

GARWOOD v. SCHULTZ*

[(L)LCA9/1981]

1981. Supreme Court: Cox J.

June 22, July 19, 1981.

Criminal Law and Procedure — Jurisdiction, practice and procedure — Warrants, arrest, etc. — Detention without arrest — Escape from — Pursuit — Not in private premises against owner's will — Road Safety (Alcohol and Drugs) Act 1970 (No. 77 of 1970) s. 10(2)†.

Police — Rights, powers and duties — Entry on premises — To take into custody without arrest — Not against owner's will — Road Safety (Alcohol and Drugs) Act 1970, s. 10(2)†.

Police Offences — Offences against peace and good order — Obstructing police or public officer — In the execution of his duty — Attempting to trespass on private property — Road Safety (Alcohol and Drugs) Act 1970, s. 10(2)† — Police

*The motion began as *Garwood v. Barnard*, with the police prosecuting officer as respondent. Before the hearing the court ordered that the complainant be substituted as respondent.

†*Road Safety (Alcohol and Drugs) Act 1970, s. 10* — (1) A police officer may request a person who is liable under this Part to submit to a breath analysis or a medical examination to proceed to such place by such means and with such person as the officer may indicate and there submit himself to that analysis or that examination.

(2) If a person fails or refuses to comply with a request made under subsection (1), or is in such a condition or behaves in such a manner as to give reasonable grounds for believing that he will not comply with the request, a police officer may take him into custody and convey him or cause him to be conveyed to some appropriate place, and there detain him or cause him to be detained, for so long as is necessary to enable a direction to be given to him under subsection (4).

(3) A police officer shall not exercise his powers under subsection (2) in respect of any person unless that officer has reasonable cause to believe that the breath analysis or medical examination can be carried out, within three hours of the time of the relevant occurrence, at or near the place to which that person is to be, is being, or has been, conveyed in the exercise of those powers.

... (Continued overleaf)

Offences Act 1935, s. 34B(1) ‡ (inserted by Act No. 53 of 1965). Act No. 53 of 1965).

Vehicles and Traffic — Offences — Drunkenness while driving — Evidence — Breath analysis — Direction to undergo — Refusal — Taking into custody — Breaking away into private premises — No power to follow — Road Safety (Alcohol and Drugs) Act 1970, s. 10(2) †.

The *Police Offences Act 1935*, by s. 34B(1), provides that “no person shall . . . wilfully obstruct . . . a police officer in the execution of his duty”. The *Road Safety (Alcohol and Drugs) Act 1970*, by s. 10, provides that if a person liable to submit to a breath analysis is requested by a police officer so to submit and refuses to comply, a police officer may take him into custody and convey him to where he may be directed to undergo such an analysis. Police officers took into custody a driver who refused to comply with a request to undergo a breathalyser test. He broke away and fled into a dwelling-house, followed by the officers. The occupier barred their entry and was charged with wilfully obstructing a police officer in the execution of his duty.

Held, that—

- (a) the power to take into custody gives no power to pursue into another's house; and
- (b) the police officer in so pursuing was a trespasser and not in the execution of his duty.

Morris v. Beardmore [1981] A.C. 446 and *Clowser v. Chaplin* [1981] 1 W.L.R. 837 followed.

Dowling v. Higgins [1944] Tas. S.R. 32; *Dinan v. Brereton* [1960] S.A.S.R. 101; and *Kennedy v. Pagura* [1977] 2 N.S.W.L.R. 810 distinguished.

MOTION TO REVIEW.

