IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2019-404-090
[2019] NZHC 1335

BETWEEN	COLIN WEBSTER Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 28 May 2019

Appearances: S Kimberley and R N Roy for the Appellant
S M Murphy for the Respondent

Judgment: 13 June 2019

JUDGMENT OF PALMER J

Solicitors: Crown Solicitor, Manukau
Public Defence Service, Manukau

Summary

[1] In August 2018, Mr Colin Webster called for Police assistance at his home in Manurewa, Auckland, because of an altercation with his methamphetamine-addicted son. Mr Webster was highly agitated and holding a metal pole a short distance from his son when the Police arrived. The two constables did not know quite what the situation was. One entered his property, without permission, to ask questions and Mr Webster pushed him away. He was charged with behaving in a disorderly manner, to which he pleaded guilty. He was also charged with assaulting a police officer in the execution of his duty and possession of an offensive weapon, to which he pleaded not guilty but was convicted after a trial. He appeals.

[2] A reasoned judgment is essential to a fair trial. The judgment under appeal did not identify the law, or directly engage with the issue, of the lawfulness of the constable's presence on Mr Webster's property. I do not consider the constable was lawfully on the property and, therefore, he was not in the execution of his duty. Neither did the judgment under appeal identify the legal definition of an offensive weapon or provide any reasoning about whether its possession was proved. I do not consider the evidence sustains, beyond a reasonable doubt, that the metal pole was intended by Mr Webster for the use of causing bodily injury or that he had no reasonable excuse to hold it. Accordingly, there was a miscarriage of justice in respect of each conviction. I allow the appeal of both convictions and set aside the sentences. I also set aside the sentence of community work for behaving in a disorderly manner, which was not lawfully available.

What happened?

[3] Mr Webster's evidence was that his son had been struggling with methamphetamine addiction issues for five years and Mr Webster had previously called the Police for assistance at his home on a number of occasions. In the early hours of 13 August 2018, he said he had had an altercation with his son who had ripped their mail box out of the ground. Three hours later he called the Police. They arrived around midnight, as he was chasing his son away from the driveway and away from his other son's car. Mr Webster said he was pleased the Police had arrived, he walked

back into his property and told them his son was a P-head and they needed to take him away.

[4] The evidence of Constables Mendoza and Park was that they saw Mr Webster either inside or outside his fence waving or brandishing a metal pole. His son was about three to six metres away on the street or near the footpath. At trial Mr Webster denied holding a metal pole or bar though he accepted there was a bar inside the fence. There was a lot of screaming and shouting by Mr Webster and his son. Constable Park said he secured details from the son, who he observed to be unaffected by drugs or alcohol. Constable Mendoza said he told Mr Webster to put the pole down and was abused for his efforts. Mr Webster acknowledged he was absolutely angry and Constable Park kept trying to ask him questions. He acknowledged he told the police to "fuck off" and "go and do your job". Constable Mendoza accepted Mr Webster told him his son was the troublemaker and that he wanted his son removed.[1] Constable Park said Mr Webster told him his son was the problem, but did not recall him asking them to take his son away.[2] But the Constable said he was informed by Police communications staff that Mr Webster had called Police saying that he wanted his son removed who was high on methamphetamine.[3] There were allegations at trial of racial abuse on both sides.

[5] Constable Mendoza said, after a minute and a half or so, Mr Webster had put the pole down and was standing inside his fence. Accounts of what happened next vary slightly. Constable Park said he opened the gate to arrest Mr Webster and took steps forward, Mr Webster stood in front of him and told him to get out, Mr Webster pushed him and tried to close the gate but Constable Park put his foot on the gate to prevent it closing.[4] Constable Mendoza said Constable Park tried to open the gate but Mr Webster tried to push it back and then used both hands to push Constable Park's chest, forcing him to step backwards.[5] Mr Webster said he deliberately closed the gate to his property and Constable Park tried to knee the gate back open while he was

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1 Notes of Evidence (NOE) 10/4–23.
2 NOE 28/12–27.
3 NOE 19/19–24, 22/26–27.
4 NOE 23/30–24/14.
5 NOE 6/11–19.

shutting it, so he pushed it hard.[6] He denied the assault, saying there was no physical contact and the officers gave false evidence.

