

IN THE DISTRICT COURT
AT LOWER HUTT

CRI-2006-032-002679

NEW ZEALAND POLICE
Informant

v

MICHAEL TAIAPA
Defendant

Hearing: 19 April 2007

Appearances: Sergeant Holt for Informant
Mr Robertson and Ms Ineson for Accused

Judgment: 2 May 2007

RESERVED JUDGMENT OF JUDGE S M HARROP

[1] The defendant is charged pursuant to s 3 of the Summary Offences Act 1981 which provides:

Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding [\$2,000] who, in or within view of any public place, behaves, or incites or encourages any person to behave, in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue.

[2] The particular charge which the defendant faces is that he behaved in a riotous manner that was likely in the circumstances to cause violence against persons or property to start or continue.

[3] The case arises from a serious incident outside the Wainuiomata Rugby League Club ("the Club") in the early hours of Sunday 2 July 2006.

[4] The informant called three police officers, Sergeant Lenihan, an experienced officer who was a street supervisor for the police in Lower Hutt that night, Sergeant Kowalszyk who is the leader of the strategic response group ("SRG") based in Wellington, he having 20 years experience in the police and the officer in charge, Constable Pescini.

[5] The defendant also gave evidence but I observe at the outset that I found the main police witness, Sergeant Kowalszyk, a most impressive and accurate witness and where there is divergence between his evidence and that of the defendant I have no hesitation in preferring the evidence of Sergeant Kowalszyk.

[6] The facts as I find them to be are as follows. At about 2.10 am Sergeant Lenihan went to the Club because of a disturbance that had been reported. On arrival he found a large group of people, he estimated 200 in number, standing in the car park outside the Club and spilling onto Fitzherbert Road.

[7] The mood of the crowd was aggressive and there were a number of scuffles and fights going on. The defendant himself said that at the time when the police arrived there were about 15 fights going on.

[8] Sergeant Lenihan noted that the few people who were leaving the scene were heavily intoxicated and abusive to the police. Because of the nature of the crowd he decided not to attempt to break it up and he called for back up. Within about 15 minutes or so, eight members of the SRG arrived with their leader Sergeant Kowalszyk.

[9] The first attempt by the police to resolve the situation involved Sergeant Lenihan and four local officers approaching the crowd to see if they could get people to disperse and to desist from fighting. It was thought best to use the local police and avoid use of the SRG, if that were possible.

[10] It quickly became apparent that the SRG would be required. Sergeant Lenihan said they had only taken five or six steps when bottles and missiles began raining down on them and they retreated to safety given that they had no protective equipment. From this point on the local police were stationed behind the SRG members who were wearing protective equipment and the local officers acted as arrest teams as that became necessary.

[11] Sergeant Kowalszyk also observed the crowd to be in an aggressive mood and he noted the road was littered with bottles and cans and there were several sporadic fights going on. It was clear to him that this behaviour had been fuelled by substantial consumption of alcohol.

[12] When the SRG team gathered Sergeant Kowalszyk addressed the crowd using a loudhailer. The defendant acknowledged this was very loud and readily heard. The sergeant told the crowd that they were a disorderly assembly under s 5A of the Summary Offences Act 1981 and he instructed them to leave immediately and in an orderly fashion or they might be arrested. That was repeated at least twice with 30 seconds between announcements to allow people a chance to comply.

[13] The response was a torrent of abuse and missiles.

[14] Sergeant Kowalszyk ordered his squad to advance and form a skirmish line, about 5 metres in front of the crowd. This line was initially passive with the officers not having their batons drawn and having their hands "at ease" in front of them.

[15] Further warnings were issued by loudhailer but the same result followed.

[16] As it was now clear the crowd was refusing to budge the sergeant ordered the skirmish line to advance at a walking pace. That involved each of the officers giving individual commands to the crowd members urging them to move away, to leave the area. That was done with an open-hand gesture with both arms.

