



Précis Paper

Limitations of Police Powers

A discussion about the recent decision in the matter of *Jankovic v Director of Public Prosecutions* (2020) NSWCA 31 which focuses on the power of the police to arrest without a warrant.

Discussion Includes

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Limitations of Police Powers

In this edition of BenchTV, Tom Molomby SC (Barrister, Frederick Jordan Chambers, Sydney) and Stewart O'Connell (Senior Lawyer, O'Brien Solicitors, Sydney) discuss the recent decision in the matter of *Jankovic v Director of Public Prosecutions* (2020) NSWCA 31 which focuses on the power of the police to arrest without a warrant.

Background

1. In 2016, Stewart O'Connell received an assignment from legal aid relating to Rodna Jankovic, a Serbian immigrant, internationally standard pianist, and mother of 4.
2. She was facing charges of a breach of an AVO, resisting officers in the execution of their duty and intimidating officers in the execution of their duty.
3. Rodna had led a positive, law abiding life for most of her life. In 2004 she was struck with tragedy where her eldest child died from a brain tumor. One of the after effects was that her former in-laws took out an AVO against her.
4. This was the beginning of how these charges came about. Rodna Jankovic breached that AVO, which led the police to go to Rodna's residence where they arrested her and during the course of that arrest she resisted and used language that could be categorised as intimidating and threatening.

Defence in the local court

5. There was the breach of the AVO which Rodna admitted to the police, which was proceeded with by way of a plea of guilty.
6. There were real concerns about the charges of resist and intimidation. The defence team did not argue that those things did not occur in a factual sense, however argued that when they happened the police were not acting in the execution of their duty.
7. The case failed in the Local Court so it was taken to the District Court on an all grounds appeal where it failed again.
8. There were two parts to Rodna's case; firstly, there was the breach of the AVO and then there were the offences of resisting arrest and intimidating the police. The latter charges were pleaded as not guilty to those offences on the basis that when they did happen, the police were not acting in the execution of their duties.
9. Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) gives the police the power to arrest someone without a warrant. There are two limbs to this section:

- a. the first limb is the question of whether or not the police officer has a reasonable suspicion that the person has committed or is committing a criminal offence. This was not a problem for the police in this matter as clearly an offence had been committed;
 - b. The second limb is that the police officer has to be satisfied that the arrest was reasonably necessary for one of nine purposes that are listed in the act.
10. The argument by the defence was essentially that the police officer had not properly considered the matter so as to reach that state of satisfaction that it was reasonably necessary to arrest Ms Jankovic. The officer gave evidence that he had arrested her to protect the person in whose favour the AVO had been given which is one the nine purposes that is listed in the section.
11. The argument contended was that just having that purpose alone was not enough; there had to be another step taken in that the police officer had to give consideration and evaluation as to whether the arrest was reasonably necessary to achieve that purpose.
12. Rodna had breached the AVO by sending a single text message which did not contain anything that could be considered of a violent or threatening nature. The police received a complaint on the Friday that the text message was sent and did not decide to go and approach Rodna until Monday. There was no history of actual violence between the parties.
13. She admitted sending the text message as soon as the police asked her and elaborated by saying she sent it because she wanted them to stop harassing her as well. In these circumstances, it was contended that there was no need for Rodna Jankovic's liberty to be taken away from her.
14. She asked not to be put in the van because she had claustrophobia and post-traumatic stress disorder and the officers put her in the van anyway. She became upset and started to struggle. She then started using some language against them and made some threats and was then placed in the back of the van and taken to the police station and kept in custody for the day.

Court of Appeal decision

15. The position of the police officer, the magistrate and the District Court judge was that breaching an AVO in and of itself created a reasonable necessity for an arrest.
16. The Court said that the essence of the reasonably necessary criteria in the second limb of Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) was that the section imports a requirement of proportionality into a police officer's decision making.
17. The reasonable foreseeable consequences of continued freedom, either alone or in conjunction with other available measures, are to be compared with the obvious consequences of arrest.
18. Only if, according to an objectively reasonable assessment, continuing freedom with or without some other available measures, presents a significant risk to attainment of any of

the law enforcement results, will immediate arrest be a proportionate response to that risk and therefore substantially preferable and reasonably necessary.

