

# TRANSCRIPT OF PROCEEDINGS

MAGISTRATES COURT

VERRA SM

BRENDEN JASON POWER

Complainant

and

PATRICK JOHN COLEMAN

Defendant

TOWNSVILLE

..DATE 19/10/2000

DECISION



defendant was then taken inside the Police Beat building. The defendant seated himself on the ground and refused to move. It was necessary for three police officers and a security officer to lift the defendant into the rear of a police vehicle to convey him to the watch-house."

The standard of proof required of the prosecution is proof beyond a reasonable doubt. The versions of events given in evidence by the prosecution and the defendant vary significantly and it is necessary to set out the evidence in some detail.

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#### PROSECUTION EVIDENCE

The evidence of Senior Constable Power, the arresting officer, was as follows: On Sunday, 14 November 1999, Senior Constable Power was on duty at the Flinders Mall Police Beat shop front in company with Constable Bardell (it was common ground between the prosecution and the defence that markets are conducted on Sunday mornings in the mall and that there is heavy pedestrian traffic during the markets).

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Senior Constable Power was monitoring pedestrian traffic on a security camera system display monitor. He observed the defendant moving through a walkway area between the Centra Hotel and the permanent stage carrying a 2.2 metre wooden pole with coloured cloths attached to one end draped over his shoulder and also carrying a number of placards measuring 50 centimetres by 50 centimetres made from cardboard and wrapped

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with butchers' paper. Photographs of those items form Exhibit 3.

The walkway area in that vicinity narrows to a width of approximately one and a half or two metres because of the congestion of people and stall tables.

The defendant was observed shoving the placards out at people in their faces for them to read. Senior Constable Power stated:

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"As he was moving, the pole was moving obviously and the people behind him were ducking and weaving to avoid being struck by the pole and its attachments, the flags"  
(transcript page 10).

Senior Constable Power continued to observe the defendant on the monitor as the defendant continued in an easterly direction until he reached the front doors of the Police Beat. His evidence continued:

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"As he came across, I then left where I was sitting at the table and went to the front door of the Police Beat to intercept him. I stepped outside the Police Beat and we were approximately two, three metres apart."  
(transcript page 10).

Senior Constable Power's evidence was that the following conversation then took place between him and the defendant:

Power, "Mate, you're not doing that here". Defendant, "What?". Power, "Waving that flag around creating a disturbance". Defendant, "I can do what I like; your laws

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protect me". Power, "I don't think so" (transcript pages 10 and 11).

Senior Constable Power's evidence continued:

"I then stepped back inside the Police Beat and called Constable Bardell. .

What did the defendant do at this stage?-- As I stepped back inside the Police Beat, he then situated himself on the - as I'm looking at the Police Beat from the outside, he situated himself on the left-hand side of the doorway, placed his flag on the ground pointing directly from the doorway and threw his placards on the ground and then placed another one up against the wall of the Police Beat - the glass wall - and then situated himself on the ground to the left-hand side of the doorway. I had a short conversation via the radio with other police and I also had a short conversation with Bardell. During the conversation with Bardell, he told me something and from that I then went back outside. I told the defendant he was under arrest and leant down to start to collect his placards and stuff off the ground. As I started to grab them up, he attempted to grab them back. We then engaged in a bit of a struggle. Constable Bardell was assisting." (transcript page 11).

As to what occurred after his initial conversation with the defendant, Senior Constable Power stated during cross-examination by the defendant:

"I had a conversation with you. I then went back inside. I had a conversation with Bardell. He advised me of something else that occurred whilst I had my back turned to you." (transcript page 21).

In re-examination, the Prosecutor asked:

"Your second conversation was after you returned from going inside. You came outside and you told him that he was under arrest for disorderly behaviour and he said he wasn't?-- That's right. I went inside to make contact with our communications centre to organise extra police

that I thought I may need and to call Constable Bardell out." (transcript page 74).

That question by the Prosecutor was not consistent with Senior Constable Power's evidence-in-chief, which was, "I told the defendant he was under arrest" (transcript page 11).