[17] This was met with some resistance and several arrests were made, those people being handed over to the local police so that the line was not broken. This

slow advance was mirrored by a slow retreat from the crowd, though further arrests were made. The movement had been in a southerly direction down Fitzherbert Road but a hard-core crowd of about 80 people again stopped just beyond reasonable doubt the Club rooms so the sergeant halted the skirmish line and made another assessment of the situation. He decided to issue a further warning by loudhailer as before but it met with the same response. At least 6 of the SRG team took direct hits on their heads, shoulders, feet and knees from the missiles and suffered minor injuries.

[18] The sergeant then became aware of several males coming forward and one of those was the defendant. He was extremely aggressive and was challenging the police line to come forward and take him on. He was then joined in this by five to six other young males who did the same. They were then standing in front of the crowd. The defendant turned to the crowd and actively encouraged them to move forward. He did that by gestures and moving to and fro using both hands to gesture them to come forward.

[19] The sergeant said this had the effect, which he considered the defendant desired, namely that the crowd advanced, and there were more threats, abuse and missiles.

[20] The sergeant made a further assessment and decided that the squad should be moved to a state of extended readiness which is where their long batons were drawn but held at a 45 degree angle pointing down with the handle close to the body. That is a stationary position.

[21] The defendant then performed a haka, the well known All Black haka, Ka Mate. The sergeant described him as leading the crowd in doing that. That caused the crowd to become even more excited and to move forward and the barrage of missiles and abuse increased. The sergeant described the defendant as having his moment in the spotlight and that he appeared to be revelling in it. He said that when the defendant did his haka he advanced slowly as is typically done by the All Blacks. He took about half a step at each stage of the haka.

[22] The sergeant decided a show of strength was required in view of this challenge and ordered the squad to advance five paces at the same time executing what is known as long-end punches with their batons.

[23] Initially this caused the defendant to stop his haka but then the defendant and his associates started performing it with renewed vigour and the crowd started to move forward again with rocks and bottles. To the sergeant it appeared that the momentum of the crowd was building with the performance of the haka.

[24] The sergeant then decided to order the squad "go". This is a short charge at the crowd in a line to try to break the crowd up and to take the momentum of their advance away. That movement was ordered to stop shortly before the intersection with The Strand.

[25] As soon as the police began the "go" manoeuvre the defendant stopped his haka, appeared startled by that advance and ran back through the crowd knocking over several people in order to avoid apprehension. Further arrests were made and the skirmish line was reformed again about level with the line of trees near the intersection of Fitzherbert Road and The Strand.

[26] The sergeant again reassessed the situation. The crowd had not dispersed, they were still extremely aggressive and threats were being made and missiles thrown.

[27] The defendant and his associates then re-emerged through the crowd and the haka was then performed for a second time. In the sergeant's words "*this seemed to increase the resolve of the crowd to "have a go" at the police*". A second "go" was therefore ordered; that stopped about 15 metres south of the intersection of Strand and Fitzherbert. Again, as soon as the line rushed forward, the defendant burst back through the crowd to avoid apprehension.

[28] The second "go" was effective in dispersing the crowd and large numbers ran away, the crowd was effectively split with about half running south on Fitzherbert

Road and the other half down The Strand. The sergeant said the last time he saw the defendant was when he was running south on Fitzherbert Road.

[29] The defendant was not apprehended on the night, as the police were busy tidying up the scene and making further arrests.

[30] Constable Pescini gave similar evidence but said that towards the end of the incident he had seen the defendant at the intersection throwing rocks at the SRG members. He was adamant that this was the defendant because he knows him from other dealings and in fact, prior to the incident beginning, only about half an hour before it began, he had had a one-on-one discussion with the defendant and so was aware of his clothing on the night.

