IN THE COURT OF APPEAL OF NEW ZEALAND

CA186/2016
[2016] NZCA 433

BETWEEN		PHILIP DEAN TAUEKI Applicant
AND		NEW ZEALAND POLICE Respondent

Hearing:	30 August 2016
Court:	Kós P, Mallon and Whata JJ
Counsel:	Applicant in person K A Courteney for Respondent
Judgment:	12 September 2016 at 10 am

JUDGMENT OF THE COURT

A Leave to appeal is granted on the issue of whether the police officers maintained custody of Mr Taueki such as to support a charge of escaping custody.

B The application for leave to appeal is otherwise declined.

REASONS OF THE COURT

(Given by Whata J)

[1] Philip Taueki, of Lake Horowhenua, a taonga of Muaūpoko,[1] is not happy with the local rowing club's occupation of the Lake's foreshore. This has brought him before the courts on a number of occasions. The present matter arises when he

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1 *Taueki v R* [2013] NZSC 146, [2014] 1 NZLR 235 at [1].

was found one night in the club's building and, according to the police, was arrested but escaped. Mr Taueki disputes this. The District Court Judge preferred the police's account and Mr Taueki was convicted and discharged on one count of escaping custody.[2] At the same trial, Mr Taueki was acquitted on related charges of defacing a building and burglary.

[2] The charges were tried immediately after a trial for four charges relating to incidents that occurred at Kemp Street, Hokio Beach on which Mr Taueki was acquitted.[3] Mr Taueki had also faced drug and receiving charges that were withdrawn at a case review hearing prior to trial after the police reviewed the legality of their search with respect to those charges.

[3] At sentencing, the District Court Judge refused to make an order for the disbursements of a McKenzie Friend in the sum of $55,135.36 in relation to withdrawn and/or dismissed charges.

[4] Mr Taueki's appeal to the High Court was resolved on the orthodox basis that the District Court Judge was well placed to make the requisite credibility findings, that there was sufficient evidence to justify his conclusions and that there was no error in the discretion to decline costs and disbursements.[4]

[5] Mr Taueki seeks leave to bring a second appeal to this Court on the conviction and the refusal to award disbursements. He must show that the appeal gives rise to an issue of general or public importance or that a miscarriage of justice may have occurred or will occur if the appeal is not heard.[5] Three aspects of his intended appeal are in focus:

(a) Whether (alleged) police misconduct vitiates the conviction.

(b) Whether the Judge was right to find that he was in custody.

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2 *R v Taueki* [conviction] [2015] NZDC 7815; *NZ Police v Taueki* [sentence] [2015] NZDC 14034.
3 The charges were for wilful damage, male assaults female and two charges of assault with a weapon.
4 *Taueki v NZ Police* [2016] NZHC 667 at [20].
5 Criminal Procedure Act 2011, ss 237 and 276.

(c) Whether the costs of a McKenzie Friend are recoverable as disbursements.

[6] This judgment is concerned only with whether leave for a second appeal should be granted. It does not determine the substantive appeal should leave be granted.

Background

[7] In the early hours of 28 March 2014, Mr Taueki was found by police officers at the rowing club situated on the foreshore of Lake Horowhenua. The police officers say they asked Mr Taueki a number of questions, arrested him and then, at Mr Taueki's request, gave him permission to drive to a nearby a nursery so he could pick up some personal items. One officer followed him on foot, while the other stayed at the rowing club. While at the nursery, Mr Taueki made a telephone call and went to the bathroom, climbed out of the window and went to the urupa to watch the police search for him.

[8] The police charged Mr Taueki on 15 April 2014 with, among other things, escaping from lawful custody, pursuant to s 120(1)(c) of the Crimes Act 1961.

District Court verdict judgment

[9] Mr Taueki was tried before by Judge W K Hastings in a trial dealing with three charges. These were for defacing a building, burglary and escaping from custody.[6] As noted above, Mr Taueki was acquitted on the defacing and burglary charges.

[10] On the charge of escaping lawful custody, the Judge preferred the evidence of Constables Johns and Daley that Mr Taueki was told that he was "under arrest for unlawfully being in a building". The Judge referred to an email from Mr Taueki, sent on 31 March 2014, in which he said:

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[6] See *R v Taueki* [conviction], above n 2.

> I am sending this email from a clearing known as Mua Upoko as I am on the run after escaping police custody on the weekend.

[11] The Judge did not find it necessary to place any reliance on this email, instead, placing significance on the fact that Mr Taueki asked for permission to go to the nursery, noting that he would not have asked for permission if he did not think that he was arrested. The Judge also noted that it did not matter that Mr Taueki was not physically constrained because he knew that he was no longer at liberty. The Judge therefore found Mr Taueki guilty of escaping lawful custody.