Constable Bardell's evidence was that he was on duty with Senior Constable Power at the Police Beat on 14 November 1999. His evidence was:

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"That day at about 10 past 10, Brenden had called out to me. I was out the back doing some paperwork. I came out the front and I saw Patrick seated out the front." (transcript page 47).

Constable Bardell observed the defendant talking to two or three people whilst seated at the front of the Police Beat. Constable Bardell continued:

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"Yeah, well, initially when he called me out it basically happened so quick. He came out, I just saw what had happened. I said, 'Who's he?', because I had never seen Mr Coleman before and Brenden had got up and said that he was going out to arrest him and walked straight out the door and I walked out with him and that's when he grabbed the placards and Patrick said - and he said to him, 'You're under arrest for disorderly behaviour', and Mr Coleman said he wasn't." (transcript page 48).

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As to the words of arrest, Constable Bardell's earlier evidence was that Senior Constable Power "advised the defendant he was under arrest" (transcript page 47).

As to the time lapse between the initial conversation and the arrest, the defendant asked Constable Bardell in cross-examination:

"And how long was I sitting outside there for?-- Oh, I can't be sure. I got up-----

A fair time obviously in order to sit there and-----?-- I can't be sure - if it was from when my partner yelled out to me to come out and assist him - then, no, a very short amount of time." (transcript page 57).

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No evidence as to the time lapse was given by Senior Constable Power in evidence-in-chief or in cross-examination.

#### Obstruct

I have previously set out the particulars of the obstruct charge. The defendant does not dispute that he obstructed the police. The defendant's evidence in cross-examination was:

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"I struggled, I hindered, I resisted, because they had no power. I protested very loudly. I grabbed his mate around the legs to try and stop him dragging me inside, you know. I did all that, 'cause it was self-defence against an unlawful arrest. At that time, your Worship, I knew I had a right to be there. I was peaceful. I did it all peacefully, your Worship, and the arrest is totally unfounded in law. They had no right to arrest me. I knew the law." (transcript page 77).

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#### DEFENDANT'S EVIDENCE

The evidence of the defendant up to the point in time when he commenced obstructing the police is in stark contrast to that of the prosecution. The defendant stated:

"On that day, I went into the mall with my flag, my placards for the purposes of protesting against an unlawful arrest that took place, which I still maintain to be an unlawful arrest, which took place a week beforehand and, yeah, I probably would have said g'day to a few people on the way in. I didn't hit nobody. Didn't intend to hit nobody with the flag. Didn't aim to hit nobody with the flag. Didn't use it as a battering ram. Didn't thrust anything at members of the public."  
(transcript page 76).

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The defendant's further evidence was that he spoke to a few of the stallholders on his way to the Police Beat. The defendant continued:

"Anyway, sat outside the Police Beat, spread out my placards, leaned them up against the Police Beat window without attaching them or affixing them. The doorway I left unobstructed." (transcript page 76).

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The defendant stated that Senior Constable Power then came outside and told him to move on while showing him a yellow piece of paper with by-laws on it. The defendant responded, "In any case, I told him he's got no power to do nothing basically" (transcript page 76). The defendant continued, stating that Senior Constable Power then walked back inside.

The defendant's evidence as to the actual arrest was far from precise. The defendant stated that he had been sitting there for "20 minutes or so" (transcript page 76) prior to his being arrested.

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The defendant's evidence in cross-examination was:

"Did Senior Constable Power inform you as to why you were being arrested?-- He came out and showed me that little bit of paper, right, and made it clear that his belief

was I was doing something against the by-law. I've told you that I remember that it had 8(2)(g) as one of them, all right - and then he showed me 8(2)(g) as one of them. Then he went inside for a long length of time and after I - I was having a conversation with somebody, probably had a conversation with other people along - 'cause it was a long time. He comes out and all of a sudden, bang, middle of an arrest scenario, right? Placards getting dragged in, me getting dragged in, me obstructing, hindering, everything like that. Yelling and screaming at-----

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All the question was - you've gone beyond that - is did Senior Constable Power inform you why you were being arrested?-- And his reasonable belief was the by-law. That - but when he came out and arrested me, he just came out and arrested me.

He didn't say anything to you at all?-- No, he just came out and that old lady just took off.

