IN THE COURT OF APPEAL OF NEW ZEALAND

CA186/2016
[2017] NZCA 113

BETWEEN	PHILIP DEAN TAUEKI Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	20 February 2017
Court:	French, Mallon and Duffy JJ
Counsel:	Appellant in person I R Murray for Respondent E A Hall as Counsel assisting
Judgment:	7 April 2017 at 2.30 pm

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by French J)

[1] Following a judge-alone trial before Judge Hastings in the District Court, Mr Taueki was convicted of escaping from lawful custody.[1] The conviction was upheld on appeal to the High Court by Toogood J.[2] Dissatisfied with that outcome, Mr Taueki then sought and obtained leave to appeal to this Court.[3]

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1 *R v Taueki* [2015] NZDC 7815. Mr Taueki was found not guilty on charges of defacing a building and burglary.
2 *Taueki v Police* [2016] NZHC 667.
3 *Taueki v Police* [2016] NZCA 433.

[2] Leave to appeal was granted on one issue: namely, whether the police officers who had arrested Mr Taueki had maintained custody of him such as to support a charge of escaping custody.

The evidence

[3] In the early hours of the morning, two police officers doing a mobile patrol of the Lake Horowhenua Domain discovered Mr Taueki at a building used by the Horowhenua Rowing Club. One of the roller doors was open and he was removing items from the building into his truck parked alongside. The Rowing Club's occupation of this building and the land on which it sits has been the source of a long standing dispute.

[4] The officers asked Mr Taueki a number of questions and then arrested him for unlawfully being in a building.[4]

[5] Mr Taueki asked if he could take his truck back to a nearby shed where he was living and collect some personal belongings including a laptop to bring with him to the police station. The police agreed to this request. One officer, Constable Johns, stayed at the scene to take photos while the other, Constable Daly, followed Mr Taueki on foot as the latter slowly drove his truck to the shed, some 30 to 40 metres from the Rowing Club building.

[6] Once back at the shed, Mr Taueki parked the truck and went inside. He collected his lap top and a jacket and then made a phone call. While he was still talking on the phone, he went into the toilet area. Constable Daly then heard a loud banging noise and realised that Mr Taueki had exited the shed by climbing out the toilet window. Constable Daly called out to him to stop and that it was just going to make things worse. Mr Taueki who was running through paddocks responded by shouting "[f]uck yous come and get me."

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[4] Mr Taueki continues to dispute the finding that he was ever placed under arrest or, if he was, that it was a lawful arrest but both issues are outside the scope of the appeal.

[7] Mr Taueki argues that in circumstances where he was allowed to drive his truck, and was not stopped from making a phone call, collecting his belongings and going to the toilet,[5] he was no longer in custody at the time he exited via the toilet window.

The legal principles

[8] This appeal proceeds on the basis of Judge Hastings' finding that Mr Taueki was told he was under arrest and knew he was no longer free to go where he pleased. That is to say, it proceeds on the basis he was lawfully arrested at the Rowing Club building.

[9] Following a lawful arrest, a person is in the lawful custody of the arresting officer. There is well established New Zealand authority as to what constitutes a lawful arrest,[6] but unfortunately little or no authority on the issue of whether custody continues. Counsel have however drawn our attention to a line of English authority which we have found most helpful and which we respectfully adopt.[7]

[10] The following principles can be distilled from those authorities:

(a) The word "custody" should be given its natural and ordinary meaning. For a person to be in custody, their liberty must be subject to such constraint or restriction that they can be said to be confined by another, in the sense that their immediate freedom of movement is under the direct control of another.[8]

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5 Mr Taueki claimed in submissions that he also had a smoke and a cup of tea once back at the shed. However, although there was evidence his original request to return to the shed included a request to have a smoke, there was no direct evidence he did in fact have a smoke and a cup of tea. That was never put to Constable Daly in cross-examination and indeed never stated by Mr Taueki himself in his evidence

6 See *Arahanga v R* [2012] NZCA 480, [2013] 1 NZLR 189 at [53]–[56]; and *R v Goodwin* [1993] 2 NZLR 153 (CA).

7 *E v Director of Public Prosecutions* [2002] EWHC 433 (Admin); *H v Director of Public Prosecutions* [2003] EWHC 878 (Admin), [2003] Crim LR 560; *R v Rumble* [2003] EWCA Crim 770, (2003) 167 JP 205; *Regina v Dhillon* [2005] EWCA Crim 2996, [2006] 1 WLR 1535; *Regina v Montgomery* [2007] EWCA Crim 2157, [2008] 1 WLR 636; *R v O'Neil* [2007] EWCA Crim 3490; *Regina v Burgess* [2008] EWCA Crim 516; and *Regina v Wilkins* [2015] EWCA Crim 2364, [2016] 4 WLR 109.