Allan Clifford Garwood was the occupier of 50 Warring Street, Ravenswood. On the evening of 4th April, 1981, Robert William Garwood, the applicant's son, drove his car into the drive of 50 Warring Street. He was followed by a police car containing Sergeant Warren and Constable Schultz. Sergeant Warren, for sufficient cause, required Mr Garwood junior to undergo breath analysis. He refused, Constable Schultz arrested him, but he broke free and ran into the house followed by the police. The applicant tried to bar Constable Schultz's entry and to restrain him. Constable Schultz seized Mr Garwood junior but he broke away again and ran out of

† (continued)

‡ *Police Offences Act 1935, s. 34B — (1) No person shall —*

(a) assault, resist, or wilfully obstruct —
 (i) a police officer in the execution of his duty;

...

the house and was not recaptured. Constable Schultz proceeded with a complaint against the applicant charging him with "unlawfully, wilfully obstructing one Ettore Schultz a police officer in the Tasmanian Police Force, acting then and there in the lawful execution of his duty by physically taking hold of one Ettore Schultz by the arms to prevent Robert William Garwood being taken for the purposes of a breath analysis to Launceston Police Headquarters contrary to s. 34(B)(1)(a)(i)" of the *Police Offences Act* 1935.

On this complaint the applicant was convicted. He moved to review his conviction on the grounds that the magistrate erred in fact or in law "in not differentiating between the power to take a person into custody (as contained in s. 10(2) of the Road Safety (Alcohol and Drugs) Act 1970), and a power of arrest on warrant and as a result thereof holding that one Ettore Schultz, a police officer in the Tasmanian Police Force, mentioned in the complaint against the applicant, was acting at all material times while inside the home of the applicant in the lawful execution of his duty".

I. L. Himmelhock for the applicant.

G. J. Faulds for the respondent.

Cur. adv. vult.

JULY 19.

Cox J. referred to the point to be decided, the evidence, and the charge, and continued.

The appellant's counsel unsuccessfully submitted to the learned magistrate that 1/C Constable Schultz had no power to enter upon the appellant's premises, any licence to do so being incapable of being implied from the evidence, or alternatively, if implied being clearly revoked in the circumstances, and that in consequence 1/C Constable Schultz could not be said to be acting in the lawful execution of his duty when seized by the appellant. He relied on the decision of the House of Lords in *Morris v. Beardmore* [1980] 2 All E.R. 753, [1981] A.C. 446.

The *Road Traffic Act* 1972 (U.K.), s. 8(2), provides:

"(2) If an accident occurs owing to the presence of a motor vehicle on a road or other public place, a constable in uniform may require any person who he has reasonable cause to believe was driving or attempting to drive the vehicle at the time of the accident to provide a specimen of breath for a breath test . . ."

Section 8(3) thereof provides:

"(3) A person who, without reasonable excuse, fails to provide a specimen of breath for a breath test under subsection (1) or (2) above shall be guilty of an offence."

Section 8(5) provides:

“(5) If a person required by a constable under subsection (1) or (2) above to provide a specimen of breath for a breath test fails to do so and the constable has reasonable cause to suspect him of having alcohol in his blood, the constable may arrest him without warrant except while he is at a hospital as a patient.”

In *Morris v. Beardmore* (*supra*) an accident occurred involving a car driven by the appellant. Police officers in uniform who knew about the accident went to the appellant's home to interview him about it. They were let into the house by the appellant's son. The appellant refused five requests by the senior police officer to come down from his bedroom and discuss the accident. He then passed on a message through his son to the police officers that they were trespassers and requested them to leave his house. The officers then went upstairs to the appellant's bedroom and requested him to provide a specimen for a breath test. The appellant refused, was arrested and taken to a police station. A complaint under the *Road Traffic Act* 1972, s. 8(3), was dismissed by justices on the basis that the police officers concerned were trespassers. An appeal by the prosecutor to the divisional court of the Queen's Bench Division reversed the justices' decision and held that, provided the statutory conditions for the request of a breath test had been complied with by the constable, the fact that he was a trespasser at the time of the request did not affect the validity of police actions. In a unanimous decision the House of Lords reversed that ruling.

Lord Diplock (at p. 756, All E.R., pp. 454, 456, A.C.) observed:

“Except to the extent that such conduct by a constable is authorised by statute it is a serious violation of the common law rights of the driver to be required, under threat of forcible detention in the event of noncompliance, to do the physical act of blowing into a breathalyser against his will, to be detained by force or threat of force at the place where the constable requires the breath test to be taken until the test has been completed, which in some circumstances may take a considerable time, and to be compelled by force or threat of it to go to a police station to take the breath test if the constable thinks fit. I have used the word ‘detained’ rather than ‘arrested’ because the power which s. 8 confers on a constable to restrain the liberty of movement of a person required by him to take a breath test, particularly where that requirement is made under sub-s. (2), is of a wholly different legal nature from the arrest of a suspected offender effected by a constable, under powers conferred on him at common law or under s. 2 of the Criminal Law Act 1967.”