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\* He didn't say to you, 'You're under arrest for disorderly behaviour'?-- No." (transcript pages 89-90).

THE LAW - BEHAVE IN A DISORDERLY MANNER:

The line of authorities as to what constitutes disorderly behaviour were considered by Evans J in McDonald v. Sherrin, Tasmanian Supreme Court, Appeal No 126 of 1998. His Honour stated:

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"It is clear from the authorities I have read that the limits of disorderly behaviour cannot be sharply defined. Subject to that qualification, I proceed on the basis that, to obtain a conviction, the applicant has to satisfy the learned Magistrate that the conduct complained of, viewed in the light of the surrounding circumstances, was a substantial breach of public decorum which was likely to disturb, alarm or annoy others."

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Further, citing Bray CJ in Romeyko v. Samuels (1972) 2 SASR 529 at 564:

\* "Whether conduct is disorderly is to be decided by an objective test. It is a matter of judgment for the



Court, drawing upon its own experience and knowledge of life."

In O'Connor v. Police (1972) NZLR 379 at 381, Richmond J, applying Melser v. Police (1967) NZLR 437, concluded:

"As I understand the judgments, this really means that the Court has to apply an objective test to the conduct in question and determine as a matter of time, place and circumstances whether it was of a kind likely to cause serious annoyance or disturbance to some persons or person present."

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Whether the conduct, if proven to the requisite standard, is sufficiently disorderly to be in breach of the Statute is a question of degree (see Angel J in Watson v. Trenerry and Williams v. Trenerry (1998) NTR 1 at page 2).

SUMMARY AND FINDINGS - BEHAVE IN A DISORDERLY MANNER

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It is against this background of facts and law that I am required to determine whether the prosecution have proven beyond a reasonable doubt that the defendant behaved in a disorderly manner as set out in the particulars, Exhibit 1.

The prosecution rely on the uncorroborated evidence of Senior Constable Power that he observed the behaviour as particularised on the security camera monitors in the Police Beat centre in Flinders Mall. Constable Bardell was, on the evidence, present in the Police Beat centre during the time the observations were made by Senior Constable Power, but did

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not view the defendant's activities either of his own accord or at the invitation of Senior Constable Power. No video evidence was produced. Senior Constable Power's conversation with the defendant was not taped.

The difficulty in obtaining witnesses from the general public in the crowded mall is appreciated. However, there was no evidence that any of the stall operators were approached to ascertain whether they could provide corroborating evidence.

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\* The defendant denies that he was informed that he was under arrest for disorderly behaviour. However, failure to give notice of the cause of arrest does not of itself make the arrest unlawful (section 255(3) of the Criminal Code).

The uncorroborated evidence of Senior Constable Power could be accepted as evidence that persons ducking and weaving or having placards shoved in their faces would be annoyed or disturbed by such actions. Equally, such action might be viewed as causing mere inconvenience, just as a person carrying a potted palm tree in a crowded mall might cause some inconvenience to persons in close proximity. It is a question of degree.

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\* In the circumstances, as I have outlined them, I am not satisfied that the prosecution have proven beyond a reasonable doubt that the particularised actions of the defendant, on the evidence before me, constituted disorderly behaviour.

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ACCIDENT

As to the defence of accident which was raised in evidence (transcript page 81), I would simply add that the uncorroborated evidence of Senior Constable Power is not sufficient to negative accident beyond reasonable doubt. It is open to the defendant to avail himself of the defence of accident, (section 52(1) of the Vagrants Gaming and Other Offences Act (1931) as amended and section 23 of the Criminal Code).

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I find the defendant not guilty. The charge is dismissed and the defendant is discharged.

THE LAW - COMPLIANCE WITH STATUTORY PROVISIONS AND COMMON LAW PRINCIPLES OF ARREST

\* The starting point for this issue is the proposition that the acquittal of the defendant on the first charge does not automatically involve the dismissal of the charge of obstruction, provided the Court is satisfied beyond a reasonable doubt that, at the time of the arrest, Senior Constable Power had an honest belief entertained on reasonable grounds that such offence had been committed (see Veivers v. Roberts ex parte Roberts (1980) QR 226).

