Supreme Court of Victoria

DPP v Hamilton [2011] VSC 598 (25 November 2011)

Last Updated: 25 November 2011

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

COMMON LAW DIVISION

JUDICIAL REVIEW AND APPEALS LIST

No. SCI 2011 2013

IN THE MATTER of an appeal on a question of law pursuant to s 272 of the *Criminal Procedure Act*

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (ON BEHALF OF STEVEN HEMINGWAY, A POLICE OFFICER) — Appellant

V

ANDREW HAMILTON — Respondent

JUDGE:	KAYE J
WHERE HELD:	Melbourne
DATE OF HEARING:	22 November 2011
DATE OF JUDGMENT:	25 November 2011
CASE MAY BE CITED AS:	DPP v Hamilton
MEDIUM NEUTRAL CITATION:	[2011] VSC 598

CRIMINAL LAW – Resisting member of police in execution of his duties – Suspect fleeing police when spoken to – Not in course of arrest – Refusal to stop when pursued by police – *Summary Offences Act 1966* (Vic) s 52(1).

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr T Gyorffy SC	Craig Hyland, Solicitor for Public Prosecutions
For the Respondent	Mr L Carter and Mr T Bevan	Comito & Associates

HIS HONOUR:

1 The appellant, on behalf of Leading Senior Constable Steven Hemingway ("LSC Hemingway"), brings this appeal, pursuant to s 272 of the Criminal Procedure Act 2009, against a decision of the Magistrates' Court at Melbourne on 4 April 2011. By that decision, the Magistrate dismissed a charge brought by LSC Hemingway against the respondent, Andrew Hamilton ("Hamilton"), that he did on 20 March 2010 resist LSC Hemingway in the execution of his duty, contrary to s 52(1) of the Summary Offences Act 1966 ("the Act").

2 On that evening, LSC Hemingway suspected that the respondent had committed the offence of obtaining property by deception, by leaving a restaurant without paying his bill. LSC Hemingway stopped his vehicle, in order to speak to the respondent. Thereupon, the respondent fled. He was pursued by LSC Hemingway and other police. Ultimately, LSC Hemingway caught the respondent, tackled him, and placed him under arrest. The issue, on this appeal, is whether, by fleeing from the police when they requested to speak to him, the respondent thereby resisted police in the execution of their duty, contrary to s 52(1) of the Act. That section, so far as is material for this case, provides that any person who resists a member of police "in the execution of his duty" shall be guilty of an offence.

3 At the outset, it is important to note what this appeal is, and is not, about. In particular, this is not a case in which, at any material time, the police either had arrested the respondent, or were in the course of arresting him. Nor, on the facts of this case, was there evidence that the respondent was fleeing from the police, having been informed that the police intended, or were attempting, to arrest him. Further, it was accepted, on appeal, that this is not a case in which the respondent, as a suspect, had refused to provide his name and address in response to a request by a member of the police force, pursuant to s 456AA of the Crimes Act 1958. Rather, on this appeal, the issue which must be determined is whether, on the particular facts of this case as set out in the evidence which was led before the Magistrate, the police had the power to require the respondent, as a suspect, to stop and speak to them, notwithstanding that the police were not then in the course of arresting him. The resolution of that issue is critical to the question whether, at the relevant time, the police were acting "in the execution" of their duties for the purposes of s 52(1) of the Act.

The facts

4 The facts relating to the charge may be shortly stated, and they were not in dispute in the hearing before the Magistrate. On 20 March 2010, shortly after 9.00 pm, LSC Hemingway, together with Senior Constables Gibbons and Clark, were on duty in the central business district, near the intersection of Collins Street and Market Street. They were approached and informed by an employee of the Taco Bill Restaurant that two persons had left their premises without paying for food they consumed. The employee indicated to the police the two people to whom he was referring. Senior Constable Gibbons alighted from the police vehicle, and spoke to the respondent and another person who was with him. Thereupon, the respondent immediately gave flight. Constable Clark left the police vehicle, and gave chase on foot. LSC Hemingway pursued the respondent in the police car, having activated the police lights on it.

