Crowson v Millar [2014] NTSC 61

PARTIES:	CROWSON, Darren v MILLAR, Ronald Jeffrey
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 60 of 2014 (21320546)
DELIVERED:	15 December 2014
HEARING DATES:	11 December 2014
JUDGMENT OF:	RILEY CJ
APPEAL FROM:	Court of Summary Jurisdiction

REPRESENTATION:

Counsel:	
Appellant:	S Karpeles
Respondent:	L Wilson
Solicitors:	
Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Crowson v Millar [2014] NTSC 61
No. JA 60 of 2014 (21320546)

BETWEEN:

DARREN CROWSON
Appellant

AND:

RONALD JEFFREY MILLAR
Respondent

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 15 December 2014)

[1] On 7 August 2014 the appellant was found guilty in the Court of Summary Jurisdiction of the offence of resisting public officers whilst the officers were engaged in the discharge of the duties of their office under the *Police Administration Act 1978* (NT). The appellant has appealed against his conviction on various grounds.

The circumstances of the offending

[2] The appellant is a large man who is both deaf and cannot speak. He was assisted in the hearing by a sign language interpreter. The prosecution case relied upon two police officers, Constables Rothery and Sutton, who gave evidence that they were on duty at the Binjari Community near to Katherine

when they observed a motor vehicle pull up near to their marked police vehicle. The appellant was the driver of the motor vehicle and was known to Constable Rothery. Constable Rothery gave evidence that he had previously "had dealings" with the appellant when the appellant was sober and also when he believed the appellant was intoxicated. He approached the appellant and observed him to smell strongly of alcohol. Using hand gestures the officer asked the appellant to produce what appeared to be a water bottle which was in the pocket of his shorts. The appellant turned and walked away. The officer placed his hand on the right shoulder of the appellant who then swung around spreading his arms out and thrusting his head towards the officer. The officer informed him that he was under arrest "for the purpose of a breath analysis". In the process of placing the appellant into the cage at the rear of the police vehicle, the appellant swung his arms around in an aggressive manner. The officer felt threatened. He grabbed the appellant and took him to the ground but the appellant continued to struggle. Eventually, he was overpowered and handcuffed. Whilst being placed in the vehicle, the appellant tried to kick both officers. When placed inside the vehicle, he continued to kick out with his feet.

[3] The appellant was charged with driving a motor vehicle with a high range blood alcohol content, driving a motor vehicle whilst not being the holder of a licence and resisting public officers in the discharge of their duties. At the conclusion of the evidence, the learned magistrate ruled that it had not been established that the motor vehicle was being driven on a public road and,

therefore, dismissed the driving offences. Her Honour found him guilty of the remaining offence.

Ground 1: the learned magistrate erred in finding that s 29AAC of the *Traffic Act 1987* (NT) allows a police officer to arrest a person for breath analysis without first requiring that the person submit to a breath test.

Ground 1A: the learned magistrate erred in law by misdirecting herself as to a police officer's power of arrest.

[4] At the hearing in the Court of Summary Jurisdiction, it was submitted that the arrest of the appellant was unlawful because the arresting officer had arrested the appellant to conduct a breath analysis without first requiring him to submit to a breath test. It was submitted that, because the arrest was unlawful, any evidence obtained subsequent to the arrest should have been excluded through the application of s 138 of the *Evidence (National Uniform Legislation) Act 2011* (NT) (the Uniform Evidence Act).

[5] It was argued that her Honour relied upon s 29AAC of the *Traffic Act* in rejecting the submission and ruling that the arrest was lawful. That section provides:

> (1) A police officer may, in the following circumstances, require a person to submit to a breath test or a breath analysis (or both) to determine if the person's breath contains alcohol:
>
> (a) the person is a driver directed to pull over under section 29AAB(1)(a);
>
> (b) the officer has reasonable cause to suspect the person:
>
> (i) has committed an offence against Division 2 or 4; or

(ii) was the driver of a motor vehicle that was involved in a crash on a road, road-related area or public place; or

(iii) was involved in a crash on a road, road-related area or public place and the person has, or had at the time of the crash, alcohol in the person's breath or blood.

(2) The officer may only require the person to submit to a breath test or breath analysis if not more than 4 hours has expired since the driver was pulled over or the offence, or crash, mentioned in subsection (1) occurred.

(3) If a police officer requires a person to submit to a breath test, the person must comply with the directions given by the officer or another police officer.

(4) If a police officer requires a person to submit to a breath test and:

(a) the person fails to provide a sufficient sample of breath for the completion of the test; or

(b) the officer reasonably believes (whether as a result of the test or otherwise) that the person may have committed an offence under Division 2;

the officer or another police officer may arrest the person without warrant and detain the person for the purpose of carrying out a breath analysis.