[6] Mr Webster then went inside his house. Constable Mendoza's evidence was Mr Webster rang 111 again and made threats against the Police while inside. Eventually, Mr Webster came out of the house and Constable Park arrested him.

[7] Constable Mendoza's evidence was that he was concerned that his safety and that of Constable Park was at risk.[7] Constable Park said the reason he could not leave the property was that he needed to know who was in the house and whether anyone was injured.[8] He was trying to investigate further and make sure whoever else was involved was fine.[9]

[8] Mr Webster was charged with behaving in a disorderly manner under s 4(1) of the Summary Offences Act 1981, to which he pleaded guilty. He was also charged with assaulting a police officer acting in the execution of his duty and possession of an offensive weapon, to which he pleaded not guilty and for which he was tried the Manukau District Court on 18 January 2019.

[9] My overall impression, from the papers, is that the altercation leading to these charges owed much to emotion and mis-communication. Mr Webster was in a highly emotionally charged state, as might be expected of someone dealing with a child addicted to methamphetamine over a number of years, with whom he had just had a confrontation. The police officers had a difficult situation to deal with and were not sure what was going on. The question is whether the elements of each of the two offences were satisfied.

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6 NOE 42/8–10.
7 NOE 12/9-18.
8 NOE 23/28-24/2; NOE 30/10-13.
9 NOE 30/21; NOE 31/19.

The decision under appeal

[10] On 18 January 2019, Judge A C Roberts had no hesitation in accepting the evidence of the two officers, over that of Mr Webster, that there was a push.[10] He considered they were acting in the execution of their duty when Constable Park sought to enter the property and was assaulted. He found Mr Webster was in possession of the metal pole.[11] Judge Roberts stated Mr Webster would be convicted and found "[t]here is proof in abundance to substantiate both charges".[12] On the same day, Judge Roberts sentenced Mr Webster to 100 hours' community work, imposed on the offence of assaulting the police officer. He imposed concurrent sentences of 50 hours' community work for the offensive weapon offence and 40 hours for what he described as the "disorderly behaviour" offence.[13] Mr Webster appeals against the assault and offensive weapon convictions.

The law of conviction appeals

[11] Under s 232(2) of the Criminal Procedure Act 2011, relevantly, I must allow an appeal against conviction if: I am satisfied the Judge erred in his or her assessment of the evidence, to such an extent a miscarriage of justice occurred (subs (b)); or a miscarriage of justice has occurred for any reason (subs (c)). Otherwise, I must dismiss the appeal. A miscarriage of justice is defined to be "any error, irregularity, or occurrence in or in relation to or affecting the trial" that "has created a real risk that the outcome of the trial was affected" or "has resulted in an unfair trial or a trial that was a nullity".

[12] The Supreme Court recently considered and clarified the meaning of s 232(2)(b) in *Sena v New Zealand Police*.[14] The Court noted that, even in 1982 under predecessor appeal provisions for summary proceedings, "an unreasoned decision was highly likely to be set aside on appeal".[15] It considered it "reasonably clear" that the

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10 *New Zealand Police v Webster* [2019] NZDC 3296 at [21] (the judgment is erroneously dated 18 February 2019).
11 At [21].
12 At [23].
13 *New Zealand Police v Webster* [2019] NZDC 5595.
14 *Sena v New Zealand Police* [2019] NZSC 55.
15 At [10].

legislative purpose of s 232(2)(b) was that appeals be dealt with in the same manner.[16] Its reasons included that "there is no sensible policy reason why the approach to appellate review of decisions made by a judge should be less intensive in criminal cases than in civil cases".[17] Accordingly, the conventional *Austin Nichols* approach applies.[18] It is for the appellant to show that an error has been made and the appellate court must take into account any advantages a trial judge may have had, meaning an appellate court will exercise "customary caution" to a challenge to credibility findings based on contested oral evidence.[19] But, if the appellate court comes to a different view of the evidence, the trial judge must necessarily have erred and the appeal must be allowed.[20]