19. The police officer is required to assess the situation at hand and make an evaluative judgement.
20. The court went on to note that in particular there were other alternatives that the police could consider such as a warning, a caution or a penalty notice and in particular they noted Chapter 4 of Part 2 of the *Criminal Procedure Act 1986* (NSW) which allows proceedings for numerous offences including an offence of breaching an AVO to be commenced by the issue of a Court Attendance Notice.
21. A range of measures, obviously less drastic than arrest is thus identified as material to a police officer's decision to arrest without warrant.

The approach of a lawyer trying to attack the lawfulness of an arrest

22. In any cross examination, a lawyer should consider in advance, what the purpose of the cross examination is and what is the submission that they are going to make at the end that the cross-examination ties into.
23. The submission that the lawyer wants to be making at the end of the cross examination is that there is doubt that the police officer undertook the necessary evaluation that the court identified in this case.
24. A lawyer should look at it as a three-pronged approach. The first prong being the first limb of Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and that is whether or not the police officer had a reasonable suspicion that there was an offence committed or being committed.
25. It is important to keep in mind as a second prong, the recent High Court decision of *New South Wales v Robinson* [2019] HCA 46 where the High Court held that an arrest is unlawful unless a decision to charge a person has been made by the police before the arrest.
26. The third prong is the second limb of Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).
27. As a starting point, the lawyer should tie the relevant police officer down to what they say is the purpose of the arrest using the list of nine things found in Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). This then frames the subsequent cross examination.
28. In Rodna's case, the police officer claimed that the purpose of the arrest was to protect the victim.
29. It would then be prudent for the lawyer to start with a broad question along the lines of 'Officer what matters did you take into account when deciding to arrest?'
30. As the cross examination had shown that the officer had not considered at all whether it was reasonably necessary, the defence was able to make the argument that there was a

complete absence of evidence on that issue, which the Court of Appeal held was so in this case.

How the case got to the Court of Appeal

31. The Court held that in the particular circumstances of this case, the complete absence of evidence in relation to that element of the test meant that there was an error of law which amounted to an error of jurisdiction. Therefore, the Court of Appeal could intervene.
32. Section 5B of the *Criminal Appeal Act 1912* (NSW) allows an unsuccessful party in the District Court to ask a judge to state a case which goes to the Court of Criminal Appeal.
33. In this case, the District Court judge refused to state a case as it would be frivolous and vexatious to allow the question to be submitted that it would amount to an abuse of process. The Court of Appeal disagreed with that too. In effect what the Court of Appeal said about a judge refusing to state a case is that it should not be done except in the most extreme circumstances.
34. The Court of Appeal decision did not quite finalise the case. They quashed the rejection of the Appeal to the District Court and they remitted the whole case to the District Court for further hearing according to law according to the decision that they made.
35. As soon as the decision came down, it was accepted by the Director of Public Prosecutions and they agreed to enter into consent orders with them. Those consent orders were that the findings of guilt or the convictions in relation to the resist arrest and intimidate police charges were quashed and that Rodna's legal costs would be paid.

BIOGRAPHY

Tom Molomby SC

Barrister, Frederick Jordan Chambers, Sydney

A senior member of Frederick Jordan Chambers, Tom is highly-regarded in his areas of practice which include defamation, criminal law and inquests and inquiries. With more than 30 years' experience at the Bar, Tom has appeared in a diverse range of significant and complex civil and criminal matters, many of which have considered important questions of law and are now leading authorities. He has appeared in notable cases in the Northern Territory and Australian Capital Territory and regularly appears at both trial level and on appeal in the New South Wales Court of Appeal, Supreme Court and District Court. Notably, Tom has authored four books on Australian cases involving wrongful convictions.

Stewart O'Connell

Senior Lawyer, O'Brien Criminal & Civil Solicitors, Sydney

Stewart has worked as a criminal defence lawyer for over twenty years (including over ten years with the Aboriginal Legal Services in the Northern Territory and ten years in private practice in Sydney) and added defamation to his practice in the last ten. Throughout his legal career Stewart has achieved numerous excellent results for his clients in both the criminal and defamation courts.

REFERENCES

Cases

Jankovic v Director of Public Prosecutions (2020) NSWCA 31

New South Wales v Robinson [2019] HCA 46

Legislation

Criminal Procedure Act 1986 (NSW)

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

Criminal Appeal Act 1912 (NSW)