Sentencing (and costs)

[12] The Judge convicted and then discharged Mr Taueki. Mr Taueki does not appeal his sentence but challenges the refusal to award disbursement costs of a McKenzie Friend in the sum of $55,135.36. Judge Hastings found that as a self-represented litigant, Mr Taueki was not entitled to his costs under s 6 of the Costs in Criminal Cases Act 1967 (the CICCA) in the light of this Court's decision in *R v Meyrick*.[7] But he considered whether Mr Taueki was entitled to costs pursuant to s 5 in relation to the charges that were withdrawn and/or dismissed. Applying the guidance afforded by *R v Gillespie*,[8] the Judge reviewed the history of the relationship between Mr Taueki and the police and the police's approach to the prosecutions. The Judge was not satisfied that the prosecutions were unreasonable or improper or that the police had acted in bad faith.[9] The Judge, accordingly, declined to make an award of costs.

High Court judgment

[13] The appeal against conviction and the refusal to award costs was considered by Toogood J. Mr Taueki maintained his claim that the police officers' evidence was not credible. He said that his email (see [9] above) used quotation marks for the words "escaping police custody" and that he used these words because his sister had informed him that he had been charged with this specific offence. He complained that the email produced to the Court had the quotation marks redacted. The

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7 *R v Meyrick* [2008] NZCA 45.
8 *R v Gillespie* (1993) 10 CRNZ 668 (HC).
9 *NZ Police v Taueki* [sentence], above n 2, at [31] and [32].

judgment also referred to Mr Taueki's argument that there was some evidence that a P pipe and drug utensils had been planted on a desk in his room by the police.

[14] The Judge rejected each of these arguments, noting that Mr Taueki made no reference to the quotation marks in cross-examination, Mr Taueki had not been charged with any offence at the time the email was sent and that the allegations about the P pipe and drugs were not put to the District Court at trial. The Judge concluded that Judge Hastings was well-placed to make any relevant credibility findings and that there was sufficient evidence to justify conviction based on his conclusions that Mr Taueki was in lawful custody, that he knew that and that he escaped.

[15] Justice Toogood dismissed the costs appeal. He agreed with Judge Hastings that whether or not a disbursement claim by a McKenzie Friend was recoverable is a matter that should have the involvement of the Solicitor-General, but it was unnecessary to resolve that issue in order to dispense with the appeal. He was satisfied that Judge Hastings made no error in the exercise of his discretion and was satisfied that no miscarriage occurred.

Jurisdiction

[16] Mr Taueki's application for leave to bring a second appeal against his conviction is brought pursuant to s 237 of the Criminal Procedure Act 2011 (CPA). Mr Taueki's application for leave to bring a second appeal in respect of the costs order is brought under s 276 of the CPA. Subsection (2) of both sections provides:

> (2) The High Court or the Court of Appeal must not give leave for a second appeal under this subpart unless satisfied that—
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> (a) the appeal involves a matter of general or public importance; or
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> (b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

[17] This Court recently summarised the approach to be taken when applying this test for the granting of leave to bring a second appeal in *McAllister v R.*[10]

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[10] *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764.

Mr Taueki's submission

[18] In a lengthy submission on the conviction appeal, Mr Taueki identifies a number of instances of police misconduct, including the planting of drug evidence at his residence, the failure to investigate his complaints, breach of the Treaty of Waitangi, unlawful actions, and a long list of failed prosecutions which had been brought against him. Mr Taueki cites seminal authority on the vitiating effect of serious police misconduct on conviction — including *Wilson v R*[11] and *R v Horseferry Road Magistrates' Court ex parte Bennett.*[12] He explains that his connection to Lake Horowhenua, as recently affirmed by the Court of Appeal[13] and Supreme Court,[14] has been ignored by the police. He refers to facts, argument and evidence said to support his version of events on the issue of arrest and custody, including that he drove away to the nursery so he could not have been, and knew that he was not, in custody. He says that the email relied on by the Judges in the lower Courts was not disclosed to him and that it was tainted by the redaction of the quotation marks. All of this culminates in Mr Taueki's claim that the conviction must be set aside.

[19] On the costs appeal, Mr Taueki contends:

(a) The central issue is whether self-represented litigants have the same right to disbursements as represented litigants;

(b) Section 24(d) of the New Zealand Bill of Rights Act 1990 affirms the right of everyone charged with an offence to have adequate time and resources to prepare a defence;

(c) Judge Hastings erred in assuming that *R v Meyrick* precluded an award of disbursements under s 6 of the CICCA in respect of the costs of the McKenzie Friend;

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11 *Wilson v R* [2015] NZSC 189.
12 *R v Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42 (HL).
13 *Taueki v R* [2012] NZCA 428, [2012] 3 NZLR 601.
14 *Taueki v R*, above n 1.

