

**IN THE DISTRICT COURT  
AT ROTORUA**

CRI-2005-063-414  
CRI-2005-063-413  
CRI-2005-063-415

**NEW ZEALAND POLICE**  
Informant

v

**SIMON OOSTERMAN  
FELICITY PERRY  
ARTHUR PRICE**  
Defendants

Hearing: 17 August 2005

Appearances: Sergeant B Scott for the Informant  
Mr L Te Kani for Defendants Oosterman and Price  
Ms Perry - Self-Represented

Judgment: 17 August 2005

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**ORAL JUDGMENT OF JUDGE JJ WEIR**

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[1] This prosecution has taken place over two days commencing at approximately 12 o'clock yesterday. I am going to give an oral decision now because the defendants have come from both Wellington and Auckland and for that reason I think it is desirable that the outcome of the prosecution is known to them now rather than bringing them back at another time.

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[2] Because it is an oral decision, I reserve the right to make any additions or alterations to the judgment which should essentially be grammatical only and for the purpose of making more sense to an oral judgment.

[3] The brief factual background is that Sunday, 30 January 2005, was the day when a group of protestors came to Rotorua from as far away as Wellington and Auckland. Their purpose in town was to raise public awareness about an alleged genetic engineering experiment being carried out by the Forest Research Institute on trees at a premises at Sala Street. The protest was intended to be peaceful and rowdy but finished up with the three defendants facing the following charges

[4] Felicity Grace Perry faces one charge of trespass on the Forest Research Institute after being warned to leave that place by Constable Tony Bennett, an agent for the occupier, and she refused to do so. Simon Art Oosterman faces two charges under the Summary Offences Act, resisting Constable Blair Yockney, a Constable acting in the execution of his duty, and under s.23A further intentionally obstructing the same Constable acting in the lawful execution of his duty. Finally, Arthur Wilfred Price faces a charge of trespass similar to that faced by Ms Perry, on this occasion having been warned to leave by Constable Zane Conder.

[5] There are a number of issues that need to be determined in relation to all of these matters. I firstly deal with the trespass charges. The first question that needs to be asked is, "is the Forest Research Institute the lawful occupier of the property at Sala Street?" There was no direct evidence from the prosecution of that. That point, however, was not taken by the defence and on balance I am prepared to infer that the Forest Research Institute is the lawful occupier of that property, but the absence of producing the best evidence to prove this point highlights the many evidential flaws which exist in this prosecution case.

[6] Under s.2 of the Trespass Act, "occupier" includes "any employee or other person acting under the authority of any person in lawful occupation of that place or land." In this context the next enquiry that needs to be made is "did Trevor Bodley, the facilities manager, have that authority?" Mr Bodley gave evidence to the effect that he had been responsible for security since 1985. His job description was

[43] Mr Price's version of events was supported by Ms Emily Bailey, a Film Production Manager from Wellington, who confirmed that Mr Price was holding a big orange banner. She was standing some distance away, she estimated approximately 15 metres, and simply saw Mr Price standing, holding the banner and then a Police Officer approaching him and Mr Price falling backwards. She also referred to the fact that there were other people past the tree line and that some were right up against the fence. She did not see Mr Price step into the seedling area.

[44] I have already referred to the various technical evidential difficulties which the prosecution has and the inadequacy in the chain of evidence. There is also the absence of the evidence of Senior Sergeant Anderson and Constable Ratapu to name but two. Indeed, the Police Constable who took the video, and apparently photographs, may well have been helpful to this case. The District Commander has not given evidence about the authorisation of OC spray.

[45] Those deficiencies are sufficient to dispose of all charges against the defendants, but even if they did not, I would not have been prepared to convict on the evidence of these three Police Constables, where their evidence is contradicted so significantly by the three defendants themselves, who I have found to be credible and reliable, and also their witnesses, all of whom were credible and reliable. The video itself, and what is shown, does not assist the Police, particularly in the context of what their responsibilities are as outlined in the basic principles with regard to their conduct and management of demonstrations.

[46] Two of those basic principles, namely the exercise of tact, tolerance and restraint, and use of powers reasonably and properly, appear to have been more observed in their breach than their compliance. The use of OC spray, in particular, raises more questions than it answers. Why would a District Commander authorise the use of OC spray when the circumstances pertained, as had been outlined, and the group had been liasing through the weekend with Constable Ratapu?

[47] Finally, in this context of the use of OC spray, I refer to a recent Court of Appeal decision in September of 2003. The case is *R v Arambasic*. That involved a rather minor charge of trespass arising out of an incident involving access to an

produced and whilst security is referred to twice in that job description, in my view it must be read in the context of the "position purpose" of Mr Bodley's employment. The document confirms that the purpose of his position is to manage and develop the campus, accommodation and facilities maintenance of the Forest Research Institute at Rotorua. This includes the development, agreement and implementation of the Forest Research Campus plan and the management co-ordination of core reporting staff. Security therefore is not mentioned in the "position purpose" although, as I have said, it is referred to twice in the area of the position description referred to as key accountabilities. He reports to the Manager of Finance and Information Systems.

