IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-404-406
[2019] NZHC 2107

BETWEEN	PAUL GORDON DAVEY Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 23 July 2019

Counsel: J W Clearwater for Appellant
M J Mortimer for Respondent

Judgment: 27 August 2019

JUDGMENT OF BREWER J

This judgment was delivered by me on 27 August 2019 at 4:00 pm

Registrar/Deputy Registrar

Solicitors:
Clearwater & Associates (Auckland) for Appellant
Meredith Connell (Auckland) for Respondent

Introduction

[1] Mr Davey appeals convictions entered by Judge J Jelas on one charge of refusing to permit a blood specimen to be taken[1] and one charge of resisting police.[2]

[2] The nub of the appeal is that it was the police officer involved who acted unlawfully, not Mr Davey.

[3] My task is to assess whether a miscarriage of justice has occurred. In doing so, I must reach my own view of the evidence, bearing in mind any advantage Judge Jelas had through actually seeing the witnesses.[3]

Background

[4] There is evidence to the following effect: A car was seen driving erratically by a member of the public. The police were informed. Constable Keating was directed to investigate. A short time later he found the car parked in a driveway of a suburban home. The constable parked his police car in the street and walked up the driveway towards the car. Mr Henry, the tenant of the garage on the property (converted to a dwelling), was present. Constable Keating asked him whether he knew the driver of the car. Mr Henry's reply was to the effect he did not know the driver, but he knew the owner. Mr Henry indicated Mr Davey who was standing nearby. Constable Keating spoke to Mr Davey and Mr Davey admitted being the driver of the car. However, Mr Davey challenged Constable Keating's right to be on the property by repeatedly asking him whether he had a search warrant.

[5] There is controversy over the order of events, and what was actually said, but at some stage Constable Keating required Mr Davey to undergo a breath screening test. Mr Davey refused, and refused to accompany the police officer for the purpose of undergoing an evidential breath/blood test. Constable Keating arrested Mr Davey and Mr Davey resisted being arrested by stiffening his body and refusing to walk.

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1 *Police v Davey* [2018] NZDC 20673; and Land Transport Act 1998, s 60(1)(a).
2 Summary Offences Act 1981, s 23(a).
3 *Sena v Police* [2019] NZSC 55.

[6] Mr Davey was a visitor to the property. One tenant of the property (Mr Henry was a sub-tenant) was Mr Davey's ex-partner. She was absent. Mr Davey had taken to spending weekends at the property with the consent of his ex-partner. Also present was the 15-year-old daughter of Mr Davey and his ex-partner, Ms Brooke Davey. Ms Brooke Davey lived at the address and was also involved in this incident. What she said to Constable Keating was also the subject of dispute at the trial.

The issue

[7] A police officer has the same right as any other member of the community to walk onto someone else's residential property for a lawful purpose.[4] For example, a stranger to a neighbourhood looking for a friend's address might go to the door of a house and knock with the intention of asking whether the occupant knows where his friend lives. That is not an act of trespass. However, if the person who answers the door tells the visitor to leave the property, and the visitor refuses, then the visitor is unlawfully on the property as a trespasser. Of course, that depends on the person who answered the door having the lawful authority to require the visitor to leave.[5] To illustrate through extremes, a burglar would have no such authority, but the owner of the house would.

[8] Here, Constable Keating walked onto the property lawfully because he was there for a lawful purpose, to make inquiries as to whether the car was the one reported as being driven erratically and whether, if so, the driver was present. The issue is whether Constable Keating's implied licence to be present on the property was revoked before he started acting coercively by requiring Mr Davey to undergo a breath screening test, to accompany him for the purpose of undergoing an evidential breath/blood test and then arresting him when he refused. It is the issue because if Constable Keating's implied licence to be on the property had been revoked then he was thereafter a trespasser and his coercive requirements were unlawful. He should have left the property and applied for a search warrant to re-enter.

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4 *R v Bradley* [1997] 15 CRNZ 363 (CA) at 368; *Attorney-General v Hewitt* [2000] 2 NZLR 1100 (CA); *Transport Ministry v Payn* [1977] 2 NZLR 50 (CA); and *Robson v Hallett* [1967] 2 QB 939.