(5) A police officer may require the arrested person to submit to a breath analysis.

[6] It was submitted that this section does not give an officer the power of arrest unless the officer requires a person to first submit to a breath test and the person either fails to do so or the officer "reasonably believes (whether as result of the test or otherwise) that the person may have committed an

offence under Division 2 of the Act". It was argued that a breath test is a condition precedent to the power of arrest under the section.

[7] The respondent did not contend that the appellant had been required to submit to a breath test before being placed under arrest. However, it was submitted that this did not mean that the arrest was unlawful. Even though the arresting officer had arrested the appellant for "the purpose of a breath analysis", this does not preclude reliance upon another source of power to arrest.

[8] It was submitted that the officer had the power to arrest the appellant without a warrant under s 123 of the *Police Administration Act*. That section provides:

> A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing or is about to commit an offence.

[9] The evidence of the Constables was that they believed that the appellant had committed an offence. The basis of the belief was not challenged in cross-examination and included the following:

(a) they saw the car being driven;

(b) it came to a stop at a time when their marked police vehicle was in view of the appellant's car;

(c) they saw the appellant get out of the driver's seat and start walking away;

(d) Constable Rothery communicated with the appellant who smelt strongly ("reeked") of alcohol;

(e) the appellant would not produce the bottle from his pocket when requested; and, importantly

(f) the appellant appeared to Constable Rothery to be "under the influence of intoxicating liquor".

[10] In all the circumstances, Constable Rothery expressed his belief that the appellant was under the influence of intoxicating liquor. This belief was not challenged in cross-examination. The explanation for counsel not challenging the evidence of the Constable may be found in the result of the subsequent breath analysis of the appellant which revealed a reading of 0.184%. The unchallenged evidence of Constable Rothbery, along with the additional identified factors referred to above, provided reasonable grounds for his belief that the appellant had committed an offence.

[11] It is apparent from the reasons for decision of the magistrate that her Honour applied s 123 of the *Police Administration Act*. Her Honour observed:

> It is within the police powers to arrest a person who they reasonably suspect has committed an offence, and while both – they say that he was arrested for the purposes of the breath analysis that was on the basis that they reasonably suspected that he had committed an offence; that is, that he was driving whilst having – whilst intoxicated or having been drinking intoxicating liquor.

[12] The magistrate delivered short reasons for decision immediately after submissions were completed. Whilst her Honour, in her ex-tempore reasons, incorrectly referred to the officers having the power to arrest a person "who

they reasonably suspect has committed an offence" rather than having the power to arrest a person where the officer "believes on reasonable grounds that the person has committed… an offence", it would seem this was an error in paraphrasing the section rather than applying an incorrect test. The correct test was satisfied by the same evidence.

[13] These grounds of appeal have not been made out.

Ground 2: The learned magistrate erred in finding that the appellant's arrest was lawful despite the condition precedent in ground 1 not having been made out.

[14] This ground of appeal is dependent upon ground 1 above being upheld. It was not upheld.

[15] In addition, under this head, the appellant complained that, pursuant to s 127 of the *Police Administration Act*, it was incumbent upon the arresting officer to advise the appellant at the time of the arrest of the offence for which he was arrested. The section makes it clear that it is not necessary for the officer to use language of a precise or technical nature in providing this information. In the present case there is no dispute that, notwithstanding the difficulties of communication, the arresting officer did inform the appellant that he was under arrest for the purposes of breath analysis. This, of course, was directly linked to the offence of driving with a high range breath alcohol content. By reason of the circumstances in which he was arrested, the appellant ought to have known the substance of the offence for which he

was arrested. In addition, by his actions, he made it impracticable for further information to be provided.[1]

[16] This ground of appeal has not been made out.

Ground 3: the learned magistrate erred in finding that the elements of the offence were made out as a police officer is not a public officer for the purposes of s 121 of the *Criminal Code* (NT).

[17] Section 121 of the *Criminal Code* is in the following terms:

> **Resisting public officers**
>
> Any person who in any manner obstructs or resists any public officer while engaged in the discharge or attempted discharge of the duties of his office under any statute, or obstructs or resists any person while engaged in the discharge or attempted discharge of any duty imposed on him by any statute, is guilty of a crime and is liable to imprisonment for 2 years.

[18] This ground of appeal was not raised in the court below. It was submitted on behalf of the appellant that, whilst the term "public officer" is not defined in the *Criminal Code* or in the *Interpretation Act 1978* (NT), it should not be interpreted to include a police officer. It was submitted that the legislature has provided for the offence of resisting a police officer in s 158 of the *Police Administration Act* and, if the legislature had intended that s 121 of the *Criminal Code* also create that offence, it should have used unambiguous language. It was submitted that the term "public officer" as it appears in s 121 should not be interpreted so broadly as to include police officers.