[13] The Supreme Court's requirements of judicial reasoning also apply to appeals under s 232(2)(c). Absence of reasons is highly likely to be an error. The Court explained the kind of reasons judges should provide:[21]

> They should show an engagement with the case, identify the critical issues in the case, explain how and why those issues are resolved, and generally provide a rational and considered basis for the conclusion reached. Reasoning which consists of conclusory credibility preference is unlikely to suffice. The language of s 232(2)(b) reflects an assumption that the reasons given by a judge will reflect that judge's assessment of the evidence and why that assessment resulted in a conviction. A failure to provide such an assessment frustrates the operation of s 232(2)(b) and may well engage s 232(2)(c); this on the basis that a reasoned judgment is essential to a fair trial. A failure to provide a reasoned resolution of a significant evidential dispute may, alternatively, suggest a misapprehension of the effect of the evidence, for instance a misapprehension of the significance of the dispute.

[14] The Court also accepted that "imperfection of expression is practically unavoidable, particularly in oral judgments":[22]

> In saying all of this, we accept that imperfection of expression is practically unavoidable, particularly in oral judgments. Accordingly, appellate courts should assess reasons contextually, in light of the evidence given and allowing for the burden for judges of balancing the need for prompt determination of criminal cases with other workload requirements. The adequacy (or not) of

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16 At [26].
17 At [30].
18 At [32], citing *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
19 At [38].
20 At [38].
21 At [36].
22 At [37].

> reasons must be assessed in light of the type of case (including seriousness) and the issues involved. What is required are reasons which address the substance of the case advanced by the losing party. Depending on the circumstances, this can be achieved without necessarily referring in detail (or sometimes at all) to every issue or argument which that party has advanced.

[15] If there are no reasons at all, the appeal court must undertake its inquiry afresh, without the assistance of the trial judge. In *Sena*, the Supreme Court allowed the appeal on the ground the reasons given by the Judge for finding the appellant guilty were inadequate.[23] It found she mischaracterised the substance of evidence by some witnesses and erred in her assessment of the evidence to such an extent that a miscarriage of justice had occurred.[24] It quashed the convictions and directed a new trial.

Assaulting a police officer in the execution of his duty

The law of a constable executing his or her duty

[16] Section 10 of the Summary Offences Act 1981 provides, relevantly, "[e]very person is liable … who assaults any constable … acting in the execution of his duty". What is involved in a constable acting in the execution of his or her duty? It is a fundamental principle of New Zealand law that the coercive power of the State, including entering onto private property, may only be exercised under lawful authority.[25] There was no implied licence to enter, in the circumstances here.

[17] Police rely on s 14 of the Search and Surveillance Act 2012 (the Act) regarding entry to prevent an offence or respond to a risk to life or safety. Section 14(1) provides a constable may enter a place, and take any action he or she has reasonable grounds to believe is necessary to prevent offending or to avert an emergency, if he or she has "reasonable grounds to suspect that any 1 or more of the circumstances in subsection (2) exist in relation to a place …", which are:

> (a) an offence is being committed, or is about to be committed, that would be likely to cause injury to any person, or serious damage to, or serious loss of, any property:

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23 At [47].
24 At [56] and [58].
25 *Entick v Carrington* (1765) 19 State Trials 1029; 95 ER 807.

(b) there is risk to the life or safety of any person that requires an emergency response.

[18] Alternatively, the Police rely on s 8 of the Act. It provides a constable may enter a place without a warrant and arrest a person the constable suspects has committed an offence, where he or she has reasonable grounds, under subs (2):

(a) to suspect that the person has committed an offence punishable by imprisonment and for which he or she may be arrested without warrant; and

(b) to believe that the person is there; and

(c) to believe that, if entry is not effected immediately, either or both of the following may occur:

(i) the person will leave there to avoid arrest:

(ii) evidential material relating to the offence for which the person is to be arrested will be destroyed, concealed, altered, or damaged.