(d) The CICCA does not expressly discriminate between lay litigants and other litigants in terms of expenses;

(e) He has successfully defended 33 charges during the past five years, and the 10 charges heard together with the escaping custody charge; and

(f) Direction on this issue, and in particular whether a disbursement cost in relation to a McKenzie Friend is recoverable, is a matter of some general and public importance — as both Judge Hastings and Toogood J observed.

The Crown's submissions

[20] On the conviction appeal, the central points made by the Crown are:

(a) Mr Taueki's claims about Police misconduct are not directed to the conviction in question and are properly matters for the Independent Police Conduct Authority.

(b) The factual findings about custody were available to the Judge.

[21] As to the costs leave application, the Crown acknowledges, as both Courts below have pointed out, that the scope of disbursements as costs claimable by self-represented persons is a matter of some importance. But the Crown submits that Toogood J was correct to conclude that this was not an appropriate case to determine the McKenzie Friend costs as disbursements point. This is because, as both Courts below have found, the criteria required to be established for awards under ss 5 and 6 CICCA are not made out in Mr Taueki's case.

Assessment

[22] The conviction appeal directed to alleged police misconduct does not raise any issue of general or public importance or give rise to any risk of miscarriage of justice. As the Crown submits, there is no nexus between the alleged police misconduct and the conviction for escaping custody. In fact, the alleged misconduct had nothing to do with the police case on the escaping custody charge or the subsequent conviction. The concerns and corresponding principles enunciated in *Wilson* and *Horseferry* about the maintenance of the integrity of the judicial system are therefore not engaged.

[23] We accept, however, that Mr Taueki's concern about the Judge's findings on custody potentially raises an issue of public importance, namely whether the police officers maintained custody of Mr Taueki such as to enable a charge of escaping custody thereafter to be maintained. The key passages in the District Court judgment are:

> [55] It is obvious that the prosecution must first prove that a person is in lawful custody before moving on to prove an escape (*Dillon v R* [1982] AC 484, [1982] 1 All ER 1017 (PC); *R v Templeton* [1956] VLR 709 (SC)). The Court of Appeal said in *Arahanga v R* [2012] NZCA 480 that a valid arrest is made when the arresting police officer, by words or conduct, makes it clear to the person being arrested is no longer free to go where he pleases. In this case, Constable Johns said that he told Mr Taueki was under arrest and recorded this fact in his notebook. To my mind, Mr Taueki's actions in asking for permission to go back to the nursery means that he accepted that he was no longer free to go where he pleased. He would not otherwise have asked for permission. The evidence of both Constable Johns and Mr Taueki indicates that Mr Taueki was arrested, and that Mr Taueki knew he was arrested.
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> [56] What then to make of the Constables' decision after arresting Mr Taueki to let him return to the nursery in his truck to retrieve some personal items before going to the Police station? These facts are similar to those in *Licciardello v The Queen* [2012] ACTCA 16. In that case, the person who had been told that he was not free to leave and would be required to accompany police officers, but who had not been physically restrained by them, was nevertheless held to have been in custody. In this case, I am satisfied that Mr Taueki was told, and knew, that he was no longer free to go where he pleased. He asked to go to a particular place for a particular purpose, and the arresting officers consented. This does not mean the custody then ended. It means that the custody continued, but on condition and under direction of the Police to go to that place for that purpose. It does not matter that Mr Taueki was not physically constrained because he knew that he was no longer at liberty and knew that he could

> only go to the nursery with the permission of the arresting officers. When Mr Taueki breached those conditions of his continued custody by leaving from the bathroom window, he ceased to be under control of the arresting officers who continued to have ongoing and lawful custody of him (*R v Kura* [2008] NZCA 337 at [16]).
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> [57] It does not matter whether Mr Taueki said he was "on the run" in his email before or after media reports to the same effect. His acknowledgement of escape, and his attempt to explain it away, do not alter the fact that he was arrested, placed in custody, had narrow conditions put on that custody at his request, and then escaped custody when he breached those conditions and left the building, and thereby ceased to be under the control of the arresting officers. I am satisfied therefore that the prosecution has proved beyond a reasonable doubt that Mr Taueki escaped from lawful custody.

[24] The Judge's findings about Mr Taueki's knowledge and understanding were available to him at the point of arrest. The threshold requirements identified in *Arahanga v R* were met:[15]

> (a) the arrester, by words or conduct, makes it clear to the person being arrested that he or she is no longer free to go where he or she pleases; and
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> (b) the person being arrested knows that he or she is no longer free to leave.

