IN THE COURT OF APPEAL

OF NEW ZEALAND

CA 186/2016

BETWEEN PHILIP DEAN TAUEKI

and NEW ZEALAND POLICE

SUBMISSIONS OF THE AMICUS CURAE IN RELATION TO THE APPEAL AGAINST CONVICTION

DATED: 27 JANUARY 2017

Filed By:

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MAY IT PLEASE THE COURT;

Introduction

1. On 6 May 2015 Mr Taueki was found guilty and ultimately convicted and discharged of one charge of escaping lawful custody pursuant to section 120 of the Crimes Act 1961. The issue at the defended hearing was, among others, whether the appellant had been arrested, whether he was in lawful custody and if so, whether he was still in lawful custody at the point when he returned to the nursery where he lived and absconded. The District Court Judge found the charge proven.

2. Mr Taueki appealed the District Court finding to the High Court. The appeal was dismissed.[1]

3. Mr Taueki applied for and was granted leave to bring a second appeal against his conviction by virtue of section 237 of the Criminal Procedure Act 2011 (the "CPA") to this Court.

4. In dealing with the leave application this Court accepted that the appeal may raise 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[2]. The Court of Appeal noted:

   "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. The judge regarded asking and receiving permission to leave as evidence of ongoing arrest, rather than termination of custody."[3]

   And that

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[1] ***Taueiki v R*** [2016] NZHC 667
[2] ***Taueiki v R*** [2016] NZCA 433 (leave to appeal) at para [23]
[3] ***Taueiki v R*** R [2016] NZCA 433 (leave to appeal) at para [26]

"... 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."[4]

5. Thus the sole issue on which leave to appeal has been granted is whether the police officers maintained custody of Mr Taueki so as to support a charge of escaping custody.

6. Mr Taueki is self-represented.

7. These submissions are filed by counsel as *amicus curiae* to assist the Court. Counsel has had the benefit of reviewing the submissions filed on behalf of the Appellant.

Escaping Custody

8. Section 120 of the Crimes Act 1961 provides:

120 Escape from lawful custody

(1) Every one is liable to imprisonment for a term not exceeding 5 years who,—

(a) having been convicted of an offence, escapes from any lawful custody in which he or she may be under the conviction; or

(b) whether convicted or not, escapes from any prison in which he or she is lawfully detained; or

(ba) being subject to an order or direction made under any of sections 38, 42, and 44 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 or section 169 of the Criminal Procedure Act 2011, escapes from the place in which he or she is required to stay under the order; or

[4] ***Taueiki v R*** [2016] NZCA 433 (leave to appeal) at para [27]

(bb) being subject to a public protection order made under the Public Safety (Public Protection Orders) Act 2014, escapes from the residence in which he or she is required to stay under that Act; or

(c) being in lawful custody otherwise than aforesaid, escapes from such custody.

(2) For the purposes of this section, custody under an illegal warrant or other irregular process shall be deemed to be lawful.

9. The issue identified for this appeal predicates a finding that Mr Taeuki had been placed under arrest and was in custody at least intitially. However in order to assess whether custody of Mr Taeuki was maintained it is useful to traverse the what amounts to an arrest.

Arrest

10. In the 2012 case of ***Arahanga v R***[5] the Court of Appeal reviewed the case law relating to arrest. Having reviewed ***Police v Thomson***[6], which was consistent with the English decision of ***Alderson v Booth***[7] (***Alderson*** having been cited with approval in ***Ahmed v R***[8]) and considering a High Court decision of Justice Simon France in ***Ballantyne v Police***[9] to conclude that, at para [47] :

"This means that, under the case law to date relating to escaping from custody charges, there are three alternative means of effecting an arrest:

(a) The actual seizing on touching of a person's body with a view to his or her detention; or

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[5] ***Arahanga v R*** [2012] NZCA 480
[6] ***Police v Thompson*** [1969] NZLR 513 (SC)
[7] ***Alderson v Booth*** [1969] 2 QB 216
[8] ***Ahmed v R*** [2009] NZCA 220, [2010] 1 NZLR 262
[9] ***Ballantyne v Police*** HC Auckland CRI-205-404-110, 27 July 2005

(b) words of arrest and submission to arrest, including apparent submission; or

(c) words of arrest and the ability at the relevant time to give physical expression to the arrest (absent submission)[10]*."*

And that, at para [48]:

"In order to sustain a charge of escaping lawful custody, the Crown must also prove intent (as well as the absence of any defences raised by the person charged such as a defence of unconscious or involuntary action). Intent would be impossible to prove unless the prosecution proved that the arrested person knew that he or she was no longer free to leave."