[7] He confirmed that he did report to that person, although he referred to him as the Chief Financial Officer. He said in his evidence that on occasions he received instructions from the Chief Operating Officer and a letter was referred to purporting to establish that, which was not produced in evidence. The line of delegation of the authority to trespass to him is therefore unclear given that the Chief Operating Officer himself apparently had such an authority, although there was no evidence in respect of that either.

[8] If he had that authority, the next enquiry that must be made is to whom then did he delegate that authority and in respect of what. He apparently delegated his authority to Senior Sergeant Jackson who did not give evidence in this case. Once he had spoken to Senior Sergeant Jackson, Mr Bodley had nothing further to do with the protest and was not even in the immediate area at the relevant times. He did not observe anything or have any other contact with the Police or security guards.

[9] What purported instructions did he give? His primary evidence was the plan was to keep the protestors away from the target area by marking a line on the ground outside the perimeter for the fence containing the material that they were protesting about. It transpired that that area was a four metre high electric fence. He said that it was decided at a meeting, 45 to 60 minutes before the march, that the area to be protected was to be marked off by a red and white danger tape, extending from the Forest Research gateway to the fenced area.

[25] Her version of events is also supported by Amanda Reid, a General Manager employed locally, who said that the mood of the protest march was peaceful, and it was a family event. She said also that the security guards were confrontational and she was in close proximity to Ms Perry.

[26] That is, once again, supported by the video on close analysis. She observed jostling and Ms Perry stumbling forward. The way she saw it was there was suddenly a security guard there who grabbed her. She heard Ms Perry call out that she had done nothing and then a Police Officer arrived.

[27] She was cross-examined in some detail and in particular about what Police Constable Ratapu had said. All of that cross-examination involved her giving hearsay evidence which was not objected to by the defence, but seemed to me to be an unusual way of the prosecution conducting that part of the case. But she said that she did not recall anyone telling her, including Constable Ratapu, that they should not cross in the area in question.

[28] She was clear that Ms Perry had stumbled forward and she was questioned closely as to whether or not she had spoken recently to Ms Perry about the evidence that she would give, and she, in common with all of the defence witnesses, struck me as being an honest witness who gave evidence with integrity. She said that she wrote out a statement within an hour of the incident and after that she had not seen Ms Perry prior to her giving evidence.

[29] Ms Le Greou also said that Ms Perry went across the line by accident. She also said that security guards were very aggressive. She gave evidence about the method of arrest of Ms Perry and that she was grabbed in a headlock. She said that there were many people in fact over this line which had been created by the Police in that area. She did not hear any warnings and none were specifically directed at her.

[30] She also referred to the fact that Constable Ratapu had been invited to attend all meetings that the protestors had in relation to the protest because it was their desire for the protest meeting to be transparent and peaceful.

clearly establishes that there was a significant amount of protest activity going on including organised chanting and the use of megaphones.

[19] She said that she walked forward into the seedling area and Police Constable Bennett put an arm on her shoulder and she was really surprised at that because she did not know that she was not supposed to be there. She said that he said to her "if you step on the trees, you will be done for intentional damage" and "trespass" was not used in the warning.

[20] Her version effectively is not contradicted by the concession made by Police Constable Bennett when questioned on this point.

[21] She said that she was steered into the group by him and she then noticed that another member of the protest group had been provoked by a security guard. She stepped forward to check out that position and as she was stepping forward, the crowd behind her surged, and as a result of the surge, she stumbled forward and it was then that she was grabbed by Police Constable Bennett.

[22] She said that he held on to her and then immediately started handcuffing her. That manoeuvre caught a leather handbag which was around her chest and pinned it under her arm and was very painful causing her to scream out in pain. She said, at that stage, one of the other defendants, Mr Oosterman, came to her assistance and said that he attempted to persuade Police Constable Bennett not to be rough.

[23] She said that two other men then jumped on her and joined in the struggle. She suffered injuries and in fact medical records of examination produced by her including that of a Police doctor, confirm that she had a swollen red and raw wrist and an abrasion under her arm.

[24] Her version of events furthermore is supported by a short graphic scene in the video which shows her being pulled forward quickly into the area of the seedlings and it seems that this whole incident occurred over a very short period of time. I will refer to that in detail further on.

**POLICE CONSTABLE BENNETT**

[15] He said that his brief was to protect the experimental area, but also referred to a line along an area of seedlings and that the protestors were not to enter that area. He said that there were 30 to 40 protestors. Other evidence suggests that there were approximately 50 accompanied by 10 Police Officers and security guards as well. He said that he spoke to a group, including the defendant Perry, and that he warned them. He said that she walked past him once into the area of the seedlings. He warned her, she did it again, and he arrested her and handcuffed her almost immediately.

