLR 104 at 112, noting that at page 116 the Court also held; "[b]elief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce inclination of mind may depending on the circumstances, leave something to surmise or conjecture".

12. The facts set out at 4(i) to (iii) above, compounded by Mr Bara Bara's flight, without any doubt constituted the reasonable grounds required by s 123 of the Act. The situation was not one to which the caution discussed in *DPP v Carr* (2002) 127 ACrimR 151 at 159 applied. Constable Hopkins was undoubtedly in the lawful execution of his duties until the time of the interaction or incident in the car park and his beliefs provided an objective and lawful basis on which to seek to arrest Mr Bara Bara.
13. The primary issues for determination then arose. Namely, once Constable Hopkins located Mr Bara Bara behind the vehicle in the carpark, did he continue to act in the execution of his duty or, alternatively, did he act without the legislated authority and support of the Act, supplemented by the common law.
14. In particular, whether either the Act or the common law obliged and required Constable Hopkins to first inform Mr Bara Bara that he was "under arrest" or that he was seeking to place Mr Bara Bara under arrest and, perhaps, the nature of the offence(s) for which he was being arrested. Associated with that issue are whether the directions to submit to arrest and, secondly, the force purported to be applied by Constable Hopkins, were properly in the execution of duty and lawful in the circumstances.

The obligation to inform

15. The interaction or incident in the car park occurred quickly, over a very short period, and commenced by Mr Bara Bara standing and adopting a 'fighting stance' in relation to Constable Hopkins. The considerations referred to in *McIntosh v Webster* (1980) 43 FLR 112 at 123, discussed further below, were apposite to the circumstances.
16. Constable Hopkins frankly stated in evidence that at no time on encountering Mr Bara Bara in the car park did he inform Mr Bara Bara that he was; "under arrest", or expressly of his intention to arrest and take

Mr Bara Bara into custody. On encountering Mr Bara Bara, including having regard to the stance adopted, Constable Hopkins directed him to “Stop” and “Get on the ground”, loudly and more than once.

17. Section 123 of the Act expressly empowers a member of police to both “arrest” and “take into custody” a person reasonably believed to have committed an offence. Although obviously connected, those two powers are separate, and may be approached and applied as such; *North Australian Aboriginal Justice Agency Ltd & Anor v Northern Territory of Australia* [2015] HCA 41 at [15].
18. On aspects where the Act is silent, the common law applies; see *North Australian Aboriginal Justice Agency Ltd & Anor v Northern Territory of Australia* (supra) at [24] and [28]. As noted in *Johnson v Northern Territory of Australia* [2016] NTSC 49 at [271], the common law determines how a lawful arrest must be effected under s 123 of the Act. See also *Slaveski v State of Victoria* [2010] VSC 441 at [103]. The legal requirement to inform an arrestee that they are under arrest is not prescribed by the Act, but by the common law.
19. That position is in contrast with the prescription of s 127 of the Act that a member “who arrests a person for an offence shall inform the person, at the time of the arrest or as soon as practicable thereafter, of the offence for which he is arrested”. Subsections 127(2) and (3) of the Act then proceed to further qualify the obligation to inform, in that only advice stating “the substance of the offence” is required and “language of a precise or technical nature” is unnecessary. Secondly, the requirement to inform does not apply “if that person ought, by reason of the circumstances in which he is arrested, to know the substance of the offence for which he is arrested” or where “the person arrested makes it impracticable by reason of his actions” to be so informed. The common law generally requires that an arrestee be informed that they are under arrest upon being arrested, or as soon as possible

thereafter. Although s 127 deals with a discrete aspect, a relationship exists between informing a person that they are under arrest on the one hand, and the reason for their arrest on the other. Section 127 of the Act is broadly reflective of the common law requirement concerning the exercise of the power of arrest, including the overriding qualification that the arresting officer's conduct be reasonable in the circumstances; see *Slaveski* (supra) at [108] to [117] and *Hull v Nuske* (1974) 8 SASR 587 at 595, and the authorities discussed therein, including *Christie v Leachinsky* [1947] AC 573.