11. Thus in ***Arahanga*** Justice Glazebrook, giving the reasons of the Court, identified three alternate means of effecting an arrest (contact, words with submission, words without submission but with the ability to enforce) but determined that for the purpose of the facts of that case the relevant test was a wider one, the ***Goodwin*** test.[11]

12. In ***R v Goodwin***[12] it was held that an arrest can occur through words alone, without submission (real or apparent) or the ability to give physical expression to the arrest. Thus the ***Goodwin*** test for arrest is wider that the three alternate means identified by Justice Glazebrook - an arrest can occur through words alone, without submission by the target of the arrest, and without the ability to give physical expression to the arrest. Arrest, under ***Goodwin***, is completed when:

(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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[10] This third method of arrest is derived from the case of High Court decision of Justice Simon France in ***Ballantyne***. A search of this case reveals that other than its use in ***Arahanga*** it has been adopted on one occasion in the case of ***Hotene v Police*** HC Wellington CRI 2009-485-34 27 May 2009.

[11] Refer para [56] ***Arahanga***

[12] ***R v Goodwin*** [1993] 2 NZLR 152 (CA)

(b) the person being arrested know that he or she is no longer free to leave.

13. As this Court noted in the leave decision[13] the adoption of the ***Goodwin*** arrest test was relevant to the facts in that case and that *"additional issues may arise in other escaping lawful custody cases; for example, whether the person being arrested did in fact escape from custody."*[14]

14. A review of the case law reveals that ***Arahanga*** has not been further considered or commented on (except in the context of sentencing appeals).

15. In ***Licciardello v R*** ACTCA 16 (4 April 2012) the definition of arrest was confirmed as requiring either actual seizing/touching or words accompanied by the submission of the arrested. The Court adopted the ***Alderson*** test. In ***Licciardello*** the case of ***Wilson v New South Wales*** (2010) 278 ALR 74 was discussed. The police had visited Mr Wilson and his address and whilst on the veranda at the address the police said to him that he was under arrest. Mr Wilson responded by locking his door and walked back further into his house. Thus there were the words of arrest without submission. The police left the property initially but returned in order to prevent Mr Wilson from leaving the address. The Supreme Court determined that there had been no arrest - there was no physical contact that could amount to arrest and no submission. The ***Ballantyne*** third method of arrest (words with the ability to enforce the arrest) does not appear to be a feature of the Australian arrest definition.[15]

16. The Court in ***Licciardello*** determined however that the appellant was in custody (although not under arrest) and that leaving without permission did constitute an escape from custody. The custodial status arose because, as was decided in ***Goodwin***, it was made clear to the individual that they were not entitled to leave and yet he did.

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[13] ***R v Taueki*** [2016] NZCA 433 at para [25]
[14] ***Arahanga*** para [56]
[15] Halsbury's Laws of Australia at 80-1020

Custody

17. The analysis of arrest above serves to demonstrate that once arrested the individual is regarded as being in the custody of the arresting officer, however, one can of course be in custody without being under arrest. As Cooke P observed in ***R v Goodwin***[16], where a person is informed they are not free to leave and that is understood by them, this equates to being in custody.

Escaping custody vs permission to leave

18. In the 1921 case of ***R v Keane***[17] the NZ Court of Appeal held that to escape custody required the absconder to be outside the supervision of the authorities. In that case the prisoner had been working outside the prison and walked off into Auckland city. The Court of Appeal stated *"if a prisoner has regained his liberty by getting away from the precincts of the prison, and also from the sight of all prison officials, he then has made his escape, and is no longer in lawful custody"*.[18]

19. A recent application of ***Keane*** is the case of ***R v Kura***[19]. The appellant was under arrest and ran off from the arresting officers, the Court held *"the key question as to whether the escape was complete was not whether the police officers could see the appellant but whether the officers had lost control of the appellant. Here the appellant had removed himself from where he had been arrested against the will of the police officers. The officers had no control at that stage over the appellant. His escape was therefore complete"*[20]

[16] ***R v Goodwin*** [1993] 2 NZLR 153 at 161
[17] ***R v Keane*** [1921] NZLR 581 (CA)
[18] ***Keane*** at page 583
[19] ***R v Kura*** [2008] NZCA 337
[20] ***Kura*** at para 15-17

20. Where there is no permission to leave the matter is more straight-forward. Where the authorities give permission to leave the custodial place or the direct supervision then the position changes.

21. In the English Court of Appeal case of ***R v Montgomery***[21] the defendant was granted a daily temporary release from open prison. He failed to return at the appointed time and remained at large for a period of almost 6 weeks. The Court of Appeal held *"as a matter of common sense and ordinary language what had happened was not that he had escaped from custody but that he had failed to return to it"*[22]. The Court held that conceptually a person may be in custody notwithstanding that he is not physically confined provided that he is nevertheless under the direct control of - that is in the charge of - a representative of authority[23].

