

CITATION: *Police V KL and DP [2017] NTLC 006*

PARTIES: Police
V
KL & DP

TITLE OF COURT: Youth Justice Court

JURISDICTION: Youth Justice

FILE NO(s): 21653876
21653884

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JUDGMENT OF: Judge Fong Lim

CATCHWORDS:

Voir dire – unlawful arrest – impropriety – unreasonable use of force
s138 Evidence (National Uniform Legislation) Act

REPRESENTATION:

Counsel:

Crown: Mr Smith
Defendant: Ms Lee for KL
Mr Morgan for DP

Solicitors:

Crown: Director of Public Prosecutions
Defendant: NAAJA

Judgment category classification: A
Judgment ID number: 006
Number of paragraphs: 36

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

No.

BETWEEN:

Police

AND:

KL & DP
Defendant

REASONS FOR DECISION

(Delivered 9 February 2017)

JUDGE FONG LIM:

1. Both Defendants are youths. They were in a stolen vehicle as passengers which vehicle was being driven by another youth. The vehicle had come to the attention of police as driving erratically and the police were on the lookout for that vehicle. At one stage the vehicle passed a police vehicle and one of the officers in that police car recognised the driver. At no stage were the police aware KL and DP were in the vehicle until it was finally apprehended at a service station. Prior to that apprehension the vehicle had stopped at another service station and when officers approached the vehicle it was driven away without refuelling.
2. During the day in question the vehicle was being tracked by various police officers who had observed it and reported back through police communications where it was at various times. No pursuit was undertaken because the area in which it was being driven was populated and at times in places where there were many pedestrians. The police assumed the vehicle was in need in of fuel because of the previous stop at a petrol service station and so anticipated given the direction it was moving, it may stop at

the Woolworths service station in Bakewell. Officers Bland and Watson travelled to that place and waited for the vehicle to arrive which it did. Officer Bland upon seeing the vehicle arrive, instructed the console operator to disable the pumps so that fuel could not be obtained. What happened next is recorded on the CCTV of that service station. The footage is from cameras at nine different angles and was tendered by consent subject to a voir dire on its admissibility.

3. Officer Bland is seen to approach the youth who had alighted from the driver's seat and who was at the time on the passenger side of the car. He places hands on the youth and they fall back into the front of the vehicle. DP is seen to have just prior moved into the driver's seat. It is clear Bland has hands on both the driver and DP and a struggle takes place. It is also clear from the footage and his own evidence that Watson has his taser drawn at the time he approaches the car from the front. He then goes to the driver's window, which is closed and strikes the window with the taser, lowers his taser and then strikes the window with his baton. DP is seen through the windscreen to be at one stage laying across the front seats with the lower part of his body in the driver's seat and the upper part across the passenger seat. DP is also seen to sit up briefly in the driver's seat before exiting the vehicle via the front passenger door and running away to the front of the vehicle. KL is then seen to exit the vehicle from the passenger door and run away to the rear of the vehicle.
4. DP is pursued by Watson who then raises his taser again and shoots DP in the back with that taser. DP was near one of the bowsers at the time the taser was shot. He is then handcuffed by Watson and sat up on the ground.
5. KL is seen to be taken to the ground by Officer Rankin who had reached the service station, soon after the call of "go go go" had been issued, is then handcuffed and walked back towards the front of the stolen vehicle where

he is handed over to Officer Gregory who keeps control over him until placing him into the police van.

6. The evidence of the police officers concerned was taken on the basis that there would be a challenge on a voir dire to the lawfulness of the arrest of the defendants and the propriety or otherwise of the actions of the arresting officers and a ruling sought on whether or not the evidence subsequent to arrest should be excluded under section 138 of the Evidence (National Uniform Legislation) Act.
7. Both KL and DP have been charged with and pleaded not guilty to escaping lawful custody. DP faces an additional charge of driving without a licence constituted by him attempting to start the vehicle. Both have pleaded guilty to the unlawful use of a motor vehicle by being present in the stolen vehicle.
8. Prosecution has particularised the arrest of both defendants as Officer Bland's laying of hands on DP and uttering the words "you are under arrest" and then his further words inside the car of "you are all under arrest" having realised KL was in the back lying across the back seat. There was some evidence of Officers Watson and Rankin telling the defendants they were under arrest however that is not relied upon.

Lawful arrest and effective custody:

9. KL submits he was not under arrest at the time he tried to flee the scene on the basis that Officer Bland's uttering the words "you are all under arrest" without looking at him was not an effective arrest and therefore he has no case to answer as on the charge of escape lawful custody.

Lawful arrest and effective custody:

10. KL Both KL and DP submit that the drawing of the taser by Officer Watson was unlawful or improper and therefore any evidence of a subsequent arrest

and of them trying to flee should not be admitted pursuant to s 138 of the Evidence (National Uniform Legislation) Act.