[19] In reviewing the Act in 2017, the Law Commission did not consider the difficulty in satisfying s 8 was reason enough to justify widening it, noting the power "was intended to be available in a relatively small number of cases only".[26] It cited the Court of Appeal in *H v R* which stated:[27]

> The power vested by s 8 is of an extraordinary nature. Any entry or search of a property is a trespass unless conducted in accordance with a warrant lawfully issued or in the absence of a warrant within carefully prescribed statutory limits. The text and context of s 8 leave no doubt that police officers are authorised to exercise the warrantless power of entry and search only in very narrowly defined circumstances. There must be a real and pressing need to act urgently because otherwise the person would avoid arrest or evidential material will be damaged or destroyed.

[20] In *R v Fraser*, the Court of Appeal interpreted a predecessor to s 8 in 2004 as leaving open a carefully circumscribed application of the doctrine of necessity. It held Police can rely on the doctrine of necessity to enter private property where they have reasonably objective grounds for a belief, and do believe, that a 111 call is indicative of an emergency where life and safety are endangered.[28] The Court considered the integrity of the 111 emergency system is based on acceptance by citizens that, in

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26 Law Commission *Review of the Search and Surveillance Act 2012* (NZLC R141, 2017) at [13.14].
27 *H v R* [2015] NZCA 49 at [10].
28 *R v Fraser* [2005] 2 NZLR 109 (CA) at [33].

exercising their duty arising from an emergency call, the Police may impinge upon private property rights.[29] In *Aue v Police,* the High Court suggested the doctrine of necessity did not apply to a 111-call asking for help with a verbally abusive adult son where: no weapons were involved; the Police had assessed the situation as presenting no apparent risk; and police officers were only sent four hours after the call.[30]

[21] Since those cases the Act, including s 14, has been passed regarding emergency responses by the Police. The Act derives from a Law Commission report proposing that a statutory power of warrantless entry and the common law doctrine of necessity be codified in a single provision with two limbs: "one for crime prevention, and one for emergency assistance to people".[31] The Commission's reasoning for the recommended threshold for entry, of "reasonable grounds to suspect", was "[t]hese are circumstances where quick action is paramount; police delay out of concern that they do not know enough about the circumstances to satisfy the threshold of belief would jeopardise the interests we are seeking to protect".[32] The proposed threshold for further action, having entered, was to be reasonable belief, as the common law had previously set for entry as well. The defence of necessity was recommended to be expressly preserved for people other than police officers, which was achieved by s 44.[33]

[22] I consider it likely, as Ms Kimberley submits, that the doctrine of necessity now has no independent existence from the Act, as far as police officers are concerned. Section 14 now appears to "cover the field" and substitutes for, or subsumes, the application of the doctrine of necessity in emergency situations. But, whether or not that is so, the result is the same here.

Submissions

[23] Ms Kimberley, for Mr Webster, submits Constable Park entered the property without lawful authority when the assault occurred so he was not acting in the execution of his duty. She submits he had no reasonable grounds for suspicion under

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29 At [28].
30 *Aue v Police* [2013] NZHC 637, [2013] NZAR 471.
31 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [5.50].
32 At [5.56].
33 At 146, recommendation 5.8.

s 14 and there was no emergency. She submits s 8 does not apply because Constable Park was not sure what offence he suspected Mr Webster of committing, Constable Park could have asked further questions from where he was and Mr Webster did not display an intention to leave or avoid arrest or interfere with evidence. She submits it was not necessary for him to enter the property.