5 The respondent first fled west in Collins Street, and turned south into Queen Street and ran to Flinders Lane. By then LSC Hemingway had overtaken him and driven across his path. LSC Hemingway challenged the respondent to stop, and told the respondent that he could drive all night, because at that point he (LSC Hemingway) was not tired at all. The respondent looked at LSC Hemingway, changed direction by 90 degrees, and fled east along Flinders Lane. LSC Hemingway continued his pursuit in the vehicle, with Constable Clark doing so on foot. The respondent then turned right into Bond Street, which is a small laneway off Flinders Lane. LSC Hemingway followed in the police vehicle, with Clark still following on foot. At the intersection of Flinders Street, the respondent crossed Flinders Street, and then turned to the east. LSC Hemingway overtook him in the police vehicle, alighted, and tackled him to the ground. The respondent was placed under arrest, and conveyed to Melbourne West Police Station. He was later interviewed at the station, and he made a "no comment" record of interview. He was charged with one offence, obtaining property by deception, and released on bail.

The Magistrates' Court proceeding

6 After a number of mention hearings at the Magistrates' Court, three further charges were brought against the respondent. The fourth charge is that with which this appeal is concerned, the charge of resisting LSC Hemingway in the execution of his duty.

7 At the hearing before the Magistrate on 22 March 2011, the first three charges were withdrawn, so that the only charge heard by the Magistrate was the charge of resisting LSC Hemingway in the execution of his duty. LSC Hemingway, gave evidence, the effect of which I have summarised. At the conclusion of evidence, counsel for the respondent submitted that his client had not committed the offence charged. In particular, he submitted that an accused person could not be guilty of resisting police in the course of their duty, where the accused is simply refusing to do something, which he has no obligation to do. In the present case, he submitted that the respondent had no obligation to respond to the request by LSC Hemingway that the police talk to him. At that stage, he was not under arrest, and he was at liberty to refuse to speak to the police, and to take flight from them.

8 On the other hand, the prosecutor submitted that the police, on the evening, were acting in the lawful execution of their duties, by seeking to speak to the respondent, as a step which was preliminary to arresting him under s 459 of the Crimes Act. He submitted that the actions of the respondent in fleeing from the police, and taking evasive action while being pursued by them, constituted the offence of resisting the police in the execution of their duty.

9 At the conclusion of submissions, the Magistrate reserved his decision, which he delivered on 4 April. His Honour reviewed the facts, and a number of the authorities, to which he had been referred in the course of submissions. The basis of his Honour's decision is contained in paragraphs 11 and 12:

> "[11] Even accepting that Mr Hamilton's actions constitute a physical resistance to LSC Hemingway, the real issue is, what was he resisting and was he entitled to do so. Mr Hamilton was resisting a police request to stop for the purpose of answering questions to which he had no legal obligation to comply. Section 459 of the *Crimes Act* authorises a member of the police force to arrest a person that he or she believes on reasonable grounds has committed an indictable offence. It was not disputed that the police had reasonable grounds for suspecting that Mr Hamilton had committed the indictable offence of obtaining property by deception. He was identified as the person suspected of committing the offence by an employee of the Taco Bill Restaurant. However, his lawful arrest did not occur until the chase ended on Flinders Street when LSC Hemingway detained him, informed

> him that he was under arrest and the reason for it. Mr Hamilton had no prior obligation to stop when requested to do so or answer any questions asked of him.
>
> > [12] Therefore, whilst it may be argued that Mr Hamilton had a moral or social duty to stop when requested to do so and assist the police with their inquiries, he had no legal obligation to do so. On this basis his action in taking flight does not constitute resisting LSC Hemingway in the execution of his duty contrary to s 52(1) of the Act. Accordingly, the charge will be dismissed."

Grounds of appeal

10 The notice of appeal, upon which the appellant relies, contains three grounds of appeal, namely:

> "1. The learned Magistrate erred in finding that the respondent was not resisting a member of the police force in the execution of his duty for the purposes of s 52(1) of the *Summary Offences Act 1996* when he ran away from the policeman after either
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> > (i) the policeman was considering or preparing to arrest the respondent, or
> >
> > (ii) the policeman was attempting to arrest the respondent, or was arresting the respondent.

2. The learned Magistrate erred in finding that the respondent was not physically resisting arrest for the purposes of s 52(1) by running away from the police.
3. The learned Magistrate erred in finding that the respondent did not have a legal obligation to stop when requested to do so by a member of the police force, or when being chased by a member of the police force."

