IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S119 of 2019

BETWEEN:

STATE OF NEW SOUTH WALES
Appellant

and

BRADFORD JAMES ROBINSON
Respondent

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APPELLANT'S REPLY

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PART I: PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

(a) Facts

2. The assertion in the respondent's submissions (**RS**) at [4] that the findings of the primary judge set out at [8(c)] and [8(d)] of the appellant's primary submissions (**AS**) were challenged should be rejected. There was no such challenge in Mr Robinson's notice of appeal to the Court of Appeal [**CAB 27**]. Each of the judges in that Court recorded that those findings were unchallenged: CA [26] per McColl JA [**CAB 44**], [190]–[193] per Basten JA [**CAB 89–90**], [199]–[200] per Emmett JA [**CAB 92**]. Mr Robinson has filed no notice of contention in this Court. The case is to be conducted on the basis that each of the primary judge's findings set out at AS [8] is unchallenged. In any case, the point made seems to have no significance in Mr Robinson's submissions.

(b) Errors of approach

3. Mr Robinson's submissions manifest significant errors of approach. *First*, without reference to the text or context of the provisions at issue, Mr Robinson posits a purpose of arrest which those provisions *must* be taken to pursue absent clear language to the contrary (eg RS [8], [15], [49]). But purpose "is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction".[1] Mr Robinson erroneously makes an *a priori* assumption about the purpose of the provisions.[2]

4. *Secondly*, Mr Robinson's submissions ignore the textual indicators inconsistent with the posited purpose. Indeed, Mr Robinson asserts: "If the text is inconsistent with the purpose of the provision, that meaning must be rejected" (RS [7]). That is quite wrong. On the contrary, "[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention".[3] Mr Robinson's point is not supported by the passage cited from *SZTAL*,[4] which simply recognises that the *ordinary meaning* of a word might be rejected in favour of some other reasonably open meaning.

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1 *Lacey v A-G (Qld)* (2011) 242 CLR 573 at [44].

2 *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 at [26].

3 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47].

4 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14].

5. *Thirdly*, Mr Robinson asserts that the legislation at issue "embodies common law principles" (RS [8]). That reflects the *a priori* assumption referred to above. The statutory power is in addition to the common law power of arrest — that is the significance of s 4 of LEPRA (cf RS [7]). The statutory power is not conditioned on the common law power being engaged. That being so, what does it mean to say that the legislation "embodies common law principles"? In any event, what Mr Robinson seeks is not the application of any common law principle to s 99. Rather, it is the recognition of an implied requirement as to the arresting officer's subjective mental state on the basis of an asserted equivalent recognition with respect to previous statutory arrest provisions.

6. *Fourthly*, as to the principle of legality, Mr Robinson correctly identifies the fundamental principle at issue as "liberty", not "freedom from arrest for a purpose other than charge" (RS [8], note also [19]). Yet the conclusion he seeks to draw is not that the words of s 99 should be construed in some narrower, rather than broader, way. Rather, it is that an *implication* should be made in s 99 to cut down its express words: that is evident from Mr Robinson's submission that the "literal fulfilment" of the conditions in s 99 is insufficient (RS [19]). The principle of legality provides no foundation for such legislative rewriting. In truth, Mr Robinson seeks to preserve a particular purpose of arrest (RS [49]). That is improper (see AS [48]–[49]).

7. *Fifthly*, Mr Robinson repeatedly asserts that the State concedes that an arrest for the purposes of investigation is improper (RS [14]–[15], [21], [34]). As explained at AS [34], the State accepts that the express requirements of s 99 must be met and that, if they are not, s 99 will not authorise an arrest merely because it is for the purpose of investigating an offence. The State makes no other concession. If the requirements of s 99 are met, there is not then some further possibility that an arrest might be unlawful because the officer is undecided whether to bring a charge.

(c) Text

8. ***Section 99(1)(b).*** The distinction drawn at RS [19] (also RS [26]) between the "purpose of an arrest" (or, at RS [16], the "motivation for the arrest") and the "reasons" stated in s 99(1)(b) is obscure. It is the product of the *a priori* assumption Mr Robinson makes that there must be some purpose beyond that stated in s 99(1)(b). The purposes for which the arrest power may be exercised are to be found in the Act. Mr Robinson's

characterisation of s 99(1)(b) as merely *constraints* on the power of arrest ignores the restructuring of s 99 by the 2013 amendments: that was how the provision had been expressed, but that structure was deliberately altered (see AS [53]).

9. Mr Robinson's suggestion that, on the State's construction, a police officer can arrest a person *merely* to establish their identity (RS [19]) is wrong. In addition to satisfying s 99(1)(b)(iii), the officer must first suspect on reasonable grounds that the person is committing or has committed an offence (s 99(1)(a)). If both limbs are satisfied, s 99 on its terms indeed authorises the arrest for the purpose of establishing identity; that is hardly "a radical encroachment on the subject's liberty" (RS [19]). Section 99(1)(b)(iii) was deliberately introduced by the 2013 amendments to achieve that result (AS [54]–[55]). Again, Mr Robinson's assumption about the purpose of s 99 distracts from the purpose as revealed by the text and context of that provision as it now stands.

10. Contrary to RS [20]–[22], the matters in s 99(1)(b) are not directed only to circumstances where an arresting officer intends to charge the arrested person (see AS [26]–[27]). Mr Robinson's answers to the State's examples are unpersuasive, and ignore the long-recognised distinction between a belief and a suspicion. What a suspect's flight "suggests" (RS [19]) readily goes to suspicion of having committed an offence; it would not generally support a positive belief in guilt.