5 See *Lovelock v Ministry of Transport* HC Timaru GR102/80, 21 July 1981*; Robson v Hallett*; and *Torres-Calderon v Police* [2018] NZHC 722, [2018] NZAR 665.

[9] The issue is complicated by the fact that Constable Keating encountered and spoke to three people after he walked onto the property. The issues relating to them are:

Mr Davey:

- Did Mr Davey have the right to tell Constable Keating to go?
- If so, did he tell Constable Keating to go?
- If so, did he tell Constable Keating to go before Constable Keating exercised his coercive power?

Ms Brooke Davey

- Did Ms Davey have the power to tell Constable Keating to go?
- If so, did she tell Constable Keating to go?
- If so, did Ms Davey tell Constable Keating to go before Constable Keating exercised his coercive power?

Mr Henry

- Did Mr Henry give Constable Keating permission to be on the property which continued through the period in which he dealt with Mr Davey?
- If so, did that permission entitle Constable Keating to remain even if Mr Davey and/or Brooke Davey had the right to tell him to go and did so?

District Court decisions

[10] Judge Jelas gave two decisions relevant to this appeal. The first was in response to an application by Mr Davey at the end of the Crown case for the charges

against him to be dismissed.[6] Judge Jelas in her judgment of 18 April 2018 declining to dismiss the charges found Mr Davey had no authority over the property to enable him to require Constable Keating to leave.[7] Further, on the evidence the Judge did not consider Mr Davey had actually required the constable to leave:

> [13] In addition, I do not consider there was a revocation of the implied licence. Mr Davey's repeated reference to a search warrant is not an act revoking the Constable's licence. The test for revocation is objective. A misapprehension by Mr Davey that a warrant was required was not a revocation but rather a misstatement of law.
>
> (footnotes omitted)

[11] Judge Jelas dealt with a number of other objections to the legality of the way Mr Davey was treated by the police, but they are not pursued on this appeal.

[12] The trial resumed, and evidence was called on behalf of Mr Davey. At the conclusion of the defence evidence, Mr Davey again applied for the two charges against him to be dismissed. The application was determined against Mr Davey by Judge Jelas in her judgment of 5 October 2018. Having dismissed the application, the Judge found the charges to be proved. Findings by the Judge relevant to the issues on the appeal regarding Ms Davey are:

(a) Ms Davey did not have the lawful authority to revoke Constable Keating's implied licence.[8] Ms Davey was the daughter of a tenant of the property (in addition to her mother, her mother's partner was a named tenant on the tenancy agreement). Therefore, the Judge concluded, while Ms Davey was lawfully on the premises that did not give her the authority to revoke Constable Keating's implied licence of entry. Merely being a child of a tenant and resident at the property did not give her an agency on behalf of the tenants to exercise their authority in this way.

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6 *Police v Davey* [2018] NZDC 2896.
7 At [12].
8 *Police v Davey*, above n 1, at [8].

(b) Ms Davey did not actually tell Constable Keating to leave.[9] Instead, all that was asked of him, multiple times, was whether he had a search warrant. Where Constable Keating's evidence conflicted with that of Ms Davey, the Judge preferred the evidence of the constable.

Mr Davey's case on appeal

[13] On appeal, Mr Davey argues that Judge Jelas was in error in concluding that Mr Davey, and/or Ms Brooke Davey, did not have the authority to require Constable Keating to leave and did not in fact do so. So far as Mr Davey is concerned, the submission is that, on the evidence, Mr Davey asked Constable Keating whether he had a warrant to be on the property "about one minute into the conversation". The constable replied that he did not require a search warrant and that under the Land Transport Act he had a right to be there. According to Constable Keating:[10]

> … the conversation kept on going around in a circle that I needed a search warrant and I explained that I didn't need a search warrant and I required him to undergo a breath screening test. I believe I did this at least five times.

[14] Later, in response to a question from the Judge, Constable Keating said:[11]

> He kept on saying that I couldn't be on the property, I needed to go away and get a search warrant and it was just a, it was just a circuitous conversation.