Submissions

11 The parties had each filed written submissions in the appeal. However, the oral submissions made on behalf of the appellant, by Mr T Gyorffy SC, differed substantially from those contained in the written outline filed on behalf of the appellant. In particular, Mr Gyorffy accepted that, at the relevant time of the alleged offence, LSC Hemingway was not arresting, or attempting to arrest, the respondent. He therefore accepted that ground 1(ii) was not tenable. Rather, the focus of Mr Gyorffy's submissions was on ground 3, which is directed to the second sentence in paragraph 11 of the Magistrate's reasons, namely, that the respondent was resisting a police request to stop for the purpose of answering questions " ... to which he had no legal obligation to comply".

12 Mr Gyorffy submitted that the Magistrate's reasoning, in that passage, was based on the position at common law, namely, that a suspect has no obligation to comply with a request by police to stop and speak to them. However, Mr Gyorffy submitted that the common law position was altered significantly by the provisions of subdivision 30(A) ("subdivision 30(A)") of Part 3 Division 1 of the Crimes Act 1958, which were introduced by the Crimes (Custody and Investigation) Act 1988. Mr Gyorffy submitted that those provisions modified the common law position, and had the effect that a police officer is entitled, in the execution of his duty, to detain a person, suspected of an offence, for the purpose of questioning in relation to that offence, with a view to determining whether the suspect ought to be arrested in respect of the offence.

13 In particular, Mr Gyorffy submitted that, before 1988, the common law, and s 460 of the Crimes Act as it was then in force, required that, upon arrest, a person be brought before a Magistrates' Court as soon as possible after being taken into custody. No time was allowed to the police to interrogate the suspect. Mr Gyorffy submitted that the amendments, introduced in 1988, had the effect of enabling the police to interrogate a suspect, without taking the suspect into arrest, but subject to greater protections being afforded to suspects, both before and after arrest, than had previously been provided, both by the common law and by statute.

14 In particular, Mr Gyorffy relied on s 464(1)(c) of the Crimes Act, which was introduced with the 1988 amendments. That section provides:

> "(1) For the purposes of this subdivision (that is, subdivision 30A) a person is in custody if he or she is —
>
> (a) under lawful arrest by warrant; or
>
> (b) under lawful arrest under s 458 or 459 or a provision of any other Act; or
>
> (c) in the company of an investigating official and is—

(i) being questioned; or

(ii) to be questioned; or

(iii) otherwise being investigated—

> to determine his or her involvement (if any) in the commission of an offence if there is sufficient information in the possession of the investigating official to justify the arrest of that person in respect of that offence."

15 Mr Gyorffy noted that it was not disputed, before the Magistrate, that the police had reasonable grounds for suspecting that the respondent had committed the indictable offence of obtaining property by deception. He contended that, accordingly, the police were entitled to take the respondent into custody, pursuant to s 464(1)(c) of the Crimes Act, for the purposes of questioning him, in order to determine whether or not to arrest the respondent in respect of that offence. Thus, Mr Gyorffy submitted that the respondent was under an obligation to comply with the police request to stop, for the purpose of answering questions by the police. Mr Gyorffy accepted that, in complying with that request, the respondent would not be obliged to answer those questions, but was entitled to rely on his common law right to silence, which is indeed confirmed by s 464J(a) of the Crimes Act. Nevertheless, Mr Gyorffy submitted that the Magistrate erred in holding that the respondent had no obligation to comply with the request by the police that he stop for the purposes of being questioned by the police.

16 Mr Gyorffy further submitted that, in fleeing from the police when requested to speak to them, the respondent had resisted the police in the execution of their duties. He submitted that the act of refusing to stop, of fleeing, and of persisting in his flight, constituted such an act of resistance by the respondent. In support of that submission, he referred to the meaning given to the word "resist" by the Full Court in R v Hansford[1]. He also referred to the Macquarie Dictionary definition of "resist", namely, "to withstand, strive against, or oppose".

17 In conclusion, Mr Gyorffy submitted that, by fleeing from the police, and by refusing to comply

with their request to speak to him, the respondent was resisting the due execution by the police of their duty to investigate the crime, which was suspected to have been committed by the respondent, with a view to arresting him for it.