11. Mr Robinson's submission on the differing mental states for arrest and to avoid malicious prosecution is inconsistent. He apparently accepts that the mental state necessary to arrest (reasonable suspicion) is different from that necessary to charge (reasonable belief in guilt) (RS [40]). Despite this, Mr Robinson seeks to merge the two (RS [40], [41], [44]). At RS [44], he says "no sensible distinction [can] be drawn" where the police officer is basing their suspicion on what they have themselves perceived. The examples at AS [27] demonstrate that this is incorrect. Mr Robinson is not assisted by Jordan CJ's statement in *Bales v Parmeter*[5] referred to at RS [46]: his Honour was speaking of what was required for a lawful arrest, not addressing malicious prosecution.

12. ***Sections 99(3) and 105, and Pt 9.*** Contrary to RS [17]–[18], s 99(3) does not support Mr Robinson's position, for the reasons in AS [28]–[31]. The fact that the arrested person can be detained for the purposes of investigation under Pt 9 and the arrest

[5] (1935) 35 SR (NSW) 182 at 186.

discontinued under s 105 answers the straw man of an arrested person being brought before an authorised person absent a charge (see also RS [34] fn 50). With the benefit of additional investigation time under Pt 9 — time which is not "unspecified" (RS [23]) but carefully delineated by the Parliament — the person will be brought before an authorised person and charged or the arrest discontinued. This is also the answer to the hypothetical at RS [28]. Mr Robinson's attempt to read down s 105 (RS [34]) fails to give effect to its terms and the reinforcement intended by the 2013 amendments.

13. Contrary to RS [23]–[24], Pt 9 is of considerable significance, for the reasons in AS [32]–[33]. The fact that, temporally, the exercise of powers under Pt 9 follows the arrest does not mean that its terms are irrelevant when construing s 99. The purpose of Pt 9 is to extend the time permitted for detention to enable investigation (s 109). Section 99(3), on which Mr Robinson places such emphasis, is subject to the operation of Pt 9. No simple distinction can be drawn between arrest, under s 99, and the permissible continuation of deprivation of liberty (continuation of the arrest) authorised by Pt 9. That s 113 provides that it does not confer any power to arrest (cf RS [25]) does not deny that the terms of Pt 9 may inform what is required for a lawful arrest.

14. ***Sections 4 and 107.*** That s 4 preserves a police officer's common law powers of arrest does not assist Mr Robinson (cf RS [7]). That says nothing about the scope of the further powers conferred by the Act. Similarly, that s 107 recognises that arrest is one way proceedings may come to be commenced against a person does not imply that all arrests must lead to, or must be intended to lead to, proceedings (cf RS [35]).

(d) Context

15. The State accepts (see AS [40]–[41]) that some intermediate appellate authorities (RS [10]–[14], [32]) provide support for the view that the arrest provisions with which they were concerned required the arresting officer to have decided to charge the arrested person at the time of the arrest. But it does not follow that that must be so of *all* arrest provisions, no matter how different their terms. Nor does it follow that those cases were correctly decided. As noted at AS [41], in none was attention directed to the differing mental states relevant to arrest and to charge. So too, the passage from *Drymalik v Feldman*[6] quoted at RS [11] slides between the fact that a person must be taken before a justice *after* arrest and the proposition that this must, from the outset, be the subjective

[6] [1966] SASR 227.

purpose of the arresting officer. The opposite conclusion was reached in *Clyne*,[7] which drew attention to Pt 9's predecessor. Contrary to RS [14], the conclusion was not that an arrest for the purpose of investigation would be permissible. Rather, it was that if the express requirements of s 99 as it then stood were satisfied, there was no further implied requirement that needed to be satisfied.

16. Turning to decisions in this Court, nothing in Mr Robinson's submissions concerning *Williams v The Queen*[8] (RS [29]–[31]) detracts from the points made at AS [42]–[45]. The point presently at issue was not at issue in that case. What was said, especially by Mason and Brennan JJ, is consistent with the State's position.

17. *Foster v The Queen*[9] does not bear on the present dispute. The question was whether evidence of a confession given by the appellant while under arrest should be excluded. It was conceded that the purpose of the arrest had been to interview the appellant and that the arrest was unlawful.[10] Accordingly, no consideration was given by this Court to whether or not the arrest was lawful. The case thus provides no authority on the point.[11] In any event, the unlawfulness was not merely because the purpose of the arrest had been to interview the appellant but because the requirements of s 352 of the *Crimes Act 1900* (NSW) were not satisfied: there was no evidence to justify a charge[12] or, it appears, even the reasonable suspicion necessary under s 352.

18. Nothing turns on the other legislation identified at RS [36]. As explained at [7] above, the State does not submit that s 99 authorises an arrest for the purpose of investigation. It authorises arrest for the purposes set out in s 99(1)(b). The absence of a provision, found in other statutes, authorising arrest for the purpose of investigation is immaterial.

Dated: 18 July 2019

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7 *Clyne v New South Wales* [2012] NSWCA 265.
8 (1986) 161 CLR 278.
9 (1993) 67 ALJR 550; 113 ALR 1.
10 (1993) 67 ALJR 550 at 552; 113 ALR 1 at 4.
11 *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13].
12 *Foster* (1993) 67 ALJR 550 at 555; 113 ALR 1 at 8.