[15] Mr Clearwater for Mr Davey submits this evidence can only be interpreted as being a denial by Mr Davey of the constable's implied licence to be on the property and amounts to a requirement for the constable to leave. Mr Clearwater submitted also that Mr Davey had the authority to require the constable to leave because he was lawfully present as a periodic guest of the tenants and because Ms Brooke Davey gave evidence that while her mother was away she was in charge but when Mr Davey was at the property both were responsible as to who visited it.

[16] So far as Ms Brooke Davey is concerned, the submission is she had authority to require the constable to leave because she lived on the property and while her

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9 At [10].
10 NOE, 8 August 2017, at p 25, lines 18– 21.
11 At p 26, lines 26–28.

mother was away she was in charge. Ms Brooke Davey explicitly or impliedly exercised her authority to tell the constable to leave, but the constable did not.

The Crown's response

[17] Mr Mortimer's first submission is that, regardless of the positions of Mr Davey and Ms Brooke Davey, Mr Henry was clearly, as sub-tenant, able to give Constable Keating permission to be on the property and to remain there. He submits that on the evidence Mr Henry did so.

[18] The evidence is that Mr Henry, having pointed out Mr Davey to the constable when he first arrived, went into his garage. He reappeared at the time the constable was attempting to arrest Mr Davey. Mr Henry did not oppose the constable being on the property. To the contrary, he urged Mr Davey to co-operate with Constable Keating and to go to the Police Station to sort things out.

[19] Mr Mortimer submits that where a person who has authority over a property permits a person to remain on it, then that permission confers lawful authority to remain on the property even if others who are entitled to exercise authority direct the person to leave.[12]

[20] The Crown supports Judge Jelas's finding that, regardless of authority, neither Mr Davey nor Ms Brooke Davey directed Constable Keating to leave. All they did was question the constable's right to be there without a search warrant.

[21] Mr Mortimer, properly, conceded that at common law an occupier is defined as someone who has a sufficient degree of control over premises to come under a duty of care to those who come lawfully onto the premises.[13] He accepted, without conceding the point, that Ms Brooke Davey and possibly Mr Davey could be considered occupiers under this test.

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12 *Bell v Police* HC Dunedin, AP 10/01, 27 June 2001 at [15]; citing *R v Thornley* (1980) Cr App R 72 (CA); and *Attorney General v Hewitt*, above n 4.

13 *Wheat v E Lacon & Co Ltd* [1965] 2 All ER 700 (CA).

Discussion

Mr Davey

Did Mr Davey have the right to tell Constable Keating to go?

[22] The evidence is that Mr Davey had been staying weekends at the property with the permission of the tenants. When Constable Keating arrived, the tenants were absent attending their church (per Mr Henry) or shopping (per Ms Davey). Mr Davey was a guest and he was no longer in an intimate relationship with his ex-partner.

[23] I have not found, or been referred to, authority explicitly setting out who is authorised to withdraw or revoke an implied licence. However, I accept that the ability to grant or revoke permission to be on land has generally been attributed to a person who is an occupier, or in possession of that land.[14]

[24] In tort a person is prima facie entitled to sue for trespass if they had possession of the land at the time of the contended trespass.[15] Actual possession consists of intention to possess the land and the lawful exercise of control over it to the exclusion of other persons.[16] Without either element, a person will generally lack the authority to revoke a licence, implied or otherwise, unless acting as an agent of someone who does.

[25] I note that answering implied licence questions of this type requires a balance between individuals' right to privacy and public interest in the enforcement of the criminal law.[17] The privacy interest is more forceful regarding the dwelling itself than the property outside it.[18]

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14 See *Transport Ministry v Payn*, above n 4; *Howden v Ministry of Transport* [1987] 2 NZLR 747 (CA) at 751; *Lovelock v Ministry of Transport*, above n 5; *Police v McDonald* [2010] NZAR 59 (HC)*;* and *King v Police* [2010] NZAR 45 (HC)

15 Stephen Todd (ed) *The Law of Torts in New Zealand* (9th ed, Thomson Reuters, Wellington, 2019) at [9.2.04].

16 At [9.2.04]; citing *Moore v MacMillan* [1977] 2 NZR 81 (SC) at 88; *Shattock v Devlin* [1990] 2 NZLR 88 (HC) at 112; and *Attorney-General v Hewitt*, above n 4, at 118.