8 *E v Director of Public Prosecutions*, ibid, at [19].

(b) Once taken into lawful custody, a person must remain under sufficient direct control or direct lawful control of the custodian for the custody to continue.[9]

(c) Whether that is so in any particular case is a question of fact.[10]

(d) A person may be in custody notwithstanding that they are not physically confined or under continuous supervision provided they are nevertheless under the direct control of — that is, in the charge of — the relevant authority.[11]

(e) If custody is not maintained, and the person is therefore not in custody at the time he or she absconds, it cannot be said as a matter of logic or language that they have escaped from custody. What has happened is that they have failed to return or resubmit to custody. Thus, a prisoner granted day release from prison who failed to return to the prison at the end of the day was held not to have escaped from custody because during the course of the day there had been no form of supervision by the prison.[12] He was not under the prison's direct or immediate control.

[11] In addition to the above, it is also of course necessary as part of the mens rea of the offence of escaping from lawful custody to prove that the arrested person knew he or she was no longer free to leave.[13]

Application of legal principles to the facts

[12] The critical factor is the degree of direct or immediate control.

[13] As Constable Daly himself conceded under cross-examination, it was in hindsight probably unwise to allow an arrested person to drive away in a vehicle.

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9 *Dhillon*, ibid, at [28].
10 *E v Director of Public Prosecutions*, ibid, at [19].
11 *Montgomery*, ibid, at [14]; and *Rumble*, ibid, at [6].
12 *Montgomery*, ibid, at [15]; and see *Burgess*, ibid.
13 *Arahanga v R*, above n 6, at [53].

However, as the officers knew, the distance from where the truck was parked to Mr Taueki's residence was only a matter of 30 to 40 metres and Constable Daly followed on foot within touching distance from the truck. Mr Taueki characterised the permission he was given as permission to leave. But that is to misstate the evidence. The permission was very specific — it was to go to a specific place for a specific purpose. And it was under the supervision of Constable Daly as evidenced by the fact he accompanied the truck.

[14] On arrival at the shed, Constable Daly followed Mr Taueki into the shed and observed him collecting his belongings.

[15] Both the phone call and the visit to the toilet were outside the scope of the express permission that had been granted back at the Rowing Club building, but the phone call was made within sight and earshot of Constable Daly. He heard Mr Taueki telling the person at the other end that he thought he had been illegally arrested and detained. Constable Daly did not accompany Mr Taueki to the toilet but, as the English cases show, the custodian can be absent from the scene on a temporary basis without custody necessarily coming to an end. [14] Indeed in this case, we consider Constable Daly could properly be criticised had he attempted to stop Mr Taueki from going to the toilet or tried to accompany him. Mr Taueki was only in the toilet area for a few minutes before exiting.

[16] In the circumstances detailed above, we are satisfied on the evidence that at all times Mr Taueki remained under the direct control of the police and that therefore he remained in custody throughout.

[17] As for Mr Taueki's knowledge that he was not free to leave the shed, Mr Taueki's submission was that only he knows the state of his own mind. Therefore if he asserted (as he does) that he considered he was free to go, then that must be the end of the inquiry. However, that is patently not correct. A fact-finder is fully entitled to draw inferences about a person's intent and knowledge from their conduct. Indeed, if it were otherwise, it would mean a defendant could never be found guilty of an offence unless they admitted the necessary mental element.

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[14] For example see *H v Director of Public Prosecutions*, above n7, at [18] and [19].

[18] There was in our view sufficient evidence to support the concurrent finding of Judge Hastings and Toogood J that Mr Taueki knew he was not free to move where he liked both at the time of the arrest and when he exited via the toilet window. In particular, we point to the following items of evidence:

- the fact Mr Taueki thought it necessary to seek permission to move the truck and collect his belongings;

- the fact he did not object to Constable Daly following him and entering the place where he was living;

- the comments he made on his phone call;

- the fact he chose to exit via a toilet window rather than through the front door;

- the fact his response to Constable Daly's direction to come back was not to say "I don't have to" but rather "come and get me"; and

- the content of an email he sent to a friend saying "I am sending you this email from a clearing known to Muaūpoko as I am on the run after escaping police custody on the weekend."[15]

Outcome

[19] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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[15] Mr Taueki submitted the words in the email ("on the run") had been in quote marks and that the copy of the email put to him in cross-examination which did not contain any quote marks had been doctored. There is no evidence of any doctoring. Furthermore, although another defence witness claimed there were quote marks after Mr Taueki had given his evidence, Mr Taueki himself did not raise it. In any event, whether those words were in quote marks or not, the email also contained a reference to escaping from police custody.