[16] In cross-examination he accepted that the whole area was very noisy and that he could not remember the exact words he used to Ms Perry, particularly the use of the word "trespass". He also acknowledged in cross-examination that he was not watching her the whole time and that it was possible that she could have been pushed into the area of the seedlings.

[17] Ms Perry, on the other hand, said that her position on the day was as media spokesperson and that over the whole weekend she had quite a lot to do with a Police Officer, Constable Ratapu, who, as I perceived it, although he was not specifically described as same, appeared to be a liaison officer between the Police and the protestors. He attended a number of meetings with the protestors who were staying at a local marae and she said that there was a clear understanding that the purpose of the protest was for it to be peaceful but to draw the attention of the public to a genetic engineering experiment going on and that there was no intention of damage.

[18] She said that in her job as media spokesperson she, just immediately prior to her arrest, had been talking to a journalist from TV3. The protest group had been split up into two, one half going to the fenced off area where the subject trees were, and the other half who had strayed into the area which is known as the area of the seedlings. She joined that group and she said that when she joined them, she had no idea that they had been stopped and warned not to go into the seedlings at all. She said that people were chanting and the videotape, that has helpfully been provided,

[10] He said that his instructions were that if the protestors crossed that red and white taped area, that the Police could arrest for trespass. As I perceived it, he was not involved in laying down the tape himself. He said that he gave the tape to the security guards and the Police. He conceded in cross-examination by Ms Perry that if the protestors did not cross the tape, then his delegated authority, if indeed he had authority to delegate, would not apply. It was only in re-examination by the prosecution that this area was widened for him to say that if anyone entered the paddock, they were to be arrested, but in my view that evidence lacked specificity and was unsatisfactory and unconvincing.

[11] Instead, what appeared to happen was that quite separate from that area marked off by the red and white tape, a cordon was put up in front of a row of seedlings at right angles to the fenced off area, which is where some of the protestors gathered as evidenced by a videotape of the demonstration produced by the prosecution.

[12] Following on from Mr Bodley's evidence, there is therefore, in my view, a doubt as to whether or not there is any delegated authority being available to trespass the protestors from the area of the seedlings or from walking over the seedlings. It should be noted that that general area is open to the public, according to the uncontested evidence of Denise Le Greou. She walks her dogs in that area three to four times per week. Indeed, there was further evidence during the course of the hearing that there were other protestors and other people in that area walking through the seedlings and even up on the hill at the back of the four metre high protected area.

[13] These facts, as I have found, combined with the absence of the evidence of Senior Sergeant Jackson, make it very doubtful in my view that the Police Officers who purported to effect the arrests for trespass had the appropriate authority to do so.

[14] I turn now to the actions of the Police Officers.



[36] The only thing that is not seen on the videotape, as far as Mr Oosterman is concerned, is the pepper spraying. But what is seen on the videotape is him being led away by two Police Constables and his version of events, namely that one arm was being pulled in one direction and one in another is at least as cogent as the evidence of Police Constable Yorkney. It is also clear that one of the Police Constables was trying to trip him up.

[36] He next appears on that video 28 seconds later in the middle of the paddock of seedlings, slumping to the ground. During that period of time therefore, it is established that Police Constable Yorkney took the actions that he did in pepper spraying Mr Oosterman.

[37] At the conclusion of the evidence yesterday, after the adjournment, I made arrangements for documentation to be made available by the prosecution to the bench dealing with the basic principles of Police actions in demonstrations and also the carriage and discharge of OC spray. The first document is known as document DC31 Basic Principles and I read it in its entirety:

"(1) During demonstrations, Police must balance the need to maintain order against the rights of citizens. Among those rights are:

- freedom of speech
- peaceful demonstration
- security of life and property
- freedom from intimidation or interference.

Preservation of the peace is paramount. Subject to that, Police should as far as possible allow individuals and groups to exercise their rights.

(2) In policing demonstrations, members of the Police should:

- maintain team work and discipline;
- exercise tact, tolerance and restraint;
- remain impartial;
- use their powers reasonably and properly."

[38] Insofar as the carriage and discharge of OC spray is concerned, it is referred to in a document number A275. This is a significant document and contains very detailed procedures in relation to dealing with demonstrations, none of which was

put before the Court. Insofar as the carriage and discharge of OC spray is concerned, at subparagraph (3) the following appears –

“OC spray is not to be carried by members rostered for duty at demonstrations unless specifically authorised by a District Commander.”

[39] There was no evidence that anyone was authorised to carry OC spray at that demonstration.