18 In the written outline, which had been filed on behalf of the appellant, it had been submitted that the legal obligation of the respondent arose, at the least, from the power of the police, pursuant to s 456AA of the Crimes Act 1958, to request a person to state his or her name and address, if the police member believes, on reasonable grounds, that the person has committed an offence. However, Mr Gyorffy accepted, correctly, that there was no basis, in the evidence before the Magistrate, on which he could rely on s 456AA in the present case. In particular, there was no request, or attempt to make a request, by the police, that the respondent state his name or address.

19 In response to the submissions of the appellant, Mr Carter, who appeared with Mr Bevan on behalf of the respondent, submitted, first, that the respondent was under no legal obligation to comply with the request made to him by the police that he stop and talk to them. It is well established, at common law, that, while each citizen may have a moral or social duty to assist the police, there is no such legal duty. Thus, at common law, a citizen is not required to speak to a policeman if requested to do so.[2]

20 Mr Carter further submitted that the provisions of subdivision 30A of the Crimes Act, to which Mr Gyorffy referred, did not, on their proper construction, alter that position. In particular, he submitted that s 464(1)(c) of the Act did not extend the powers of the police; rather, it was designed to reinforce and extend the protections provided by the law to citizens, who are either under arrest, or who are being investigated without being arrested. In particular, Mr Carter pointed to s 464I, which provides that nothing in ss 464 to 464H confers a power to detain a person, who is not under arrest, against his or her will. He also referred to s 464J(a), which provides that nothing in subdivision 30A affects the right of a person, suspected of having committed an offence, to refuse to answer questions or "to participate in investigations", except where required to do so by legislation.

21 Mr Carter further submitted that there is no provision, in subdivision 30A, which confers on the police a power to detain a person for questioning, without arresting that person. In the absence of any such provision, the law would not imply such a power, which would have the effect of significantly detracting from long standing common law rights.[3] Accordingly, Mr Carter submitted that the Magistrate was correct in concluding that the respondent did not have any obligation to stop and speak to the police when requested to do so. He submitted that the accused could therefore not be guilty of resisting a police officer in the performance of his duties, where the person was doing no more than acting in accordance with his or her legal rights.

22 Further, Mr Carter submitted that in any event, on the facts of the case, the prosecution had failed to prove any act of "resisting" by the respondent. He pointed out that, in paragraph 11 of his reasons, the Magistrate assumed, without deciding, that the act of the respondent, in running away from the police, might constitute an act of resisting. Mr Carter submitted that, as a matter of construction, the act of fleeing from the police, in the circumstances described in this case, could not constitute a resisting of police in the execution of their duty contrary to s 52(1) of the Summary Offences Act 1966. In support of that proposition, he referred to the meaning ascribed to the word "resist" in the joint judgment of O'Bryan, Deane and Hudson JJ in R v Galvin (No 2)[4], and by the Full Court in R v Hansford[5]. In particular, Mr Carter submitted that the act of resisting necessarily involved a "physical dimension", by which he meant that the person resisting must, in some way, offer physical opposition to the performance by the police officer of a particular act.

Analysis

23 The offence, provided for in s 52(1) of the Summary Offences Act 1966, is of some antiquity. It had its origins in ss 36 and 38 of The Offences Against the Persons Act 1861. An equivalent

provision was included in s 34 of the Victorian Criminal Law and Practice Act 1864. The section was reproduced (with alterations) in s 36 of the Crimes Act 1890. Since then, it was included, with minor alterations, in the consolidations of the Crimes Act of 1915, 1928 and 1958.

24 At the same time, the common law has long recognised that a citizen does not have a legal duty to cooperate with, or to assist, the police, upon request. In Rice v Connolly[6], the defendant, who appeared to have been acting suspiciously in an area in which there had been a number of burglaries, refused, upon request by a police constable, to give his name and address, and to accompany the police to a police box. He was convicted by the Justices of having wilfully obstructed the police constable in the execution of his duty. That conviction was quashed on appeal to the Court of Queen's Bench Division. Lord Parker stated[7] the basic principles in the following terms:

> "It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place; short, of course, of arrest."

25 The corollary of that principle is that, at common law, the police do not have the power to detain a suspect, in order to question the suspect, with a view to determining whether or not the suspect should be arrested.