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It is necessary to identify the duty being exercised by Senior Constable Power which the defendant is alleged to have obstructed (see Hortin v. Rowbottom (1993) 68 A Crim R 381 at 390). The Prosecutor, in his closing address, submitted that

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Senior Constable Power was performing his duty as required by the Police Service Administration Act of 1990. Section 2.3 of that Act sets out at length the functions of the Police Service. However, the duty which Senior Constable Power was performing and which the defendant is charged with obstructing was specifically the arrest itself.

In Criminal Procedure, John B Bishop, Butterworths (1983) at page 46, the author states:

"As early as 1857, it was stated that anybody who seeks to arrest another by virtue of a Statute must take care to pursue strictly the power conferred by the enactment. A strong line of cases since that time has continued this cautious approach."

The law of arrest comprising a mixture of common law rules and Statutory provisions was considered in *Wornes v. Rankmore ex parte Rankmore* (1976) QR 85.

Section 255 of the Criminal Code, in so far as it is relevant, provides that it is the duty of a person arresting to give notice if practicable of the cause of the arrest. Further, that failure to give such notice does not of itself make the arrest unlawful, but is relevant to the inquiry whether the arrest made by reasonable means in a less forcible manner.

Section 35(1) of the Police Powers and Responsibilities Act (1997) provides, "It is lawful for a police officer without warrant to arrest a person the police officer reasonably suspects has committed or is committing an offence if it reasonably necessary for one or more of the following

reasons", and the section sets out 11 reasons in paragraphs (a) to (k).

Whilst it might be inferred from the evidence that the arrest for disorderly behaviour was reasonably necessary for one or more of the reasons contained in the section, no evidence was given by Senior Constable Power as to his reason for proceeding to arrest the defendant in the terms outlined in section 35(a) to (k).

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Importantly, the Police Powers and Responsibilities Act of 1997 provides, in section 6, "Unless this Act otherwise provides, this Act does not affect (a) the powers, obligations and liabilities a constable has at common law".

The leading authority as to the common law principles applicable to arrest is *Christie and Anor v. Leachinsky* (1947) Appeal Cases 573. The principles are essentially consistent with section 255 of the Criminal Code except for the principle that failure to inform the arrested person of the facts which are said to constitute a crime on his part render the arrest unlawful.

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In summary, the principles are:

- (1) A police officer arresting without warrant upon reasonable suspicion of commission of an offence must in ordinary circumstances inform the person arrested of the true ground of arrest.

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- (2) The requirement that the person arrested should be so informed does not apply if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.
- (3) The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is one of substance and turns on the elementary proposition that a person is, prima facie, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that restraint should be imposed. 10
- (4) The person arrested cannot complain that he has not been supplied with the above information as and when he should be if he himself produces the situation which makes it practically impossible to inform him; for example, by immediate counter-attack or by running away. 20

In *Wornes v. Rankmore, Williams J*, at pages 104 and 105, states:

"Whilst circumstances necessarily have required the legislature to cut down or extinguish some of the basic rights of the individual for the betterment of the public generally and so have provided for numerous occasions upon which police officers may arrest without warrant, it is helpful to examine the circumstances whereunder at common law a peace officer (a term which included a sheriff, coroner, constable or Justice of the Peace) might arrest without warrant". 30

His Honour referred to the 12th edition of Russell on Crime at page 660 and the final paragraph of the passage to which he refers states:

"He may arrest any person who, in his presence, commits a misdemeanour or breach of the peace if the arrest is effected at the time when or immediately after the offence is committed or while there is danger of its renewal, but not after the breach or danger of its renewal has ceased."

His Honour then noted:

"The above passage is interesting in relation to the necessity for the arrest to be almost contemporaneous with the offence or whilst there is a danger of its renewal."

SUMMARY AND FINDINGS - COMPLIANCE WITH STATUTORY PROVISIONS  
AND COMMON LAW PRINCIPLES ON ARREST

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Significant aspects of the present case are as follows:

- (1) Even accepting Senior Constable Power's evidence of his initial conversation with the defendant, the only evidence that the defendant might have known he was in jeopardy of arrest prior to his actual arrest was: Power, "Mate, you're not doing that here". Defendant, "What?". Power, "Waving that flag around creating a disturbance".