[25] But the Court in *Arahanga* noted at [56] that this test was relevant to the facts in that case and that additional issues may arise in other escaping lawful custody cases.

[26] In this case, the issue is whether the officers maintained ongoing custody of Mr Taueki when they gave him permission to drive to the nursery.[16] The Judge regarded asking and receiving permission to leave as evidence of ongoing arrest, rather than termination of custody. Mr Taueki put it colourfully: "'given permission to leave' and 'remaining in custody' is the perfect oxymoron". Being granted this permission was completely contrary to his past experience of arrest. The facts and result in *R v Montgomery*[17] provide an illustration of Mr Taueki's point. Mr Montgomery was given day release from prison and did not return by the allocated time. The English Court of Appeal found that he was not, during his

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15 *Arahanga v R* [2012] NZCA 480, [2013] 1 NZLR 189 at [53].

16 Mr Taueki asserted during cross-examination at trial that he never thought that he was under arrest at any stage during his interaction with the Police on 28 March 2016. He also denied asking permission to return to the nursery.

17 *R v Montgomery* [2007] EWCA Crim 2157, [2008] 2 All ER 924.

temporary release, in custody because not only was he not in prison, but he was not under the direct or immediate control of any representative of authority.[18] This may be distinguished from the facts in *Licciardello v The Queen*[19] cited by the Judge. In that case there was no permission to leave or lack of control so the action of the appellant in running away constituted escaping custody.

[27] The significance of these authorities, if any, will be for the Court hearing the substantive appeal, but we are satisfied that Mr Taueki raises a matter of public importance in terms of defining the circumstances where the police may maintain remote custody of an arrested person and the conditions that must be satisfied in order to maintain such custody. If, in this case, those conditions have not been met, the possibility of miscarriage is raised.

[28] As to the costs appeal, the availability of disbursement awards to self-represented litigants under the CICCA is an issue of general importance. But Judge Hastings refused Mr Taueki's application for disbursements as costs on its merits by reference to the applicable statutory criteria. No inquiry into a point of fact, law or principle of public or general importance was engaged by this fact-specific evaluation.

[29] For completeness, we have examined the costs decision. The relevant sections of the CICCA are:

> **5 Costs of successful defendant**
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> (1) Where any defendant is acquitted of an offence or where the charge is dismissed or withdrawn, whether upon the merits or otherwise, the court may, subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the costs of his defence.
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> (2) Without limiting or affecting the court's discretion under subsection (1), it is hereby declared that the court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to—
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> (a) whether the prosecution acted in good faith in bringing and continuing the proceedings:

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[18] At [15].

[19] *Licciardello v The Queen* [2012] ACTCA 16.

(b) whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence:

(c) whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty:

(d) whether generally the investigation into the offence was conducted in a reasonable and proper manner:

(e) whether the evidence as a whole would support a finding of guilt but the charge was dismissed on a technical point:

(f) whether the charge was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty:

(g) whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.

(3) There shall be no presumption for or against the granting of costs in any case.

(4) No defendant shall be granted costs under this section by reason only of the fact that he has been acquitted or that any charge has been dismissed or withdrawn.

(5) No defendant shall be refused costs under this section by reason only of the fact that the proceedings were properly brought and continued.

6 Costs of convicted defendant

Where any defendant is convicted but the court is of the opinion that the prosecution involved a difficult or important point of law and that in the special circumstances of the case it is proper that he should receive costs in respect of the arguing of that point of law, the court may, subject to any regulations made under this Act, order that he be paid such sum as it considers just and reasonable towards those costs.

[30] Judge Hastings was correct to conclude that the prosecution raised no difficult or important point of law, so s 6 of the CICCA was not engaged. The Judge correctly framed his discretion as a "wide", having regard to what is "just and reasonable" for the purpose of s 5, but cognisant of the proper boundaries between the Executive Branch, Parliament and the Courts. The Judge took into account the context of Mr Taueki's history with the police and reviewed the specific conduct of the police in relation to the charges that were before him. The Judge was well placed

to make that assessment, having spent six days hearing the evidence and then argument on the charges. The Judge's findings on the decision to withdraw charges was reasonable and logically followed from his review of the prosecutor's decision — namely that the decision was properly made after considering all the evidence and the legality of the police search. The Judge's conclusions as to the sufficiency of the evidence to bring the dismissed charges and his assessment of the bona fides of the police were available to him. The granting of leave in respect of the escaping charge does not affect this overall analysis. Whatever the outcome, there was a proper basis for that charge.

Outcome

[31] The application for leave to appeal on one issue is granted, namely whether the police officers maintained custody of Mr Taueki so as to support a charge of escaping custody.

[32] The application on all remaining matters is declined.

Solicitors:
Crown Law Office, Wellington for Respondent