17 See *Robson v Hallett*, above n 4; *Howden v Ministry of Transport*, above n 14; *R v Bradley*, above n 4; and *R v Pou* [2002] 3 NZLR 637 (CA).

18 See *Howden v Ministry of Transport*, above n 14, at 755.

[26] In *Edwards v Attorney-General* Dobson J said the following on the authority of a visitor or guest to revoke an implied licence:[19]

> … such a decision is dependent on the particular facts. In the absence of specific evidence I think that the authority of a casual visitor or guest to deal on the occupier's behalf with strangers coming on to the premises must be regarded as quite limited. Clearly a request to leave by a person having no such authority would be ineffective. Here there was no express evidence that the plaintiff had any direct authority to give such a direction and having regard to all the evidence, including the degree of vagueness on the plaintiff's part as to how long he had been at the Cortina Avenue address, I am not prepared to infer the presence of any such power.

[27] I agree with Dobson J that "the authority of a casual visitor or guest to deal on the occupier's behalf with strangers coming on to the premises must be regarded as quite limited". Such a person is not generally to be classified as an occupier, or in possession of land. They could not sue in trespass in respect of intrusion on the land. Of course, if a casual visitor or guest has been given authority by an occupier to act as the occupier's agent in controlling access to the land then that is a different matter.

[28] Judge Jelas, as the Crown accepts, erred in taking the position that only a tenant is authorised to revoke an implied licence to be on the property. The position is wider than that. It depends on the evidence.

[29] Mr Davey was more than a casual guest. He was a regular weekend guest. He did not give evidence and neither did his ex-partner or her new partner. I must apply the law as I understand it to the limited inferences I can draw from the evidence which was called before the Judge.

[30] I do not consider that a regular weekend guest, without evidence of entitlement, obtains by that fact the status of occupier or possessor of land. I do not think that a weekend guest, relying only on that status, could sue in trespass.

[31] The more pressing point is whether Mr Davey had delegated authority, implicit or actual, from the tenants (his ex-partner and her new partner) to control access to the property in their absence. I infer he did. Mr Davey was a guest, the only adult at the property. There were children present. One, at least, was his daughter and also the

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[19] *Edwards v Attorney-General* [1986] 2 NZLR 232 (HC) at 239.

daughter of a tenant. I infer the tenants, away from their home for a short time, would naturally expect Mr Davey to act on their behalf as a responsible adult in keeping the children and the property secure from visiting strangers.

[32] Ms Brooke Davey stated that when her mother was away Mr Davey and she were responsible as to who visited the property. She was not asked on what basis she made that statement. It stands baldly. Judge Jelas did not place weight on Ms Davey's evidence. From reading the notes of evidence it appears Ms Davey was particularly partisan in favour of her father's case. Judge Jelas assessed Ms Davey as a witness and I cannot say her assessment was wrong. I do not find that Ms Davey's statement on this point adds to the inference I have drawn.

[33] I infer and conclude that when Constable Keating entered the property Mr Davey, acting with the implied agency of the tenants given the circumstances, had the right to cancel the constable's implied licence to be on the property.

If so, did he tell Constable Keating to go?

[34] An implied licence may be revoked at any time, expressly or by implication.[20] Whether certain words or conduct amount to a revocation of an implied licence requires an objective and contextual assessment of fact.[21]

[35] If a licence to be on private property is revoked before a request to take a breath screening test is made, the power to make such a request ceases to be exercisable on the property.[22]

[36] The Crown contends there must be clear and unequivocal withdrawal of the licence by someone entitled to withdraw it.[23] Counsel points to *Dallas v R*, in which an appellant told a constable that unless he was under arrest the constable was unwelcome.[24] The Court of Appeal held those words were not sufficiently unequivocal to withdraw the officer's implied licence to be there.