26 In Kenlin & Anor v Gardiner & Anor[8], two school boys had been visiting a number of premises for the purpose of reminding members of their school football team of a forthcoming match. However, their activities aroused the suspicion of two police officers on duty in plain clothes. They questioned the boys as to their actions. Thereupon, one of the boys started to run away. The police officer took hold of his arm, and asked him what he had been up to. The boy continued to struggle punching and kicking the officer. The other boy started to run away. One of the other police officers grasped him, whereupon the boy struck the police officer. Each of the two boys were convicted by the Justices of assaulting a police constable "in the execution of his duty" contrary to s 51(1) of the Police Act 1964. On appeal, their convictions were set aside. The Court of Queen's Bench Division held that the police were not entitled, at law, to physically detain the boys, in order to question them as to their actions. Thus, the police had committed a technical assault on each of the two boys. It followed that the two boys were acting in legitimate self-defence in assaulting the police.

27 In the course of his judgment, Winn LJ (with whom Lord Parker CJ and Widgery J agreed) stated [9]:

> "... one comes back to the question in the end, in the ultimate analysis: was this officer entitled in law to take hold of the first boy by the arm – of course the same situation arises with the other officer in regard to the second boy a little later – justified in committing that technical assault by the exercise of any power which he as a police constable in the precise circumstances prevailing at that exact moment possessed?
>
> I regret, really, that I feel myself compelled to say that the answer to that question must be in the negative. This officer might or might not in the particular circumstances have possessed a power to arrest these boys. I leave that question open, saying no more than I feel some doubt whether he would have had a power of arrest: but on the assumption that he had a power to arrest, it is to my mind perfectly plain that neither of these officers purported to arrest either of these boys. What was done was not done as an integral step in the process of arresting, but was done in order to secure an

> opportunity, by detaining the boys from escape, to put to them or to either of them the question which was regarded as the test question to satisfy the officers whether or not it would be right in the circumstances, and having regard to the answer obtained from that question, if any, to arrest them. I regret to say that I think there was a technical assault by the police officer ... ."

28 The reasoning of the Court of Queen's Bench Division, in Kenlin, has been applied in a number of subsequent decisions, in which it has been held that an officer, seeking to detain a suspect, without arrest, is not acting in the execution of his duties, for the purposes of the offence provided by s 52(1) of the Summary Offences Act.

29 In Collins v Wilcock[10], the police sought to speak to the defendant, who they suspected of being involved in illegally soliciting for the purposes of prostitution. The defendant refused to speak to the police, and she walked away. One of the police officers tried to speak to her, and the defendant responded by swearing at her. Thereupon the officer took hold of the defendant's arm to restrain her. The defendant retaliated by scratching the officer's arm. She was arrested and charged with assaulting a police officer in the execution of her duty contrary to s 51(1) of the Police Act 1964. The Magistrate convicted the defendant. The Court of Queen's Bench allowed the defendant's appeal, and set aside her conviction. The court held[11] that the police officer did not have the power to physically detain the defendant for the purpose of questioning her, and that, accordingly, the police officer was not acting in the course of her duty, when she purported to detain the defendant.

30 A similar conclusion was expressed by the New Zealand Court of Appeal in Waaka v Police[12]. In that case, two constables were suspicious of the actions of the defendant's brother. They approached him, and began questioning him. The defendant intervened, took hold of his brother's arm, and started to pull him along the street. In response, one constable took hold of the brother's arm, and said that the brother was not leaving, until the police had a reason why he was standing in the doorway of a shop. Thereupon, the defendant assaulted the constable. He was charged and convicted of assaulting the police constable in the execution of his duty under s 10 of the Summary Offences Act 1981. The Court of Appeal set aside the conviction for assaulting the police in the execution of his duty. The Court held that, because the police did not have a general power to detain the brother against his will, the defendant had not assaulted the police in the execution of their duty. However, he did commit an assault on the police, which was unjustified. Accordingly, the Court of Appeal set aside the defendant's conviction, and substituted a conviction for common assault.