22. In ***Montgomery*** the Court reviewed a large number of escaping custody cases to define whether a person is to be regarded as having been 'in custody' in the period immediately prior to, or at the moment of, his non-return from a permissible absence. The Court of Appeal referred to the following:

    22.1 ***E v DPP*** [2002] EWHC 433 (admin), [2002] Crim LR 737 In this case the - 14-year-old appellant had been remanded by the youth court into a secure local authority accommodation was brought to court on the remand date by a member of the local authorities youth offending team. He left court before his case was called. The Divisional Court in dismissing the appeal against the conviction for escaping custody held *"... for a person to be in custody, his liberty must be subject to such constraint or restriction that he can be said to be confined by another in the sense that the persons immediate freedom of movement is under the direct control of another. Whether that is so in any particular case will depend on the facts of the case."*[24]

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[21] ***R v Montgomery*** [2007] EWCA Crim 2157, [2008] 2 All ER 924
[22] ***R v Montgomery*** at para [15]
[23] ***R v Montgomery*** [2007] EWCA Crim 2157, [2008] 2 All ER 924 at para [14].
[24] at paragraph [20] of E v DPP [2002] EWHC 433 (Admin), [2002] Crim LR 737.

22.2 ***R v Rumble***[25] the appellant, immediately after being sentenced to a custodial term, simply left the court which at the time had no security staff present. He was convicted of escaping from lawful custody. The Court of Appeal rejected his argument that he was not in custody because at the point when he walked out no person in authority that had actually sought to constrain his movements. Adopting the earlier case of ***DPP v Richards*** [1988] 3 All ER 406, [1988] QB 701 - the appeal was dismissed because the appellant was in the custody of the court from the moment he surrendered his bail, whether or not any officer or member of the court staff actually sought to constrain him.

22.3 In ***H v DPP*** [2003] EWHC 878 (admin), [2003] Crim LR 560 the appellant who was aged 15 was remanded into the care of a local authority youth offending team member who was arranging for them to be taken to a local authority accommodation to which he had been remanded. The youth worker could not get into her office and told the appellant to wait outside while she tried to get in by another route. She left him there and he absconded. It was held that he was escaping from custody because, as he knew, "*his immediate freedom of movement was under the direct control of [the youth worker]*".

23. In ***Montgomery*** it was determined therefore that to be in custody one must either be physically detained or at least under the direct or immediate control of a representative of authority (the case of ***Rumble*** was held to be consistent with this requirement because the appellant in that case was in the physical custody of the court, even if there was no immediate person present to enforce it).

24. ***Montgomery*** has been cited in the following cases (all with approval and without further elucidation of the principles):

24.1 In the 2015 Court of Appeal Criminal Division judgment of ***R v Wilkins***[26] the appellant had been serving a sentence of imprisonment at an open

[25] ***R v Rumble*** [2003] EWCA Crim 770 [2003] 1 Cr App Rep (S) 618
[26] ***R v Wilkins*** [2015] EWCA Crim 2364

prison. At roll-call he did not report, he was found in a field beyond the boundaries of the prison where he did not have permission to be. The Court of Appeal determined that intentionally going beyond the boundaries of the prison knowing that he was not allowed to go there was an escape from custody.

24.2 In the 2008 Court of Appeal Criminal Division judgment of ***R v Burgess and Byram***[27] where Mr Burgess failed to return to the open prison following an authorised departure for a community visit. The Court of Appeal held that *"The appellant was not in custody. He was free from custody, albeit temporarily and under an obligation to return to continue his sentence and resubmit himself to custody. In short before he did not escape at all. His failure to return the end of the period when he was lawfully at large, would not constitute this offence."*[28]

24.3 In the 2007 Court of Appeal Criminal Division judgment of ***R v O'Neill***[29] the conviction of the appellant was quashed where he had been given one day of home leave from prison and failed to return. The court determined that he did not escape because at the material time he was not in custody having been given permission to be absent for the day.

25. In summary, the UK position appears settled, that if the defendant who was in custody leaves without permission (eg from the boundaries of the prison, or the Court, from the spot they were told to wait outside the youth office) then they will have escaped custody. If, however, permission is given to leave custody a failure to resubmit to custody is not an escape from custody.

26. To be in custody requires either that one is in the confines of a custodial setting (eg within an open prison, or within the boundaries of the Courthouse) or within the direct or immediate control of a representative of authority.