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20 *R v Meyer* [2010] NZAR 41(CA) at [12].
21 *Hewson v Police* HC Wellington AP 140/96, 14 November 1996.
22 *Howden v Ministry of Transport*, above n 14, at 752.
23 *Dallas v R* (1996) 3 HRNZ 204 (CA); and *Attorney-General v Hewitt*, above n 4, at [23].
24 At 207.

[37] In *Harris v Attorney-General* the phrase "fuck off" was deemed to require some further element – words, actions, or context – to constitute a revocation of licence to be on the property (the phrase having multiple meanings in popular parlance).[25] In *Lovelock v Ministry of Transport* an appellant saying he was home now and there was nothing the traffic officer could do about it anymore was not equivalent to a demand that the officer leave.[26] In *Attorney-General v Hewitt* simply "lying low" and not responding to calls or knocks was not considered a refusal of entry.[27] In *Hewson v Police* slamming a door and saying "I don't want to talk to you" was deemed to suffice.[28] In *Wiltshire v Police* an appellant's refusal to provide a licence pursuant to s 175(3)(a) of the Sale of Liquor Act 1989, while telling police they did not have authority to be inside his private residence without a warrant (while in his private residence which they mistakenly entered, it being adjoined to the bar) was deemed a clear revocation.[29]

[38] Constable Keating told Judge Jelas (quoted at [14]) that the point came where Mr Davey told him he could not be on the property and that he needed to go away and get a search warrant. From the context of the constable's evidence, that occurred after he had required Mr Davey to accompany him. Prior to that, Mr Davey appears not to have explicitly told Constable Keating to leave the property. The words he used were indirect – repeatedly asking about a search warrant is somewhat analogous to declaring "I am home and you can't do anything" as in *Lovelock*, being a superficially legalistic reference to the officer's authority for being present, but not an overt instruction for him to leave.

[39] On the other hand, in a context where Constable Keating was clearly interested in Mr Davey's problematic driving, Mr Davey repeatedly challenging the constable's presence by asking if he had a warrant to be there, in an apparently hostile manner, conveys a clear intent the constable must leave if he does not have one. Constable Keating mistakenly thought he was empowered under the Land Transport Act to be on the premises and told Mr Davey that. Had he instead conceded that he did not have

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25 *Harris v Attorney-General* HC Auckland, CIV 2004-404-5787, 5 July 2006, at [148].
26 *Lovelock v Transport*, above n 5, at 5.
27 *Attorney-General v Hewitt*, above n 4, at [6].
28 *Hewson v Police*, above n 21, at 5.
29 *Wiltshire v Police* HC Napier AP 20/2006, 3 August 2006 at [22].

positive authority to be there, Mr Davey would likely have told him explicitly to go. I note that in *Howden v Ministry of Transport* a traffic officer's implicit misrepresentation that he had authority to be on private property, while made in good faith, induced the appellant's co-operation with breath testing, rendering that evidence unfairly obtained.[30]

[40] I bear in mind that many ordinary citizens are not aware of the extent of their legal rights.[31] While Mr Davey appeared to have some experience in situations like this, it is unlikely many citizens would intuitively appreciate a legal distinction between demanding a warrant from a police officer who is present and telling them to go explicitly. I consider most objective observers would consider Mr Davey's message to Constable Keating to be "if you do not have legal authority to be here you must go". In the context of the constable mistakenly believing he had a statutory right to be on the property, I consider the words Mr Davey used sufficiently clear to revoke the constable's implied licence to be present.

If so, did he tell Constable Keating to go before Constable Keating exercised his coercive power?

[41] The evidence on this point is not clear. Constable Keating himself does not claim to have made the request for a breath screening test before being asked for a warrant.

[42] The constable's evidence-in-chief was that after some initial questions:[32]

> A. I explained to him, I kept on explaining, the conversation just went, kept going around in circles and that my reason for being on the property and he kept on telling me that I needed a search warrant to be on the property.
>
> Q. And then when he questioned you about the search warrant, what did you advise him?
>
> A. I kept on telling I didn't require a search warrant. Under the Land Transport Act, I had the right to be there but it's just the conversation amount in a circle.
>
> Q. Did you explain anything further about that right?