[31] The defendant said that when the SRG started doing a form of chant directing the crowd to move, he decided to approach the line as soon as it formed. He said he did that because he thought the noises they were making were funny. He thought that was "the SRG haka" and so he would do his own in reply. He said that he only did it once although there was a perfectly appropriate pause part way through it. He thought this may be why the police assert there were two hakas but I find that the two hakas were performed at quite different places on the road and at different times well apart from each other.

[32] The defendant admitted that he had drunk about a dozen cans of beer that night albeit over an 8-hour period and with his having had a considerable meal.

[33] The defendant accepted that he did the haka in front of the crowd but said that he was doing the haka on his own terms and not by way of a challenge or threat. He denied turning to the crowd and encouraging them in any way but I accept the evidence of Sergeant Kowlasyk that he did, and that they were in fact encouraged by what he did to move forward and to continue, indeed increase, their riotous conduct. The defendant said that he did not take anyone else forward with him to do the haka but he accepted that once he started doing it the others did join him as the police had said in evidence.

[34] The defendant accepted in cross-examination that some people in the community might perceive the haka as a Maori challenge, indeed as a war challenge, but he said that was not in fact what it was to those who know what a haka really is about.

[35] The defendant was adamant that the level of aggression and of throwing missiles was unaffected by his haka, it was the same before, during and after he performed it. On that point there is not too much dispute in the evidence although as I have already noted Sergeant Kowalszyk saw definite encouragement and an increase in the level of aggression in the crowd following each of the hakas and I accept his evidence on that point of dispute.

[36] In summary, the defendant denied intending to encourage the crowd in any way, denied that they were encouraged and said he did the haka to his own agenda.

Legal Submissions

[37] In his submissions on behalf of the defendant Mr Robertson pointed out that the charge does not include an allegation of incitement or encouragement of any other person to behave in one of the proscribed ways but simply alleges that within view of a public place the defendant behaved in a riotous manner that was likely in the circumstances to cause violence against persons or property to start or continue.

[38] Accordingly he submits, no doubt correctly, that the elements of the charge which the prosecution must prove beyond reasonable doubt are that:

- a) The behaviour complained of occurred in a public place; and
- b) That the manner of the defendant's behaviour was riotous; and
- c) That there was likelihood in all the circumstances existing at the time that his behaviour would cause violence against persons or property to start or continue.

[39] There is no doubt that the relevant behaviour occurred in a public place but Mr Robertson submitted that it was neither riotous nor likely to have the proscribed effect.

The Meaning of Riotous

[40] Mr Robertson submits that the prosecution must prove that the defendant's conduct in performing the Ka Mate haka was riotous. I do not consider that the defendant's relevant conduct is limited to that but that it must also include his other actions including his gesturing to the crowd behind him and his throwing of rocks at the SRG as seen by Constable Pescini. As indicated above despite the defendant's denials of that additional conduct I find that it occurred and that it is relevant to a consideration of whether his behaviour was riotous.

[41] Considering first however the haka itself (albeit performed on two occasions rather than one as the defendant claimed), Mr Robertson refers to the definition of haka provided by Allan Armstrong in his book *Maori Games and Haka* (1964) which is:

“The haka is a composition played by many instruments. Hands, feet, legs, body, voice, tongue, and eyes all play their part in blending together to convey in their fullness the challenge, welcome, exultation, defiance or contempt of the words. It is disciplined, yet emotional. More than any other aspect of Maori culture, this complex dance is an expression of the passion, vigour and identity of the race. It is at its best, truly a message of the soul expressed by words and posture.”

[42] I interpolate at this point that Mr Taiapa appeared to me to be Maori although I do not recall he specifically saying so in his evidence.

[43] Mr Robertson submits that the performance of Ka Mate is not riotous. He says that Ka Mate is not as is commonly supposed a war dance but rather describes Te Rauparaha's elation in avoiding near certain death at the hands of other hostile tribes.