20. Defence counsel contended that, on encountering Mr Bara Bara in the car park, the law mandated that Constable Hopkins immediately inform Mr Bara Bara either that he was 'under arrest' or, alternatively, that he was intending and seeking to place Mr Bara Bara under arrest. It was further contended that Constable Hopkins' failure in those regards placed him outside the execution of duty, so rendered his actions in the encounter to be unlawful. On that basis, any resistance which might then be found could not have been in relation to "a member in the execution of his duty" within the meaning of s 158 of the Act, so Mr Bara Bara cannot have contravened as alleged.
21. In my opinion the powers to "arrest" and "take into custody" provided by s 123 are not in every case to be exercised simultaneously and, where circumstances require separate and discrete exercise, those powers need not be exercised in any particular order. That is, arrest may precede the taking into custody or, depending on the circumstances, vice versa. Which of the powers is first exercised will depend on the presentation and behaviour of the person to be apprehended and conveyed, and particularly whether the subject has submitted or will submit to the officer's authority. That includes due to the concept of custody being, in practical terms, 'not free to go'.
22. A relevant summary of the common law position from Prof. Glanville Williams article *Requirements of a Valid Arrest* [1954] Crim LR 6 at 11

concerning arrest was approved in *Woodley v Boyd* [2001] NSWCA 35 at [38], including:

“If the officer indicates an intention to make an arrest, as, for example, by touching of the suspect on the shoulder, or by showing him a warrant of arrest, or in any other way by making him understand that an arrest is intended, and if the suspect then submits to the direction of the officer, there is an arrest. The consequence is that an arrest may be made by mere words, provided that the other submits”.

23. In addition, the Court of Appeal in *Woodley* (supra) at [38] approved the proposition that it is also possible to effect an arrest without using words of arrest, despite that it is generally desirable to use such words. As was said in *Anderson v Booth* [1969] 2 QB 216 at 221, “...an arrest is constituted when any form of words is used which in the circumstances of the case were calculated to bring to the defendant’s notice and did bring to the defendant’s notice, that he was under compulsion”, noting that in order to perfect or conclude any arrest it is also necessary that “thereafter he submitted to that compulsion”. The English Court of Appeal also noted in *R v Inwood* [1973] 1 WLR 647 at 652 that what may be sufficiently clear advice to an arrestee depends on all the circumstances of the case, with the officer’s fundamental obligation being to “...make it plain to the suspect by what is said and done that he is no longer a free man”.
24. As in effecting any arrest, it was first necessary for Mr Bara Bara to submit to Constable Hopkins’ authority. Informing Mr Bara Bara that he was under arrest could not practically occur in this case until Mr Bara Bara submitted to custody. Where a person does not submit to an officer’s authority, they are not ‘under arrest’ and cannot be ‘in custody’, noting that to flee at that point does not constitute ‘escaping lawful custody’; see the authorities at paragraph 8 above.

25. Constable Hopkins was in uniform, and prior to encountering Mr Bara Bara in the car park, had twice earlier had ‘contact’ with Mr Bara Bara, resulting in flight on each occasion. Mr Bara Bara was well aware of the circumstances surrounding his first contact with members of police on 10 October 2017, and that a ‘non-intoxication’ and ‘no harm’ DVO was in force on him in relation to Ms Rankin, who was in an injured state at that time. It of course did not follow that Mr Bara Bara was certainly responsible for Ms Rankin’s state, or was intoxicated. However, it was obvious to Mr Bara Bara that he was objectively a suspect of having offended and that police would seek to arrest him. Although not obliged to remain, fleeing on first seeing the Constables, and again a second time, were clear indications of Mr Bara Bara’s understanding.
26. Prior to the encounter in the car park, Mr Bara Bara was already acutely aware that members of NT Police were seeking to arrest and take him into custody. Even if that were not the case, on seeing and hearing Constable Hopkins’ directions, any continuing misapprehension would have been impossible.
27. I find that Mr Bara Bara was on the clear understanding concerning what Constable Hopkins was seeking to do. Also, despite English undoubtedly being Mr Bara Bara’s second or more language, that he was under no misapprehension concerning what he was being directed to do by Constable Hopkins. That is, the officer was seeking his submission to arrest him, then take him into custody.
28. In the circumstances, I do not consider Constable Hopkins’ obligation at law included to provide preparatory advice to Mr Bara Bara in precise and formal terms of his intention to arrest and take him into custody. The directions issued by Constable Hopkins sufficed.
29. For a range of reasons, including common law principles discussed in the various authorities above and the proscription of “unnecessary force” by

s 27 of the *Criminal Code*, members of police are obliged to effect any arrest by use of as minimal force as necessary. The powers conferred by s 123 carry with them an inherent authority, so implicit power, to employ force in order to exercise the powers; *R v Turner* (supra) at 36, *Gardiner v Marinov & Anor* (supra) at 190.