[24] Ms Murphy, for the Police, submits the Judge did not err. She submits *Sena v New Zealand Police* applies to appeals under s 232(2)(b) and, in relation to s 232(2)(c), does not establish more stringent requirements for the adequacy of reasons than those addressed by the parties. She submits Constable Park was lawfully entitled to enter the property under the doctrine of necessity which is preserved by s 14 of the Act. She relies on *Fraser* and *Aue* on the basis the 111-call indicated a threat to public safety which was confirmed by Mr Webster's agitation and refusal to follow directions. She submits Constable Park had a duty to investigate the reason for the call and identify anyone who needed protection and his entry onto the property was as minimal as possible. Alternatively, she submits s 8 entitled entry onto the property.

Should the conviction be overturned?

[25] Judge Roberts identified the elements of the offence of assaulting a police officer in the execution of his or her duty, being an assault and the officer being in the execution of his duty. He found Mr Webster pushed Constable Park when he attempted to enter the property, which was an assault. As to the Judge's reasoning, he said "[t]his comes down to a question of credibility".[34] It can be inferred, from his repeated characterisation of the witness testimony, that Judge Roberts' finding in this regard was based on his view of Mr Webster's "attitude", "fixation" and "disturbed thought patterns".[35] He stated, in the sentence preceding his statement that it comes down to credibility: "[i]f the police had to deal that night with the attitude that this man shows in [t]his very Court trial regarding his behaviour, then I have every sympathy for them".[36]

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34 *New Zealand Police v Webster,* above n 10, at [21].
35 *New Zealand Police v Webster,* above n 10, at [16] and [20].
36 At [20].

[26] This is not particularly persuasive reasoning. A judge, like a jury, needs to be careful not to draw inferences of guilt from a witness's demeanour in court. The Judge's reasoning here looks like the sort of "conclusory credibility preference" which the Supreme Court in *Sena* warns "is unlikely to suffice" as reasoning.[37] It appears that Judge Roberts' concluding paragraph was accurate in saying he had rejected Mr Webster's evidence "out of hand".

[27] However, there was evidence on which a finding of assault could be based. The record shows Mr Webster's evidence that he pushed the gate, rather than Constable Park, was consistent with some of Constable Mendoza's evidence. But the evidence of the two police witnesses was generally consistent about Mr Webster pushing Constable Park, and not so consistent as to suggest it was concocted. The credibility of Mr Webster compared with that of the constables is a relevant consideration. I do not consider Judge Roberts erred in finding an assault had occurred.

[28] The second, and primary, issue on appeal is whether Constable Park was executing his duty when he attempted to enter Mr Webster's property and was assaulted. Judge Roberts identified the issue, which was put by defence counsel in cross-examination, of whether the constable had authority to enter onto the property.[38] However, having identified the issue, Judge Roberts did not engage directly with the question of whether Constable Park had lawful authority to enter onto the property. He had "no hesitation in saying that these police officers were acting in the execution of their duty and particularly Constable Park at the time he was assaulted".[39] And he had "no doubt at all that the constable, his concern possibly for the presence of others, was acting in his duty when he sought to enter the property".[40] He said "[o]ne only has to have regard to what it was these two officers witnessed" and pointed to the officers observing Mr Webster on the footpath with a metal bar, "behaving aggressively and in a disorderly manner" and being "unsure whether there was anyone

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37 *Sena v New Zealand Police,* above n 14, at [36].
38 At [15].
39 At [21].
40 At [22].

else in the house".[41] But the Judge did not relate any of his reasoning to the issue of whether there was lawful authority for Constable Park to enter Mr Webster's property.

[29] In relation to s 14 of the Act, there was no consideration of what offence was being committed or about to be committed, that "would be likely to cause injury to any person" or why there was "risk to the life or safety of any person that requires an emergency response". Was such reasoning available? From the perspective of the Police, that midnight, they were responding to a 111 call and Mr Webster was angry and abusive and had been brandishing a metal pole. He would not engage with their questions. But, by the time Constable Park attempted entry, Mr Webster had dropped the pole and was standing inside his property at his gate some distance from his son. Constable Park's evidence was that he had not identified an offence being committed.