[1] *Police Administration Act*, s 127 (3).

[19] I note that the offence created by s121 of the *Criminal Code* is not necessarily the same as that created under s 158 of the *Police Administration Act*. The former relates to obstructing or resisting a public officer who is engaged in the discharge of duties under a statute. The latter, which relates only to members of the Police Force, is not so constrained.

[20] I see no reason to read the term down in the manner suggested. The language of the section makes it clear that a public officer is someone who discharges the duties of his or her office under a statute. Police officers may discharge duties under a statute and, in the circumstances of the present matter, the relevant officers were discharging duties under the *Police Administration Act*. Elsewhere in the *Criminal Code* a "public officer" is defined to include a police officer. Section 103 A of the *Criminal Code* creates a series of offences relating to threatening or effecting reprisals against "public officers". In that section, a public officer is defined to include a police officer.[2] It would be unusual for the expression to be given one meaning in one part of the *Criminal Code* and another meaning elsewhere.

[21] This ground of appeal is not made out.

Ground 4: the finding of guilt was, in all the circumstances, unsafe and unsatisfactory.

[22] The appellant submitted that there was not sufficient evidence before the magistrate to be satisfied beyond reasonable doubt that:

[2] *Criminal Code*, s 103A(6).

(a) the arresting officers were engaged in the discharge of the duties of their office under statute when the appellant resisted them; or

(b) that Constable Rothery had a reasonable belief that the appellant had committed an offence at the time of arresting him, thereby enlivening a power of arrest under s 123 of the *Police Administration Act*.

[23] The principles applicable to such a ground are to be found in the decision of the High Court in *M v The Queen*[3] and need not be repeated here.

[24] It was argued that there was insufficient evidence to establish that Constable Rothery believed on reasonable grounds that the appellant had been consuming alcohol prior to driving to a sufficient extent to cause his blood alcohol content to exceed 0.05g. With great respect, there was sufficient evidence to provide reasonable grounds for the belief and these have been summarised in paragraph [9] above.

[25] This ground of appeal is not made out.

Ground 5: the learned magistrate erred in dealing with count 3 on complaint because the charge of resisting a public officer pursuant to s 121 of the *Criminal Code* is not permitted to be laid on complaint.

[26] Section 3 of the *Criminal Code* provides that offences are of three kinds namely, crimes, simple offences and regulatory offences. In the present case, the charge of resisting public officers was laid on complaint which is the procedure reserved for a simple offence.[4] It was argued, on behalf of the appellant, that an offence under s 121 of the *Criminal Code* is a crime and,

[3] (1994) 181 CLR 487 at 494; most recently discussed in the Northern Territory Court of Criminal Appeal in *Osadebay v the Queen* [2014] NTCCA [6] at [106] et seq.
[4] *Justices Act 1928* (NT), s 49.

pursuant to s 3(2) of the *Code* a person charged with a crime cannot, unless otherwise stated, be prosecuted or found guilty except upon indictment. It was submitted that there was no power for the magistrate to proceed on the complaint.

[27] Section 38E of the *Interpretation Act* provides that, where an Act provides for a penalty of imprisonment for a period of more than two years for an offence, the offence is a crime unless expressed to be otherwise. Section 121 of the *Criminal Code* provides a penalty of imprisonment for two years and, as a consequence, is not a crime for the purposes of the section. However, the wording of the section makes it clear that a person who commits the offence "is guilty of a crime". In my opinion, it is apparent that the offence is a crime and proceedings alleging an offence under that section should be commenced by way of information.

[28] It is accepted on behalf of the appellant that the offence is a minor indictable offence which is capable of being heard and determined in a summary way under the provisions of the *Justices Act*. If a charge of a crime is dealt with in the Court of Summary Jurisdiction that charge must proceed on information.[5] In order to adopt that approach it is necessary that the defendant consent.[6]

[29] In this case, both the prosecution and the defendant were represented by counsel in the Court of Summary Jurisdiction. The transcript does not reveal

[5] *Ellis v Balchin* (2009) 24 NTLR 180 at [58].
[6] *Justices Act*, s121A(4).

the discussions that took place. However, it is apparent that the appellant, through his counsel, consented to the matter being heard within the Court of Summary Jurisdiction. Contrary to the submission made on behalf of the appellant at the time of the appeal, the consent of the appellant was not absent.

[30] In my opinion, it is now too late for the appellant to suggest that he did not consent to the procedure adopted and he has not sought to do so.

[31] This ground of appeal is not made out.

[32] The appeal is dismissed.

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