11. Both KL and DP submit if not unlawful the drawing of the taser was so improper then that evidence of any attempt to escape lawful custody must be excluded because of that impropriety.
12. In relation to DP, counsel also submitted the arrest was unlawful because there was an unlawful threatened application of force, the deployment of the taser, which constituted an assault. The officer did not have proper grounds for deploying the taser and therefore that officer was not acting in the execution of his duties.
13. It is further argued by DP that he had justification for fleeing because once he got out of the vehicle the danger of being tasered became more much greater (see section 29(2) Criminal Code).

The arrest of KL

14. It is clear none of the police officers knew of the presence of KL until he fled and the only one who actually saw him in the vehicle was Officer Bland. His presence in the vehicle was noticed fleetingly by Officer Bland when he was struggling with DP and the driver of the vehicle. Officer Bland's evidence is that he then uttered the words "you are all under arrest". When challenged about those words in cross examination he was unshaken. There is no evidence that KL reacted to those words and it is submitted by KL's counsel that I cannot be satisfied beyond a reasonable doubt that KL even heard those words or understood them to be directed at him.
15. Prosecution submits that I can accept the unchallenged evidence of Officer Bland that he said those words and that the circumstances of the arrest supported the strong inference that all the occupants of that car knew they would be arrested if found in the vehicle because they knew they were in a

stolen vehicle, they had already attracted the attention of the police and they had in fact been found in the stolen vehicle.

16. It is my view that these circumstances do support a strong inference that KL was aware he would be arrested if found in the car and that inference coupled with the unchallenged evidence of Officer Bland supports a finding of a case to answer for KL in relation to the charge of escape lawful custody.

Lawfulness of arrest- unreasonable use of force

17. It is submitted that the arrests of KL and DP were unlawful because of Watson's drawing of his taser as that was an unreasonable use of force and there were other options available to the police other than arrest. First of all I do not agree that arrest of youths in these circumstances is necessarily unreasonable. KL and DP were unknown to the police and showed all the signs of fleeing. Had they not been arrested they were unlikely to have been located or identified unless the driver co operated with the police. They had just been in a car which had in the police officers' opinion endangered other people around around and were involved in that behaviour at a time when that type of criminal activity was particularly prevalent.

18. In relation to the drawing of the taser, the evidence of Watson was that he had no intention of actually shooting the taser and he was using it to ensure compliance of the subject and while there was no evidence of any warnings having been given, I accept in the circumstances that was the original intention of the officer. However the intentions of the officer involved is not the only thing that has to be considered. On the evidence before the court I find the arrest was affected by Bland almost simultaneously with Watson drawing his taser and possibly before the taser was drawn and therefore I cannot be satisfied the arrest of the two youths was unlawful on the basis there was an unreasonable use of force at the time of the initial arrest.

Exclusion of evidence under section 138 for impropriety

19. Both defendants submit there is evidence of more than one instance of impropriety by the police officers concerned at the time of the defendants' apprehension. The most relevant for the operation of s138 is the drawing of the taser by Officer Watson.
20. The Police General Orders for Operational Safety and Use of Force require training of officers before they are permitted to use tasers. There are restrictions on the use of tasers included in those general orders and there are specific exclusions unless extraordinary circumstances exist.(see orders 191 -195)
21. Officers are not to use tasers "solely as a method of subject compliance" (O193) the use must be a reasonable response and not an unnecessary use of force (O191), tasers can be used when the officer believes a person is acting in a way that presents an immediate risk of serious harm to the officer or other persons (O192) and cannot be used against a young child, against persons in a vehicle where there is a risk of the vehicle going out of control or in the presence of volatile or flammable chemicals (O194).
22. While the exclusions in O194 are not absolute they should be considered as a contraindication first, then the officer should weigh up all the risks involved before deploying his taser (see O195).
23. At the time Officer Watson had raised his taser he was aware that the driver had alighted from the vehicle and that the driver was a youth. He continued to have his taser raised when Officer Bland had hands on that person. His awareness of a second person in the driver's seat was part of his original observations through the windscreen of the car. He has seen a person climb into the driver seat and it was then he says there was a danger of the vehicle moving off. His reaction to run to the driver's side of the car and strike the window with his taser and then with his baton to discourage

DP from driving off and to direct him to leave the vehicle was, in my view, entirely reasonable. He had knowledge that the vehicle was stolen, he observed a youth to be in the driver's seat and observed him to be attempting to start the vehicle and the youth did not immediately get out of the vehicle as directed. However the reasonableness of his actions at the window is not really at issue. What is at issue are the circumstances when he initially raised his taser.

24. It is clear that he had drawn his taser before he was aware of DP trying to start the car. He did not say that he felt he was in immediate danger but expressed concerns that should the behaviour not be stopped, members of the public would again be put in danger. His aim was to arrest the driver and stop him using the vehicle. It was after he raised his taser and after Bland had wrestled with the driver near the vehicle that he saw DP in the driver's seat trying to start the vehicle. In his oral evidence he stated he had drawn the taser as a deterrent to get subject compliance. That use is in direct contravention to the General Order number 193.