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30 *Howden v Ministry of Transport*, above n 14, at 752.
31 See *Torres Calderon- v Police*, above n 5, at [56].
32 NOE, 8 August 2017, at pp 24-25.

A. I did, I said, “I require you to undergo a breath screening test for me”.

Q. And what was the reason you required him to undergo a breath screening test?

A. I believed that he was intoxicated.

Q. And did you explain this?

A. Yes.

Q. To the man?

A. Yes.

Q. And after you explained this to the male what happened?

A. The conversation kept on going around in a circle that I needed a search warrant and I explained that I didn’t need a search warrant and I required him to undergo a breath screening test. I believe I did this at least five times.

[43] As I have said, the constable was wrong in his view that the Land Transport Act entitled him to be present. He was relying on s 119 of that Act which gives rights of entry in a situation of fresh pursuit. This was not such a situation. It may be that the constable’s mistaken belief in his right to be present was the reason why he stayed on the property in the face of Mr Davey’s evident hostility to his presence.

[44] In cross-examination Constable Keating denied that the first thing Mr Davey said was his query about having a search warrant. From context, the constable was referring to his earlier evidence of the initial conversation being about Mr Davey being the driver of the vehicle, what complaint had been made, and where he had been driving. In answer to a question from the Judge the constable said the enquiry about the search warrant came “within the first minute”.

Conclusion

[45] I am not satisfied Constable Keating exercised his coercive power before he was impliedly told to go by Mr Davey.

Ms Brooke Davey

Did Ms Davey have the power to tell Constable Keating to go?

[46] I am of the view that Ms Davey had the power to tell Constable Keating to go. She was 15 and lived at the property. Ms Davey not being a tenant does not change my analysis. Her mother and her mother's partner were absent and had left her in charge of the property. Mr Davey's return to the property gave him the right to also control access to the property by strangers, but that did not displace Ms Davey's control.

[47] Mr Clearwater cited the British case of *Robson v Hallett*, in which the sons of an occupier were regarded as able to grant licence to enter property on behalf of the occupier.[33] Cited in that case, *McArdle v Wallace* indicated that a member of an occupier's family might or might not have the implied authority of the occupier to tell someone to leave.[34] In *Lovelock v Ministry of Transport* the son of an occupier of property had sufficient authority to revoke an implied licence on the basis that he had been staying there temporarily and had sufficient status to do so.[35] While these decisions are not binding, I consider the reasoning persuasive and applicable to this case. Nothing, in my view, is changed by the fact of Ms Davey being a minor. It would be a very odd thing if a 15-year-old occupant of a property, in the absence of her tenant parent, could not control access to the property by strangers.

[48] The Crown in its written submissions points to s 95 of the Search and Surveillance Act 2012, which provides that a person under 14 years of age is not authorised to consent to the search of a place, vehicle, or other thing. In my view this provision serves to protect children from erroneously consenting to searches that put themselves or others at legal risk. I do not consider that it indicates that a young person should not have authority to expel a trespasser, should they be required to. Regardless, Ms Davey was over 14 years old at the time.

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33 *Robson v Hallett*, above n 4.
34 *McArdle v Wallace* (1964) 108 Sol J 483 (QB).
35 *Lovelock v Ministry of Transport*, above n 5, at 5.

If so, did she tell Constable Keating to go?

[49] Ms Davey gave evidence that she was present from the beginning of her father's interaction with Constable Keating.[36] Mr Henry's evidence was also to that effect.[37] Ms Davey testified that after her father (immediately) challenged Constable Keating's authority by asking about a warrant she did the same.[38] As I have discussed, Judge Jelas was not inclined to accept Ms Davey's evidence.