[30] The closest the evidence comes to satisfying s 14 is that Constable Park was concerned there might be someone else in the house, which the Judge did mention. But the constable knew Mr Webster was the one who had made the call and knew he wanted them to take his methamphetamine-using son away. It was reasonable for Constable Park to continue to try to find out what was going on. But that does not satisfy the requirements of s 14 to empower him to enter the property. Constable Park's evidence was that he did not know there was anyone else inside. And there was no indication in Mr Webster's 111 call that anyone else was involved in the dispute. I do not consider the officer had reasonable grounds to suspect an offence was about to be committed causing injury or that there was a risk to the safety of any person requiring an emergency response. Quick action, in entering the property, was not paramount and not doing so would not have jeopardised emergency assistance. Accordingly, I do not consider the Police proved beyond reasonable doubt that Constable Park was lawfully on Mr Webster's property under s 14 and was, therefore, acting in the execution of his duty when he was assaulted.

[31] Neither do I consider Constable Park was lawfully on Mr Webster's property under the circumstances very narrowly defined in s 8. I consider there is insufficient evidence that Constable Park had reasonable grounds to believe, if entry was not

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41 At [21].

effected immediately, Mr Webster may leave to avoid arrest or evidence may be destroyed. There was no "real and pressing need to act urgently", in the words of the Court of Appeal in *H v R*.

[32] Overall, in relation to the issue of whether Constable Park was acting in the execution of his duty, I consider the decision under appeal is under-reasoned. A reasoned judgment is essential to a fair trial. There was a useful recitation of the evidence. But, in his oral judgment at the end of the trial, the Judge did not identify the law, or directly engage with the issue, of the lawfulness of the constable's presence on Mr Webster's property. The decision does not meet the requirements set out by the Supreme Court in *Sena*. This is not a matter of expecting too much of the Judge in the time available. A necessary issue was either missed or the reasoning omitted. Either frustrates the operation of s 232(2)(b) and engages s 232(2)(c). In any case, I have to make up my own mind on appeal. I do not consider the constable was lawfully on Mr Webster's property when the constable was assaulted and he was not, therefore, in the execution of his duty. There was a miscarriage of justice. I uphold the appeal of the conviction for assaulting a police officer in the execution of his duty.

Possession of an offensive weapon

The law of possession of an offence weapon

[33] Mr Webster was also charged with the offence of possession of an offensive weapon under s 202A(4)(a) of the Crimes Act 1961. It holds liable a person who, "without lawful authority or reasonable excuse, has with him or her in any public place any knife or offensive weapon or disabling substance". "Offensive weapon" is defined, for that purpose in subs (1), to mean "any article made or altered for use for causing bodily injury, or intended by the person having it with him or her for such use". An intention to frighten or intimidate has been held to be insufficient unless the intention is to cause injury by shock.[42]

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[42] *R v Edmonds* [1963] 2 QB 142 (Crim App) at 150–151 and *R v Rapier* (1979) 70 Cr App R 17 (Crim App), where the Court of Criminal Appeal interpreted an equivalent definition of offensive weapon.

[34] In assessing intention, it is immaterial whether the article is carried for offensive or defensive purposes, although that may be relevant to the issue of reasonable excuse.[43] In *Thompson v Police*, a member of a gang left its headquarters with a baseball bat over his shoulder during a time of high gang tension in Invercargill. His evidence was that he went outside to retrieve a softball and to speak with a gardener, but that he took the baseball bat to defend himself in case he encountered trouble from a rival gang. Tipping J was satisfied the appellant intended to use the bat for bodily injury if the need arose, which was sufficient to satisfy s 202A(1).[44] However, he held the appellant had a reasonable excuse because there was a reasonable possibility he took the bat for purely defensive purposes and it could not be held that he left the headquarters with deliberately aggressive purposes.[45] There was no evidence supporting an inference that he intended to use more force than the circumstances justified. Tipping J stated "one is entitled to go about one's business and is not necessarily confined to staying indoors and calling the Police. Everything must ultimately turn on the reasonableness of one's preparations to act in self-defence in the circumstances prevailing."[46]

Submissions

[35] Ms Kimberley submits the Judge did not consider whether Mr Webster had a reasonable excuse for possessing the weapon and that he did, to defend himself against, or to intimidate, his son who he appeared to believe was high on methamphetamine. She says the convictions are a miscarriage of justice.