At p. 757 (A.C. p. 456) his Lordship continued:

“I find it quite impossible to suppose that Parliament intended that a person whose common law right to keep his home free

from unauthorised intruders had been violated in this way should be bound under penal sanctions to comply with a demand which only the violation of that common law right had enabled the constable to make to him. In my opinion, in order to constitute a valid requirement the constable who makes it must be acting lawfully towards the person whom he requires to undergo a breath test at the moment that he makes the requirement. He is not acting lawfully if he is then committing the tort of trespass on that person's property, for s. 8(2) of the 1972 Act gives him no authority to do so."

Morris v. Beardmore is immediately distinguishable from the present case in that the arrest of Beardmore was not made until the police had clearly trespassed onto his property and thereafter made their demand that he submit to a breath test. Sergeant Warren on the other hand had lawfully entered upon the appellant's land and requested Robert Garwood to submit to a breath analysis. That request having been refused, 1/C Constable Schultz had lawfully taken him into custody. Any trespass by the police officers was only committed after that point of time and while the officers were continuing their efforts to retain him in their custody.

The more recent House of Lords cases of *Finnigan v. Sandiford* and *Clowser v. Chaplin* [1981] 2 All E.R. 267, [1981] 1 W.L.R. 837, are closer to the facts of the instant case. Their common feature was that in each of them the requirement to undergo a breath test was lawfully made. The police officer in each case was lawfully present just outside the main door of the defendant's dwelling house and the defendant was standing just inside the main door. The defendant heard and understood the requirement but refused to comply with it and retreated further inside the house. The police advanced inside after the defendant, although they had no permission to enter the house, arrested him and took him to the police station.

Their Lordships had the following point of law to consider:

"Whether a constable in uniform who is lawfully within the curtilage of a house and at the door of such premises being the home of a person to whom the constable makes a lawful requirement for a specimen of breath pursuant to section 8(1) s. 8(2) in *Mr. Chaplin's* case) Road Traffic Act 1972 is empowered to enter the said house without invitation and as a trespasser and effect an arrest under section 8(5) Road Traffic Act 1972 following a failure to provide a specimen of breath."

The leading judgment was delivered by Lord Keith who, together with all of their Lordships, answered the question in the negative. At p. 270 (All E.R., pp. 841, 842, W.L.R.), he said:

"It may confidently be stated as a matter of general principle that the mere conferment by statute of a power to arrest without warrant in given circumstances does not carry

with it any power to enter private premises without the permission of the occupier, forcibly or otherwise. . . . The proper inference, in my opinion, is that, where Parliament considers it appropriate that a power of arrest without warrant should be reinforced by a power to enter private premises, it is in the habit of saying so specifically, and that the omission of any such specific power is deliberate. It would rarely, if ever, be possible to conclude that the power had been conferred by implication."

Lord Diplock at p. 268 (All E.R., p. 840 W.L.R.) somewhat ruefully remarked:

"My Lords, the reasoning in the speech of my noble and learned friend Lord Keith, which I find unanswerable, leads ineluctably to the conclusion that once again the way in which the 'breathalyser' provisions of the Road Traffic Act 1972 are drafted has enabled motorists to 'cock a snook' at the law."

[His Honour set forth the *Road Safety (Alcohol and Drugs) Act* 1970, s. 10(1)-(3), and continued:]

It will be immediately observed that the expression "arrest without warrant" is not employed, for a failure or refusal to comply with a request under s. 10(1) is not an offence. Escaping or attempting to escape from custody and obstructing or hindering one's conveyance to any place under s. 10(2) is an offence under s. 14 (although not an arrestable one — see s. 5), while refusing to submit to a breath analysis after having been directed to do so, pursuant to s. 10(4) (that is once arrived, whether in custody or not, at a place where that analysis can be carried out forthwith), is also a non-arrestable offence.