[44] As Mr Robertson submits riotous is of course the adjective for the noun riot. He cites the definition of riot in *Blacks Law Dictionary 7th Edition* namely:

A tumultuous disturbance of the peace by three or more persons acting together (a) in the commission of a crime by open force or (b) in the execution of some enterprise, lawful or unlawful, in such a violent, turbulent and unauthorised manner as to create likelihood of public terror and alarm.

[45] Mr Robertson submits that the haka by the defendant cannot be described as violent, turbulent or likely to create public terror or alarm but rather as Mr Armstrong's definition indicates that Ka Mate is a haka that is "disciplined yet emotional". I note however that the definition includes the words "challenge", "defiance" and "contempt" in addition to those quoted by counsel.

[46] I have no hesitation in finding that the nature of the gathering outside the clubrooms was within the definition of riot and indeed I did not understand Mr Robertson to submit otherwise.

[47] I note from the *Shorter Oxford Dictionary (3rd Edition)* definition of "riotous" that one of the meanings given is:

Marked by rioting or disturbance of the peace; taking part in or inciting to a riot or tumult; turbulent.

[48] It is therefore arguable, even if the defendant had performed no haka and had simply been part of the riot, that his conduct could have been described as "riotous", especially when Sergeant Kowalszyk had issued the warning to disperse under s 5A and the crowd including the defendant had not heeded that warning.

[49] There are few New Zealand case authorities on the definition of "riotous", but Sgt Holt did refer me to *Police v McKee* (1986) 3 DCR 470. Though that case is clearly distinguishable in that the defendant's behaviour caused a much more distinct escalation in the conduct of the crowd than occurred here, Judge Willy did highlight the point that the Court is not concerned with whether what occurred was a riot, but with whether the defendant's conduct could be described as riotous. To put it another way, in my judgment, an individual may behave in such a way (e.g. throwing stones at police) without any other person, still less a crowd, being present. It is the quality of the behaviour that is in focus. Riotous behaviour can therefore occur without there being a riot; it is the type of behaviour one might expect from a member of a rioting crowd but it need not necessarily occur on such an occasion.

[50] I have no hesitation in finding that the defendant's actions in encouraging the crowd to move forward before he performed his haka and in, at a later stage, throwing stones or rocks at the SRG amount to riotous behaviour.

[51] To that extent the question of whether performing the haka was also riotous need not strictly be resolved but I proceed to consider that nevertheless.

[52] The haka is undoubtedly a very significant aspect of Maori culture and especially in recent years of New Zealand culture generally. It is performed most impressively and meaningfully on both formal and less formal occasions and it is performed with a great deal of respect and pride by the performers. Equally in almost all circumstances it is received with considerable respect by those to or for whom it is performed.

[53] The above is not to say that a haka may not in some circumstances amount to riotous behaviour. In my judgment in the particular circumstances in this case the performance of the haka was not only aggressive and challenging to the authority of the SRG members who were doing their level and lawful best to break up a very unpleasant and violent incident but I find that the defendant intended it to be so, even though his subjective intention is not strictly relevant.

[54] I note that the definition in the *New Zealand Oxford Dictionary* of "haka" is:

A traditional warlike Maori posture dance accompanied by chanting.

[55] The defendant himself saw his haka as his own way of responding to the challenge of the SRG and its own "chanting".

[56] Even if I accepted, which I do not, that the defendant had no intention of challenging the SRG, I am in no doubt that in the circumstances in which the haka was performed at the front of the crowd, accompanied by urging gestures from the defendant and the fact that the crowd undoubtedly was encouraged by what he did, including the five or six other males who came forward to join him, that this constituted riotous behaviour.

Was the defendant's behaviour likely to cause violence against persons or property to start or continue?

[57] There is no doubt that prior to the haka being performed there was already a significant amount of violence against persons, if not property, being perpetrated by the crowd. I find that the defendant's conduct did in fact cause that to continue and indeed to be somewhat aggravated. However in my judgment even if no such consequence had followed, the fact that this is an objective test would make that irrelevant.