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[27] ***R v Burgess and Byram*** [2008] EWCA Crim 516
[28] ***R v Burgess and Byram*** [2008] EWCA Crim 516 at para [17]
[29] ***R v O'Neill*** [2007] EWCA Crim 3490

27. This position is logically consistent with the case of ***Licciardello v R***, the authority cited in the District Court. In ***Licciardello*** the Court determined that the appellant was in custody because, through words, the police had made it clear that he was not free to go. He was not under arrest because he did not submit to the words of arrest and there was no physical touch (and any arrest would have been unlawful in any event), but he was in custody. On the facts of that case the appellant had asked the police officer to not make him go with them, they had said he had to and that he was "coming with us". It was clear then that he was not free to leave and he had no permission to leave (unlike in ***Montgomery***).

Was Mr Taueki in custody at the time he left the nursery?

28. The issue is whether Mr Taueki was in custody at the time he left the nursery. If:

    28.1 Mr Taueki was still in the supervision and control of the police (albeit remotely) when he went back to the nursery, and he understood that then by absconding he will have escaped custody. However, if:

    28.2 Mr Taueki has asked and been given permission by the police to leave their custody to return to the nursery (even if for a qualified reason such as gathering his belongings), then he will no longer be in the custody of the police and will not have escaped custody when he left the nursery.

29. In the District Court Judge Hastings held that one of the factors indicating that Mr Taueki was still in custody at the point when he returned to the nursery was that he asked for permission to return (thus the Judge inferred that he did not think he was free to go). However, the point is more finely tuned that this. The relevant timeframe for considering whether Mr Taueki was in custody and whether he appreciated this was at the point of when he did leave the nursery (by whatever means).

30. The Appellant would argue that when permission was granted to return to the nursery, this was the termination of the custody that accompanied the arrest and

not an extension of the supervision and control by the police. That whilst the asking to return indicates that he knew that he was under the control of the police at that point, the permission having been granted, as it was in the ***Montgomery*** type cases, this changed the custodial status and the understanding and intentions of the appellant.

Can there be remote or qualified custody?

31. The authorities establish that to be in custody means to be under the direct control and supervision of the representative of authority.

32. In the ***Montgomery*** line of cases there can be no doubt that once the prisoner left the prison boundary without supervision then they were no longer in custody.

33. In the usual arrest/custody procedure direct supervision and control is exercised closely. Physical restraints are one type of control, placing the arrested person into a locked police car, having a police officer closely accompanying an arrested person observing and controlling their every move is standard. Situations where arrests are conducting during the search of a property the arrested is only allowed to exercise movement under the direct supervision of the arrestee (even to go to the bathroom they are accompanied, moving from one room to another, removing or putting on clothing, any telephone contact etc is closely monitored and only with the permission of the police).

34. The purpose of taking custody of an arrested person is not just maintaining their physical presence, but ensuring evidence is not interfered with or disposed of and that the investigation is not hindered. Inherent then in having custody of an arrested person is the ability to closely observe and direct them.

The Evidence

35. There were three accounts in the evidence that relate to the issue of custody. Constable Daley and Constable Johns' were the attending police officers who gave evidence on behalf of the prosecution. Mr Taueki gave defence evidence.

36. In essence the police officers evidence was that Mr Taueki had been placed under arrest and had acknowledged that he was under arrest. The police account was that Mr Taueki asked if he could have a smoke, move his truck to the back of the nursery where he lived and get some personal belongings and his laptop before going to the police station. The evidence was that Constable Johns and Daley told him that he could. Mr Taueki got into his truck and drove it approximately 40 metres. Constable Daley followed on foot. Mr Taueki was free to move around the nursery, make phone calls, and go to the bathroom. He left out of a bathroom window.

37. Arguably at the point when Mr Taueki was given permission to return to the nursery he was being released from custody with the assumption by the arresting officers that he would resurrender himself to them when he had finished moving his truck, having a smoke and gathering his things. Leaving then was not an escape from custody, but a failure to return to it.

38. When the appellant was permitted to drive his own vehicle some 40 metres, and return to the nursery, where he was free to move about without direction, including making unmonitored phone calls this was an example, not of remote control but of no control.

39. What of the argument: he was only allowed to go back to the nursery to park his car and gather his belongings? If it is decided that he was not in custody then a conditional release from custody for a specified purpose is still a release from custody. Mr Taueki breaching the reason for the release would not revert him to being in custody.

40. Arguably in the context of what it means to be in custody, Mr Taueki asked for permission to go to a particular place for a particular purpose and the police agreed that he could be outside of their custody to do those tasks (akin to the ***Montgomery*** asking for a day release from prison for a home visit) but then failed to re-surrender himself to Constable Daley and Johns. This would therefore not be an escape from custody.

DATED at WELLINGTON this 27th day of January 2017:

Elizabeth Hall

Counsel assisting - amicus curiae