25. Watson's oral evidence is that it was while he was banging on the driver's window; he observed DP attempting to start the vehicle and heard the engine turn over three times. He says as he banged on the window he was yelling "get out of the car" and "you are under arrest" however he accepted that his statement did not mention anything about hearing the car turn over or yelling "you are under arrest". He explained that inconsistency by the fact that he had a lot of adrenalin in his system and while it was an important detail to include in his statement he was also involved in filling out a "Use of Force" form and he was concentrating on that. I accept his explanation for that omission given the situation was highly charged and it is perfectly understandable that he may have missed putting those details into his statement.

26. Again it is important at this point to note that the actions of Watson should be considered in the context of the circumstances. The police were aware of a stolen vehicle driving around in an erratic manner and that vehicle was being driven by a youth who had already shown disregard for the police. The vehicle had been driving around for an extended period of time and in the minds of the officers, needed to be stopped before someone was hurt. It was a matter of seconds from the time in which the vehicle pulls up to the service station, the driver gets out, Bland arrests him and Watson approaches the vehicle. It is a matter of seconds that in which the passenger swaps seats with the driver and Watson pulls out his taser. Watson clearly making makes a split second decision to use a device available to him and he has very little time to balance up all of the options. However given their powers and the weapons and devices in their control, our police officers must be held to a high standard when exercising those powers.

27. With the benefit of hindsight it was not proper for Watson to brandish his taser specifically to obtain compliance from the subject given the driver was outside of the vehicle, DP was a youth, he was in a vehicle which could have driven off, and they were in a petrol station. These are all situations which require there to be extraordinary circumstances to exist before a taser is deployed. At the time he drew his taser he did not know there was another person in the vehicle and there were no extraordinary circumstances existing or immediate danger to Watson or other persons in the immediate vicinity. Watson was also aware that there were other police units in the vicinity, as he had given the command to “go go go” and should have been borne in mind if DP had succeeded in driving away, he would probably not have got far as the vehicle apparently needed fuel.

28. He accepted that at the time he was at the window of the car and at the time he was banging on the window DP, was only sitting up for a very short period before getting out of the car. Bland and the driver were no longer in

the vehicle or in its path and therefore not in immediate danger should the car have been put in motion by DP.

29. Having found it was improper for him to draw his taser in those circumstances, the question must be was that impropriety of such a nature and degree that the evidence of the attempt to flee of both KL and DP should be excluded under s138. The raising of a taser is a serious action to be taken by police and that is made clear by the general orders and the restrictions they contain. If I accept the evidence of Watson that he raised his taser because he had thought that Bland was in danger because he was still struggling with the driver when DP was trying to start the car, I could find that the drawing of the taser against a youth in a car near flammable substances had to be balanced against the risk of the immediate danger to officer Bland being run over.
30. However a finding that Watson originally raised his taser because he thought DP was trying to start the car is not consistent with the footage. The footage has both Watson and Bland approaching car at the same time, Bland laying hands on both DP and the driver, then pulling DP towards him before Watson approaches the car. DP is seen laying across the seats for most of the time when Watson approaches and is then at the window. Watson can only have been in a position to see DP trying to start the car well after Bland and the driver were out of the vehicle and therefore at the time he had approached the car with taser drawn, there was no immediate threat of physical harm to Bland.
31. In all of those circumstances the deployment of the taser before or during the arrest of each of the defendants was an impropriety of a very high level and I must then go on to consider whether the desirability to of admitting the evidence of the subsequent offending outweighs the undesirability of admitting evidence that was obtained in the way it was obtained. In that balancing exercise I can take into account the probative value of the

evidence, the nature of the offence, the gravity of the impropriety and whether that impropriety was deliberate.

32. In my view the impropriety of the raising of the taser is grave and even though I am of the view that Officer Watson thought he was justified in raising the taser and his impropriety was not deliberate. Further the offending for which the KL and DP have been charged subsequent to that impropriety is not of a particularly serious nature.
33. The charges being considered are escaping lawful custody and in the case of DP resisting police in the execution of their duty and driving a motor vehicle without a licence. The evidence supports a finding that the actions which constitute the offending are not of at the most serious level. The escape was momentary, the resist being an attempt to flee involved no physical action contact with the police officers themselves and the driving was constituted by an attempt to start the vehicle. In those circumstances the desirability of admitting the evidence is outweighed by the impropriety which has proceeded that offending and any evidence supporting those charges should be excluded.
34. Therefore I am left with no evidence to support the charges of escape lawful custody, resist police in the execution of their duties nor do I have evidence of DP attempting to start the engine of the car.
35. The Defendants must be found not guilty of those charges. They are however found guilty of unlawful use of motor vehicle by being present in the vehicle whilst it was being driven by the other youth.
36. There is also no necessity to make a finding whether the use of force in actually deploying a taser on a fleeing 12 year old youth who was only a metre or two in front of the pursuing officer when the taser was deployed is unreasonable force although the answer in my view is obvious. The evidence shows DP could have been apprehended without the need to

deploy the taser and there was no immediate danger of him causing harm to another. The taser ought not to have been deployed.

Dated this 9th day of February 2017

JUDGE FONG LIM