31 In their judgment, which was delivered by Cooke P, the Court stated[13]:

> "The question is whether Constable Crawford was acting in the execution of his duty when he was pushed. It would be too refined an analysis of a confused melee or fracas of this kind to distinguish between the two pushes or to isolate them from the constable's attempt to detain the brother by taking hold of his arm. If that attempt was outside the scope of the constable's duty, the assaults by the defendant which were so closely linked with it were not assaults on him in the execution of his duty.
>
> It is settled law that the police have no general power to detain a person against his or her will for questioning. In carefully defined circumstances statutory powers of arrest without warrant exist and there are certain common law powers exercisable even by private persons ... and it would be possible for a statute to give a specific power to detain temporarily for questioning; but there is no suggestion in this case that the constables had any right to detain the brother against his will. In evidence any intention of arresting him was disclaimed."

32 It is not necessary for me to define, or determine the limits of, the phrase "in the execution of his duty" under s 52(1) of the Summary Offences Act.[14] The authorities to which I have just referred make it clear that, at common law, and in the absence of specific legislation to the contrary, the respondent in this case was not required to stop, when he was requested to do so by the police. I have no doubt that, in requesting the respondent to speak to them, the police were acting in the course of their duties as police constables. However, they were not, at that point, acting "in the execution" of their duties as police members for the purpose of s 52(1) of the Act. It follows that, in the absence of any specific legislative provision of imposing on the accused an obligation to remain and speak to the police, he would not be guilty of any offence under s 52(1) of the Summary Offences Act 1966. Indeed, as I have already stated, in his submissions before me, Mr Gyorffy accepted that that was so.

33 The critical question, then, is whether, in light of the above principles, the provisions of subdivision 30A of the Crimes Act, to which Mr Gyorffy referred, had the effect that the respondent was obliged to remain and speak to the police, when they requested him to do so. In my view, the clear answer to that question is that those provisions did not have such an effect.

34 It is a basic principle of statutory construction that, in the absence of express language, which is clear and unambiguous, a court will not construe a statute in a manner which has the effect of curtailing, or diminishing, a well established right or freedom.[15] Subdivision 30A does not contain any provision which expressly empowers a police officer to detain a suspect, or to take a suspect into custody, for the purposes of questioning the suspect. That is, there is no provision, contained in subdivision 30A, which expressly purports to affect or curtail the common law principles to which I have already referred. Section 464(1)(c) does not, in my view, have such an effect. It does not, by its terms, expressly empower a police officer to detain or take into custody a suspect for the purposes of questioning. Rather, that provision is a definition section. It deems, for the purposes of subdivision 30A, a person to be in custody, if that person is in the company of an investigating official and is being questioned, is to be questioned, or is otherwise being investigated.

35 Thus, subdivision 30A does not contain any provision which expressly confers on police the power to detain a suspect for the purposes of questioning, which is contended for by Mr Gyorffy. By contrast, s 464I specifically provides that nothing in ss 464 to 464H confers a power to detain, against his or her will, a person who is not under arrest. Section 464J(a) provides that nothing in subdivision 30A affects (inter alia) the right of a person suspected of having committed an offence to refuse to answer questions, or to participate in investigations. Thus, not only does subdivision 30A lack any express provision conferring a power, in a police officer, to detain a suspect for the purposes of questioning; on the contrary, the two provisions, to which I have just referred, expressly exclude the conferral of such a power on a police officer.

36 In effect, Mr Gyorffy's submissions were based on the implication, from s 464(1)(c), and from other provisions in subdivision 30A, of a power to detain a suspect for questioning. The conferring of such a power, on a police officer, would be a substantial, and indeed a radical, detraction from the fundamental freedoms which have been guaranteed to the citizen by the common law for centuries. As a matter of first principle, a court would not construe a statute as having the effect contended for by Mr Gyorffy, unless such an effect, at the very least, could be demonstrated to be the necessary implication of the provisions of the statute. In the present instance, Mr Gyorffy has not demonstrated that the implied conferral of such a radical power is a necessary implication from the provisions of Division 30A.