The observations of their Lordships concerning the limitations on a statutory power of arrest without warrant should not, with respect, be taken as directly applicable to a number of powers of arrest without warrant given by Australian legislation. In *Dowling v. Higgins* [1944] Tas S.R. 32, Morris C.J. held that a police officer's power of arrest without warrant under the *Criminal Code*, s. 27, entitled him to enter the offender's premises for the purpose of effecting such an arrest and drew attention to the duty imposed on the officer to effect an arrest which he was empowered by that section to make (s. 27(9)).

It is true that at common law a constable had no general right of entry into private property for the purposes of effecting an arrest without warrant (*Semayne's Case* (1604) 5 Co. Rep. 91; *Eccles v. Bourque* (1974) 41 D.L.R. (3rd) 392; *Reg. v. Landrey* (1981) 63 Can.C.C. (2nd) 289; and *Swales v. Cox* [1981] 2 W.L.R. 814 where Donaldson L.J. lists four exceptions at p. 817H ([1981] Q.B. 849, at p. 853). Nevertheless some Australian judges seem to have been less hesitant than their Lordships may appear to be in construing "an enactment conferring a power of arrest without warrant as impliedly

authorising a power of entry into private premises for the purposes of effecting the arrest" (per Lord Scarman in *Finnegan v. Sandiford* [1981] 2 All E.R. 267, at p. 271 (*Clowser v. Chaplin* [1981] 1 W.L.R. 837, at p. 842)). The existence of the express duty to effect the arrest adverted to by Morris C.J. in *Dowling v. Higgins (supra)* was no doubt a basis on which his Honour in that case considered such a power existed, although he considered the constable had common law rights in any event. A like duty under the *Police Offences Act* 1935, s. 55, may imply the existence of a power of entry in respect of arrests without warrant under that section.

In *Dinan v. Brereton* [1960] S.A.S.R. 101, Napier C.J. was considering the *Police Offences Act* 1953 (S.A.), s. 75(1) which provided that:

"Any member of the police force, without any warrant other than this Act, at any hour of the day or night, may apprehend any person whom he finds committing or has reasonable cause to suspect of having committed, or being about to commit, any offence."

His Honour distinguished *Davis v. Lisle* [1936] 2 K.B. 434 where officers had remained on premises without permission, seeking to investigate the possible commission of a crime, saying that they had not been acting under any statutory authority:

"But under s. 75 of our Act any member of the police force is authorized to apprehend any person whom he finds committing or has reasonable cause to suspect of having committed any offence. I think that the plain intention of the enactment is to give the constable such authority as would be given by a warrant for the apprehension of the suspected person." (At p. 104.)

In *Kennedy v. Pagura* [1977] 2 N.S.W.L.R. 810 Taylor C.J. at C.L. held that a police officer who followed an offending driver onto the latter's premises and there attempted to arrest him had the right to enter private premises for the purpose of effecting an arrest pursuant to the *Crimes Act* 1900 (N.S.W.), s. 352, which provides:

"(1) Any constable or other person may without warrant apprehend,

- (a) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act.

...

"(2) Any constable may without warrant apprehend,

- (a) any person whom he, with reasonable cause, suspects of having committed any such offence or crime, . . ."

His Honour said at p. 812:

"There are no words in s. 352 which would warrant any reading down of the section to exclude persons on private

premises or in their homes. The words are perfectly plain. The obvious purport of the section is to give police officers the right to arrest people who have committed offences or whom they suspect of having committed an offence, the suspicion being on reasonable grounds, with reasonable cause, to apprehend them wherever they may be."

Whatever the situation may be in respect of arrests without warrant under the Code or the *Police Offences Act* 1935 where an express duty to arrest is included, or under s. 5 of the Act where there is no duty expressed, the question remains whether a police officer who has lawfully taken a person into custody under s. 10(2) but whose charge breaks away and enters private premises to which the occupier denies the officer permission to enter, is acting within the lawful execution of his duty in so doing.