#### POLICE CONSTABLE CONDOR

[40] The third Constable was Constable Zane Condor. He said that he gave a general warning that protestors were not to go past the first row of seedlings. He said that all officers said that the protestors should stay back. He said that Mr Price had stepped over the line, he told him to get back twice, he did not, therefore, he arrested him, he fell backwards and he handcuffed him.

[41] Mr Price said that he was moving around the area a lot. He said there was a lot of noise. He was actually holding a banner and he did not recall being warned. He said that there were people moving in front of the banner. He stepped sideways to see what was happening to a woman being abused by a security guard, when he was grabbed by a Police officer, who said that he had warned him. He was then arrested.

[42] He said it was possible that he was in the seedling area, but he did not think so, but said there were a lot of other people past that line, and also referred to the fact that there were people, in fact, right up against the four metre high fence. That is confirmed, in fact, if the original video is watched right through. A copy of the video was supplied to defence by the prosecution, but that copy was a truncated version of the video lasting about a minute and a half. The original video, in fact, runs on for some significant period of time and shows protestors pinning various items to the security fence, and there is no evidence of other arrests being made in respect of those activities involving the area that was supposed to be protected.

## POLICE CONSTABLE YORKNEY

[31] The next Police Officer was Police Constable Yorkney who said that he spoke to the crowd in general but not to any of the three defendants directly and warned the crowd not to come onto the area where the seedlings were or they would be arrested. He could not recall seeing any tape and he did not think there was one, which supports the view that the taped area in fact was the area as previously described. He said that Police Constable Bennett was about eight metres away from him and he did not see Ms Perry step across a line, he just saw Constable Bennett in the process of arresting her and Mr Oosterman trying to pull her back. He said that he told Mr Oosterman to let go. He did not and then he arrested Mr Oosterman for obstruction. He said there was a short struggle. He pepper sprayed him because he was passively resisting, he was holding his arms out, turning and twisting and it was for that reason he pepper sprayed him.

[32] Mr Oosterman said in his evidence that there was a lot of noise going on. He referred to the use of megaphones, that he had not heard the Police and that the yelling was rather loud, some of which is evidenced on the videotape, although most of the videotape was of activity after the incident involving these charges.

[33] He again said the security guards were very rude and aggressive. He said that he heard a yell and a scream and it looked like someone, namely Ms Perry, was being pulled out of the crowd. He said that he told the Police Constable, who was Police Constable Bennett, to stop hurting her because she was in obvious distress. He said that he had not seen her cross the line. It looked to him like she was being pulled out of the crowd. He said they were pulling her arms back and he was trying to keep her stable. He said that he had no interest in resisting or obstructing the Police Officer, but he objected to what was going on.

[34] He said immediately after he was arrested he was led away by two Police Officers and they were pulling him one way and then another and trying to trip him up and that he was then pepper sprayed.

appellant's child at the Croatian Consulate in Henderson. The Court of Appeal said this:

"There are some features of this incident that bear a striking resemblance to actions of the Police in an appeal heard yesterday - *R v Tulletufuga* (CA205/03, 25 September 2003). In both cases Police arrived as a result of a complaint of minor offending. There was an escalation of violence after the use by the Police of pepper spray. Far from subduing the appellant, in each case the pepper spray enraged him, and led to a situation where ultimately batons had to be used as well.

In the present case Mr Mackey told the Court that he attempted to obtain instructions as to the use of pepper spray from the Police. His understanding was that there were no such instructions available at Police Stations, but that the use of pepper spray was part of the training at Police College. If that is correct, that instructions for the use of spray are not held at Police Stations, we regard this as surprising. As mentioned, in each of the two cases the use of pepper spray has not disabled the offender but has enraged him, resulting in an escalation of violence. In both cases, the offender took a canister of spray and used it on the Police."

[48] As an aside, none of this happened in this particular case, happily.

[49] To return to the judgment:

"In each case what started as minor offending has become much more serious. We do not know whether the Police are monitoring the circumstances and frequency of the use of pepper spray, but this and the previous case indicate the desirability of a continuing review of these matters. This is desirable for the protection of the Police and members of the public as well as for the prevention of unnecessary consequential violence."

[50] On the face of it, the use of OC spray in this context causes real concern and for that reason a copy of this decision is to be forwarded to the Commissioner for the Police. It goes without saying that all of the defendants are acquitted on all charges.

[51] There remains one issue alone now and that is the issue of costs. I have invited an application for costs pursuant to s.5 of the Costs in Criminal Cases Act 1967. In particular, I direct my attention to subs.(2) of that section. Relevant, without going into them in any detail at all because, in my view, that is contained in the body of the judgment are subs.(a), (b), (c), (d) and (f). In each case, the application by the defendants is extremely reasonable and, quite frankly, reflects

their behaviour throughout this whole sorry episode. They have sought costs of \$200.00 and in each case costs are awarded to each defendant of \$200.00.

*James G. Whit*