[36] Ms Murphy submits Mr Webster did not raise a defence of reasonable excuse, none was available on the evidence and the Judge found there was none. She submits the best evidence Mr Webster intended bodily injury was his behaviour in waving around the metal pole as a weapon, but she acknowledges it could have been used only to intimidate.

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43 *Thompson v Police* HC Invercargill AP35/96, 6 May 1996 at 6.
44 At 7.
45 At 9.
46 At 11.

Should the conviction be overturned?

[37] Early in his judgment, Judge Roberts identified the ingredients of the offence as "Mr Webster was in possession of an item that could be used as a weapon" and that "it is contended it was a steel pipe, that he was in a public place and that he had no lawful authority or reasonable excuse".[47] But the Judge did not identify the definition of offensive weapon for the relevant offence, in s 202A(4)(a): "any article made or altered for use for causing bodily injury, or intended by the person having it with him or her for such use".

[38] All the rest of the judgment concerned the assault charge. The only reasoning relating to whether the offensive weapon charge was proved is the last sentence in the judgment, which appears to be an afterthought, that "[t]here is proof in abundance to substantiate both charges".[48] Such lack of reasoning does not satisfy the Supreme Court's requirements in *Sena.*

[39] Considering the issue afresh, I do not consider the definition of "offensive weapon" is satisfied here. There is no suggestion the metal pole was "made or altered for use for causing bodily injury". For the definition to be satisfied, then, Mr Webster must have "intended … having it with him such use [for causing bodily injury]". The evidence of Mr Webster's behaviour is the best basis on which to establish an intention for use of the pole for causing bodily injury. It was Mr Webster who called the Police which is not the usual course of action of someone intending bodily injury. He had done the same before because his son had initiated fights.[49] The uncontradicted evidence of Mr Webster is that his son was being aggressive and had initiated three fist fights with him that evening and he had acted as if he was going to do a karate kick on his son, causing his son to throw down the letterbox and run.[50] He had the pole when he was confronting his son, when the Police arrived, but dropped it after they arrived. I do not consider the evidence sustains, beyond reasonable doubt, the metal pole being intended by Mr Webster for the use of causing bodily injury.

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47 At [4].
48 At [23].
49 NOE 37/25–30.
50 NOE 37/20–26, 39/32, 40/8–12.

[40] Neither do I consider the evidence sustains, beyond reasonable doubt, Mr Webster having no reasonable excuse to hold the pole. There is a reasonable possibility he held the pole for purely defensive purposes and did not intend to use more force in defending himself than the circumstances justified.

[41] Accordingly, I do not consider it was proved beyond reasonable doubt that Mr Webster possessed an offensive weapon. There was a miscarriage of justice. I uphold the appeal of the conviction for possession of an offensive weapon as well.

Result

[42] I uphold the appeal and set aside Mr Webster's convictions of assaulting a police officer in the execution of his duty and possession of an offensive weapon.

[43] Finally, there is also a problem with the community work sentence the Judge imposed for the conviction for behaving in a disorderly manner under s 4(1) of the Summary Offences Act 1981, to which Mr Webster pleaded guilty. As Ms Murphy responsibly pointed out, community work is not a lawful sentence for that offence. Under s 236(2)(b) and/or s 233(3)(e) of the Criminal Procedure Act 2011, I quash that sentence. Instead, given the process he has already been through, I order Mr Webster, under s 110 of the Sentencing Act 2002, to appear for sentence if called upon to do so within eight months of his conviction. I expect counsel to explain clearly to him, in person, what that means.

Palmer J