In my view the power of a police officer to take another into custody under that subsection does not include, either expressly or by implication, a power to enter onto private premises against the express wishes of the occupier thereof. I am not prepared to say that such entry must have the consent or licence of the occupier, express or implied. Lord Diplock in *Morris v. Beardmore* [1980] 2 All E.R. 753, at p. 757, [1981] A.C. 446, at p. 456, observed that the same considerations that had led him:

"to the conclusion that a requirement to undergo a breath test is lawful if made as a result and in the course of trespass to land committed against the person to whom the requirement is addressed (do not) apply where at the time the requirement is made the constable is on private property of some third party without the licence of the occupier. In particular, very different considerations may apply to cases of what in the course of the hearing were referred to as 'hedge-hopping', i.e. where the driver tries to dodge the constable by getting off the road onto adjacent property on which he is also a trespasser himself."

I hold the same reservations as his Lordship expressed in respect of the degree to which the power of entry under s. 10(2) is limited. Nevertheless, on the facts of this case, there was a clear enough denial of permission by the occupier to enter the house and I am concerned only with the officer's power of entry in those circumstances.

My view that a police officer may not enter private premises, if that situation prevails, arises from two considerations. Firstly, as I have already pointed out, the failure of the person liable to submit to a breath analysis to comply with a request under s. 10(1) is not an offence. The police officer is not dealing with an offender but with a person whom he is entitled to take into custody for the purpose of taking him to a place where, an analysis within three hours of the time of the relevant occurrence being capable of being forthwith

carried out, that person may be directed by a police officer to submit to it. The equivalent power of detention in the United Kingdom is as Lord Diplock pointed out in the passage I have already cited in *Morris v. Beardmore** of an entirely different legal nature from the arrest of a suspected person effected by a constable by powers conferred on him by common law or under the *Criminal Law Act* 1967 (U.K.). So too the power of detention given by s. 10(2) of the Act is of a different legal character from the arrest of a suspected person effected pursuant to the *Criminal Code*, s. 27, the *Police Offences Act* 1935, s. 55, or s. 5 of the Act. In the absence of an expressed statutory power to enter upon property to which access is refused by the occupier, I would not be prepared to infer its existence.

Secondly, the power of taking into custody a person liable to submit to a breath analysis is qualified temporally. It is not to be exercised unless the officer has reasonable cause to believe that the breath analysis can be carried out within three hours of the time of the relevant occurrence. Circumstances can therefore occur where an original taking into custody, though itself quite lawful, may by effluxion of time cease to be lawful. I do not doubt that although escaping from or resisting that custody is not an arrestable offence (s. 14(1)), a police officer may within the temporal limits of s. 10(3) continue to exercise the power of taking the person liable into custody and in so doing continue to act in the execution of his duty (cf. *Lawson v. Parsons*, Unreported (Crawford J., 19th June, 1978), where his Honour said, "Despite the fact that the respondent pulled himself free after Saunders had taken him by the arm, Saunders was still in the execution of his duty to take him into custody and conveying him to an appropriate place, the police station"). One can therefore imagine situations where the escape or resistance is of such a duration that the three hour period elapses before the police can complete their detention and conveyance of the person liable to the appropriate place. The power of taking such a person into custody is not such as to authorise a capture, recapture or detention within an unlimited period of time. I see no reason why a spatial limitation imposed by the denial of entry onto private premises should be thought anomalous.

For these reasons, in my view, the officers concerned upon their entry into the appellant's home against his will became trespassers and in endeavouring to detain and convey Robert Garwood therefrom to the police station were not acting in the lawful execution of their duty. The appellant's obstruction of 1/C Constable

*p. 121 *supra*.

Schultz was not a breach of the *Police Offences Act 1935* and the conviction should be quashed.

Motion allowed — Conviction quashed.

Attorneys for the applicant: *Bushby Taylor & Griffiths.*

Attorney for the respondent: *P. R. Cranswick*, Crown Advocate.

C.F.McK.