37 Rather, in my view, the correct construction of the provisions of Division 30A is that contended for by Mr Carter. It is clear that the intention of the subdivision was to ensure that suspects, who are undergoing questioning by a police officer, have the same rights and protections as those which are provided, by the subdivision, to suspects who are under lawful arrest. Subdivision 30A constitutes a scheme or code, stipulating a number of basic protections, which are to be assured to a suspect, who is being questioned, whether that suspect is under arrest or not. In particular, subdivision 30A

provides, in respect of any suspect who is undergoing questioning by police (whether under arrest or not): that that person be informed of his or her right to remain silent (s 464A(3)); that that person be informed, before questioning, that he or she may communicate with a friend, relative and legal practitioner (s 464C); that such person (where necessary) have an interpreter (s 464D); that if such a person is under the age of 18 years, the questioning not be carried out unless a parent or guardian, or other independent person, is available, and the suspect has been permitted to communicate with that person (s 464E); that, if the person in custody is not a citizen or permanent resident, that person be informed that he or she may communicate or attempt to communicate with the consular office of the country of which the person is a citizen (s 464F); that a recording be made of the giving to the person of the information required by the provisions to which I have just referred (s 464G); and that, where practicable, any confession or admission made by such person be recorded (s 464H). None of those provisions give rise to an implication, let alone a necessary implication, that the police have a right to detain a person, in custody, for questioning, without arresting that person. Rather, it is clear, from the structure of subdivision 30A, that that set of provisions is designed to extend the basic protections, stipulated by subdivision 30A, to persons who are being questioned, notwithstanding that they are not under arrest.

38 Accordingly, I reject the submission, made by Mr Gyorffy, that subdivision 30A has the effect that the police, in the present case, were entitled to seek to detain, or take into custody, the respondent, for the purpose of questioning him as to the matters which had been reported to them by the employee of the restaurant. It follows that subdivision 30A did not impose on the respondent a corresponding legal obligation to obey the instruction given to him, during the pursuit, by LSC Hemingway, that he was to stop and speak to him. At no point, before commencing the arrest of the respondent, did the police have the power to require the respondent to remain where he was, or to speak to them. In those circumstances, and consistent with the authorities to which I have earlier referred, the police were not acting “in the execution of (their duties)” for the purposes of s 52(1) of the Summary Offences Act 1966. Accordingly, regardless of whether or not the act of the respondent in fleeing from the police could, in an appropriate case, be characterised as “resisting” a member of the police force, the Magistrate was correct in concluding that the respondent did not resist LSC Hemingway in the execution of his duty, and, thus, that he was not guilty of an offence under that section.

39 In light of that conclusion, it is not necessary for me to express a concluded view on the second submission made by Mr Carter, namely, that the act of fleeing from the police could not be properly be characterised as an act of “resisting” for the purposes of s 52(1) of the Summary Offences Act. The submissions which were presented to me in relation to the construction of the word “resist”, in that provision, were not the central focus of the argument on appeal before me. In those circumstances, I shall desist from expressing any view in relation to that matter.

Conclusion

40 For the reasons I have set out above, the Magistrate was correct in concluding that, as the respondent, before being placed under arrest, did not have any obligation to stop when requested to do so, or to answer questions asked of him, his action in fleeing from the police did not constitute an act of resisting LSC Hemingway in the execution of his duty contrary to s 52(1) of the Act. His Honour therefore was correct in concluding that the charge should be dismissed. It follows that the appeal in this case should be dismissed.

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[1] [1974] VicRp 30; [1974] VR 251, 254.

[2] *Rice v Connolly* [1966] 2 QB 414, 419 (Lord Parker CJ).

[3] *Coco v R* [1994] HCA 15; (1994) 179 CLR 427, 437.

[4] [1961] VicRp 114; [1961] VR 740, 749.

[5] [1974] VicRp 30; [1974] VR 251, 254.

[6] [1966] 2 QB 414.

[7] Above, p 419.

[8] [1967] 2 QB 510.

[9] Above page 519.

[10] [1984] 1 WLR 1172.

[11] See especially at 1179 to 1181.

[12] [1987] 1 NZLR 754.

[13] Above page 757.

[14] Compare *R v Waterfield & Anor* [1964] 1 QB 164, 170 to 171.

[15] See for example *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277, 304 (O'Connor J); *Sargood Bros v Commonwealth* [1910] HCA 45; (1910) 11 CLR 258, 279 (O'Connor J); *Coco v R* [1994] HCA 15; (1994) 179 CLR 427, 436-8 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Morris v Beardmore* [1981] AC 446, 463 (Lord Scarman).