[58] It is clear from the wording of the section that it is the objectively likely consequences of the behaviour which have to be assessed, not what actual consequences ensued.

[59] I have no hesitation in finding that the defendant's conduct namely the performance of the two hakas together with the encouraging gestures prior to the first one and the throwing of the stones amounted to riotous behaviour that was likely to cause others in the crowd to continue to cause violence against persons namely the police officers present, if not in addition fellow members of the crowd.

[60] Indeed I also find it was likely to cause the SRG to start to cause violence against members of the crowd or to the extent there had already been such violence, for it to continue.

[61] In *Ali'Imatafitafi v Police* (H.C. Auckland, CRI-2004-404-393/2006-404-136, Courtney J, 25 Oct 2006) the High Court made a similar finding. At paragraphs 23 and 24 of her judgment Justice Courtney said:

“[23] Mr Speed submitted that there was no likelihood of violence because the only persons present who might act violently were the police, whose actions could not have been intended to have been the subject of s 3 because they would simply have been acting in the course of their duty. I do not accept that submission. It cannot be suggested that a forceful response by the police is not violent. The use of batons, firearms or pepper-spray, for example, would all be characterised in everyday language as being violence. Even the usual measures taken by the police to exercise physical restraint, such as handcuffing, would be regarded as violent in everyday language.

[24] Nor is there anything in the purpose of s 3 that would suggest that violence by the police acting in the course of their duty was not intended to fall within the second limb of s 3. Violent action by the police of the kind I have referred to is sanctioned by the law for public policy reasons. But while force by the police is sometimes necessary, it is not regarded, even by the police, as an ideal outcome. Conduct by members of the public that would tend to result in a forceful response by the police must be regarded as undesirable. In addition, such conduct carries with it the danger that other members of the public will be drawn into the situation, thereby causing more violence. For these reasons I conclude that a forceful police response should be regarded in the same way as a forceful response by any other person."

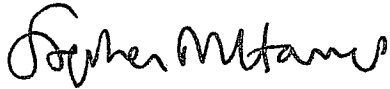
[62] Accordingly even if I had accepted the defendant's contention that the crowd behaved no differently as a result of his haka than it had behaved beforehand, the response of the SRG was certainly different and that alone was the sort of response that was not only likely but inevitable in the face of the defendant's challenging haka. Corroboration of what is likely to occur no doubt often comes from what actually then happened, though one must be cautious to conclude from what occurred that it was necessarily likely to have resulted from what preceded it. However, in this case there is no doubt that the defendant's hakas caused on each occasion the police to take a more forceful and violent though lawful approach to the situation.

[63] I do note that in a judgment dated 19 January 2007 Justice Courtney granted leave to appeal to the Court of Appeal on the question of whether a forceful response by the police to an individual, in the absence of members of the public, is capable of amounting to behaviour that is likely to cause violence against persons or property to start or continue for the purposes of s 3; at least for now however I am bound by Her Honour's judgment of 25 October 2006. Furthermore, my decision does not depend on that being correct.

[64] I am therefore entirely satisfied and certainly beyond reasonable doubt that each of the elements of the charge have been established in this case and the defendant will accordingly be convicted. I might add that if I am wrong in my conclusion about whether the defendant's behaviour was riotous, he clearly behaved in a manner which was at least threatening or disorderly and that the behaviour was likely in the circumstances to cause violence against persons or property to start or continue. Had he therefore been charged with those alternatives under s 3 I would

have convicted him on either of those bases, or I could have amended the charge under s 43 of the Summary Proceedings Act 1957. In addition had he been charged with inciting or encouraging anyone to behave in the requisite manner I would have found that he had the necessary intention to support that charge as well.

[65] At the conclusion of the defended hearing on 19 April I remanded the defendant to 29 May at 10 am and that will now be a sentencing hearing.



S M Harrop

S M Harrop
District Court Judge