30. Regardless of the adoption of a ‘fighting’ stance, it behoved Constable Hopkins to seek to obtain Mr Bara Bara’s submission without application of force, including because Mr Bara Bara did not advance on Constable Hopkins. Constable Hopkins remained within the execution of his duty in seeking to apprehend Mr Bara Bara and place him into custody by giving the simple directions to “Stop” and “Get on the ground”. The giving of those directions was sufficient to make abundantly clear to Mr Bara Bara that he was then under compulsion, and to satisfy any legal requirement that Constable Hopkins inform Mr Bara Bara of his intentions in executing his duty. Those directions were also consistent with Constable Hopkins’ evidence in relation to his usual practice. That is, he does not inform persons being arrested and taken into custody that they are “under arrest” unless and until he has placed hands on them and they have submitted to arrest.
31. The formal requirement to inform Mr Bara Bara that he was under arrest was subsequently satisfied following his apprehension in Mitchell Street. That requirement could not be satisfied unless and until Mr Bara Bara submitted to the authority of police, which he did not do in the car park in the face of Constable Hopkins’ directions.

Use of force

32. As noted above, only the minimum force reasonably necessary could lawfully be employed. Constable Hopkins actions in the car park on 10 October 2017 included to draw and discharge his Taser at Mr Bara Bara. Although the electrodes did not strike or attach to Mr Bara Bara, it is

appropriate to approach the issue of use of force assuming that the intended force was applied, despite that did not ultimately transpire.

33. In effecting an apprehension and arrest, a member of police is “...entitled to use such a degree of force as in the circumstances he reasonably believes to be necessary to effect his purpose, provided that the means adopted by him are such as a reasonable man placed as he was placed would not consider to be disproportionate to the evil to be prevented”; *R v Turner* [1962] VR 30 at 36, cited with approval in *Woodley v Boyd* (supra) at [37], and approved by *Slaveski v Victoria* (supra) at [127] and *Johnson v Northern Territory of Australia* [2016] NTSC 49 at [271] - [272].
34. Constable Hopkins was alone and seeking to apprehend a suspect who had evaded arrest by fleeing twice and, at the relevant time, clearly indicated an intention to not submit or ‘go quietly’. Mr Bara Bara’s stance was violent, regardless of whether directed to defending himself or attacking Constable Hopkins. The approach articulated in *McIntosh v Webster* (1980) 43 FLR 112 at 123, elaborated on in *Woodley v Boyd* (supra) at 37, and approved in *Johnson* (supra) at [274] and [275], is relevant to the circumstances Constable Hopkins confronted, namely;

“[A]rrests are frequently made in circumstances of excitement, turmoil and panic [and it is] altogether unfair to the police force as a whole to sit back in the comparatively calm and leisurely atmosphere of the courtroom and there make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances.”

35. The duties of a constable and considerations concerning what that duty requires in any particular situation, discussed in *Lindley v Rutter* [1981] QB 128 at 134 and approved in *Woodley* (supra) at [38], were particularly relevant to Constable Hopkins’ situation on 10 October 2017. On Mr Bara Bara’s refusal to submit to Constable Hopkins’ directions, it was clear that

mechanical rather than manual means to secure his compliance was required. Constable Hopkins' decision does not require any rarefied consideration of whether Taser, capsicum spray or baton was the most appropriate response. "It is notorious that arresting a person is one of the most difficult and dangerous duties a police officer has to perform. It is the occasion when police officers are most likely to be assaulted or injured"; *Wilson v Brown* [2015] NTSC 89 at [67]. There is no doubt that Constable Hopkins' action on the night in discharging his Taser was each of reasonable, necessary and proportionate, so complied with the objective elements imposed by law, and did not constitute "unnecessary force".

Resistance

36. The court was referred to the decision of *William Appleby* (1940) AC 1 however, other than the observation that something more than a "mere refusal" to submit to arrest may be required, that authority was of little assistance. Passages from *R v Galvin (No. 2)* [1961] VR 740 at 749 and *R v Hansford* [1974] VR 251 at 254 are relevant, as is various discussion in *Davis v Thorne* [2010] NTMC 037.
37. On being encountered by Constable Hopkins, who for the reasons explained was at all times in the execution of this duty, Mr Bara Bara adopted an oppositional and physically aggressive stance towards the officer. Mr Bara Bara knew full well of Constable Hopkins' intention and purpose, and resisted those by offering force. There is no doubt that Mr Bara Bara intend to resist Constable Hopkins in the execution of his duty within the meaning of s 158 of the Act, and did so. I make no finding on whether Mr Bara Bara's flight on three occasions may constitute the charge alleged.
38. On 24 November 2017 Mr Bara Bara was found guilty on the basis that Constable Hopkins was at all times acting in the execution of his duty and resisted within the meaning of s 158 of the Act in that context.

39. I publish written reasons and consider calculation of any appeal period should run from this day.

Dated this 19 December 2017

Greg Macdonald
Local Court Judge