[50] Constable Keating's evidence was not very clear as to the presence and actions of Ms Davey. In his evidence-in-chief he referred to her "being obstructive" as one of a crowd of people towards the end of the interaction,[39] but in cross-examination said he was not sure when she arrived.[40] He could not recall details of what she had said. He stated that that he did not recall Ms Davey telling him he had to leave the property but accepted it may have happened.[41]

[51] On the evidence, there is nothing to suggest that Ms Davey did not repeat the demands for a warrant and/or tell Constable Keating to leave. I accept Ms Davey probably did, at least, challenge the constable's presence by joining with her father in asking about a warrant. I have already indicated I consider this challenge to be sufficient to revoke Constable Keating's licence to be there in the circumstances of this case.

If so, did Ms Davey tell Constable Keating to go before Constable Keating exercised his coercive power?

[52] Ms Davey said she asked about a warrant after her father did. Given the constable's lack of recall about the order of events I find it more likely than not that Ms Davey chimed in on this issue before the request for a breath screening test.

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36 NOE, 5 September 2018, at p 9.
37 At p 46.
38 At p 10.
39 NOE, 8 August 2017, at p 29, line 17.
40 At p 53–54.
41 At p 61–65.

Mr Henry

Did Mr Henry give Constable Keating permission to be on the property which permission continued through the period in which he dealt with Mr Davey?

[53] Mr Henry had a clear right, as sub-tenant of a part of the property, to cancel Constable Keating's implied licence to enter the property and be on or near the driveway.

[54] Mr Henry's role in what happened is largely uncontested. He gave evidence for Mr Davey at the trial.

[55] Initially, Mr Henry spoke to Constable Keating and, responding to his inquiry, pointed out Mr Davey as the vehicle's owner. He did not revoke the implied licence and by his actions endorsed it. Tacitly, he gave Constable Keating permission to be on the property for the purpose the constable had indicated, to inquire about the driver of the vehicle.

[56] Mr Henry then went into his dwelling. He came out when the constable was arresting Mr Davey. Mr Henry made no attempt to revoke the constable's licence even when Mr Davey complained to him that he had "trespassed" the constable. To the contrary, Mr Henry advised Mr Davey to co-operate:[42]

> A. Constable Keating said he was arresting Paul and I asked him what for and he said I'm not going to go into it again I think was his comment, so.
>
> Q. Do you recall Mr Davey saying anything around this time?
>
> A. Well Paul was saying he can't do this, he's trespassing, I have trespassed him.
>
> Q. Did you in the presence of Constable Keating give Paul any advice?
>
> A. Well I didn't know what the legal situation was there with what right of entry and this sort of thing.
>
> Q. So what did you say?
>
> A. So I said to Paul, look, it might be best to just go along with things and get your lawyer, give your lawyer a call and get him to sort it out.

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[42] NOE, 5 September 2018, at p 47.

[57] In my view, Mr Henry gave Constable Keating tacit permission to be on the property in the context of the constable wanting to talk to Mr Davey. He then withdrew to his dwelling. When he returned to the driveway, the situation had changed completely. Mr Henry responded to that new situation by advising Mr Davey to co-operate with Constable Keating, not knowing what the legal position was.

[58] I conclude the tacit permission Mr Henry gave to Constable Keating to be on the property continued throughout the period the constable engaged with Mr Davey. However, this is subject to the next issue.

If so, did that permission entitle the constable to remain even if Mr Davey and/or Brooke Davey had the right to tell him to go and did so?

[59] The Crown has pointed to a small number of authorities in which permission granted to police by an occupier to be on property was upheld by courts, despite another occupier having purported to revoke any permission or having demanded they leave at the time.[43] Those cases were all in the context of domestic disputes.