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There is no evidence that the defendant was at any time prior to his arrest or over the period he was obstructing informed, even in broad terms, as to

Constable Power's observation of the flag waving incident alleged to constitute the offence.

Certainly there was no evidence of him being informed of the fact that the shoving of the placards in peoples' faces was part of the cause for the arrest. There was ample opportunity to do this, as the defendant was passive during the period that Constable Bardell went away to get the police vehicle.

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Consequently, the evidence falls short of establishing that the defendant "knew in substance why it was claimed that restraint should be imposed". In any event, the defendant denies that such conversation took place:

- (2) Both Senior Constable Power and Constable Bardell initially in their evidence-in-chief stated that the defendant was simply told that he was under arrest. Both later qualified that evidence by stating that the defendant was told by Senior Constable Power that he was under arrest for disorderly behaviour. In Senior Constable Power's case, this was in affirmative response to a question in re-examination by the Prosecutor that, "You came outside and you told him that he was under arrest for disorderly behaviour and he said he wasn't" (transcript page 74).

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The question was not in terms consistent with Senior Constable Power's earlier evidence, which was that he simply told the defendant he was under arrest (transcript page 11).

The defendant denies that the words, "You're under arrest for disorderly behaviour", were used.

- (3) The time lapse between the initial conversation and the arrest is particularly significant. Senior Constable Power's evidence was that he went back inside after his initial conversation and contacted the Police Communications Centre to organise extra police that he thought he may need and that he also had a short conversation with Bardell at that time. 10

Senior Constable Power's evidence was, "During the conversation with Bardell, he told me something and from that I then went back outside" (transcript page 11), and he then arrested the defendant. Further, in cross-examination, "I had a conversation with you. I went back inside. I had a conversation with Bardell. He advised me of something else that occurred whilst I had my back turned to you." 20  
(transcript page 21).

This evidence and the fact that Senior Constable Power did not wait for the extra police he thought he may need suggests that the arrest was prompted by something Constable Bardell had told Senior 30

Constable Power. Constable Bardell had not observed any of the defendant's actions on the security monitor and any later actions of the defendant were not relied on by the prosecution as constituting the disorderly behaviour the cause of the arrest.

The prosecution case at its highest is that the defendant was told he was not "waving that flag around creating a disturbance", with no reference to the particular incidents that Senior Constable Power had observed on the security monitors. Further, that sometime later - on the defendant's evidence, some 20 minutes - he is told he is under arrest for disorderly behaviour. There is no evidence that the defendant was ever informed of the incidents observed on the security monitor before, during or after the arrest.

As to credit, the defendant put in strong terms to each police officer that they were lying. There is no evidence to support such a serious allegation, nor did I form any such view during the evidence of either of the prosecution witnesses.

The evidence of Senior Constable Power as to his first conversation with the defendant, who denies that conversation took place, is not corroborated. Consequently, I am unable to accept the evidence of either witness to the exclusion of the other as to the actual conversation which took place, but, for reasons I have outlined, this is of little consequence in the end result.

As to the arrest, there was some internal inconsistency in the evidence of each officer as to the words used. Merely because there are inconsistencies is not, ipso facto, fatal to a prosecution (see Mitchell v. Norman ex parte Norman (1965) QR 587 and 589). The defendant himself was adamant that Senior Constable Power did not use the words, "You're under arrest for disorderly behaviour" (transcript page 90). In cross-examination, his evidence was that Senior Constable Power said nothing at all and that he just came out and arrested him. 40

I am satisfied and find that words of arrest were used, but, given the inconsistency in the prosecution evidence in that regard, I make no formal finding as to what actual words were used.

In the circumstances, as I have outlined them, I cannot be satisfied that the defendant would have been aware in substance of the reason for the arrest and that consequently his resistance or obstruction to what he perceived to be an unlawful arrest was justified. I find the defendant not guilty. The charge is dismissed and the defendant is discharged. 20

  
L. P. VERRA

Stipendiary Magistrate