[60] In *Bell v Police* the police officers were invited inside by the defendant's partner, who was concerned for her safety and wished to retrieve her son and sufficient possessions to stay at a women's refuge overnight.[44] Justice Panckhurst considered there was no basis to believe on probable grounds that an offence likely to cause immediate and serious injury was about to occur, which would have entitled police to enter regardless.[45] He accepted that *R v Thornley* and *Attorney-General v Hewitt* were "authority … for the general proposition that where there are co-occupiers of a property one may grant a licence to the police to enter, albeit that the other does not do so, indeed positively indicates to the police that their presence is not welcome."[46] He adopted as a ruling the headnote of *R v Thornley* that police "were entitled to remain on the premises for a reasonable period of time in order to carry out that

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43 *Bell v Police*, above n 12, at [15]; citing *R v Thornley*, above n 12; and *Attorney General v Hewitt*, above n 4.
44 *Bell v Police* at [3].
45 At [10].
46 At [15].

investigation to their satisfaction, notwithstanding they had been told by the appellant husband to get out."[47]

[61] The present case is not directly comparable to the domestic violence cases. In those cases, one occupant requested police enter for a specific purpose directed toward the other occupant who consequently opposed the police being there. The domestic violence context raises discrete policy considerations.

[62] In this case Mr Henry knew that Constable Keating had entered the property to inquire about the driver of the car. Mr Henry gave his tacit permission for that. Mr Davey, and probably Ms Davey, subsequently objected to the constable's presence when they realised where his questions were leading. The issue is whether their implied direction that the constable go overrides Mr Henry's permission for the constable to be there.

[63] In my view, the permission given by Mr Henry was a limited one: to speak to Mr Davey. Mr Henry then withdrew to his dwelling. He knew nothing of what then occurred. He did not hear Mr Davey demanding to know if Constable Keating had a warrant. He did not hear the constable's responses. I conclude that when Mr Henry went away from the scene he must either have left the question of Constable Keating's presence on the property to Mr Davey and Constable Keating, or he did not expect the constable to do more than make inquiries of Mr Davey.

[64] I accept that where control of access to a property is shared no one occupier can claim precedence over another in exercising that control. Had Mr Henry remained outside, and directly or tacitly supported Constable Keating's claimed right to be there, then Mr Davey's implied direction that the constable go would not be effective. But that is not what happened. I do not consider Mr Henry's advice to Mr Davey to co-operate after he had returned to the driveway amounts to an affirmation of a continuing permission for Constable Keating to be there. It is Mr Henry's response to a different situation after the constable had exercised coercive powers.

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47 At [16]; citing *R v Thornley*, above n 12.

Conclusion

[65] Constable Keating entered the property lawfully under implied licence. He gained the tacit permission of Mr Henry to remain on the property to speak to Mr Davey about the driving of the car. Thereafter Mr Henry left matters to Mr Davey and Constable Keating. On the balance of probabilities, Mr Davey made clear to Constable Keating that he should go before the constable used his coercive powers. Mr Davey had the implied authority of the tenants to control access to the property. The constable was under the mistaken view that he was entitled to remain and exercise his powers by reason of the Land Transport Act. Mr Henry's return after the exercise of those powers does not validate them. Accordingly, Constable Keating was not entitled to exercise his coercive powers. He was unlawfully on the property when he did so.

[66] It follows that Constable Keating was not entitled to arrest Mr Davey and Mr Davey's resistance to being arrested was not unlawful.

[67] It was submitted by Mr Mortimer that if I reached these conclusions I should nevertheless rule evidence of Mr Davey's refusal to permit a blood specimen to be taken admissible in the prosecution.[48] That would save the conviction on that charge. Mr Mortimer said he would not in the circumstances apply for the same ruling in respect of the charge of resisting police.

[68] I do not consider this to be an admissibility of evidence issue. The charge of refusing to permit a blood specimen to be taken has as an essential prerequisite (in this case) that Mr Davey refused to undergo a breath screening test after being required to do so by Constable Keating.[49] Since Constable Keating had no lawful right to require Mr Davey to undergo a breath screening test then his refusal cannot found the charge. There is no improperly obtained evidence to admit since Mr Davey never gave a sample. Put another way, if the evidence of all that happened was before a Judge, the charge would be dismissed as lacking an essential underpinning.

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[48] Mr Mortimer referred to s 30 of the Evidence Act 2006 which can permit improperly obtained evidence to nevertheless be used by the prosecution.

[49] Land Transport Act 1998, s 69.

Result

[69] The appeal is allowed. The charges are dismissed. There will not be a re-trial.

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Brewer J