

IN THE COUNTY COURT OF VICTORIA

Revised  
(Not) Restricted  
Suitable for Publication

AT MELBOURNE  
CRIMINAL JURISDICTION

CR 21-01818  
CR 22-02373

DIRECTOR OF PUBLIC PROSECUTIONS

v

NICHOLAS PATTERSON  
ADAM ROOB

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JUDGE: HER HONOUR JUDGE GAYNOR  
WHERE HELD: Melbourne  
DATE OF HEARING: 3 April 2024 - 9 April 2024  
DATE OF RULING: 16 April 2024  
CASE MAY BE CITED AS: DPP v Patterson & Anor  
MEDIUM NEUTRAL CITATION:

REASONS FOR RULING

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Subject: **CRIMINAL LAW**  
Catchwords: Co – accused – Recklessly cause injury – assaulting emergency worker on duty – common law assault – resisting an emergency worker – Pre-trial issues – collateral challenge with respect to whether the Prosecution’s burden of proof include proof beyond reasonable doubt that COVID lockdown was lawful – section 138 application – whether body worn camera evidence of encounter between police and the co-accused is admissible at trial  
Legislation Cited: *Public Health and Wellbeing Act 2008; Evidence Act 2008; Crimes Act 1958*  
Cases Cited: *Christie & Ors v Leachinski* [1947] AC573; *R v Kaba* [2014] VSC 52; *Slater (a pseudonym) v The Queen* [2019] VSCA 213  
Ruling: Collateral challenge not made out – Body worn camera and Police statements inadmissible at trial

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Director of Public Prosecutions	Mr B. Walmsley KC	Office of Public Prosecution
For Accused Patterson	Mr J. Prus-Butwilowicz	Bevan-Rhys

James, Barrister & Solicitor

For Accused Roob

Mr S. Nayel

Nayel Lawyers

HER HONOUR:

- 1 The accused Nicholas Patterson is charged with intentionally cause injury, recklessly cause injury, assaulting an emergency worker on duty, common law assault and resisting an emergency worker on duty. The accused Adam Roob is charged with assaulting an emergency worker on duty and common law assault.
- 2 The charges arose from their attendance at what I am satisfied was a protest on 29 May 2021 in the Melbourne CBD against the imposition of regulations pursuant to state-wide lockdown which came into force on 27 May 2021 in response to the COVID-19 pandemic.
- 3 There are two matters which were the subject of pre-trial argument. I will begin with the first which relates to the operation of the *Public Health and Wellbeing Act*.

**A. COLLATERAL CHALLENGE**

- 4 By way of pre-trial argument, counsel for Mr Roob, Mr Nayel, submitted that part of the prosecution's burden of proof at trial must include proof beyond reasonable doubt that the ordered lockdown was lawful pursuant to the provisions of the *Public Health and Wellbeing Act 2008*. His right to make a collateral challenge of this kind to the charges was not resisted by the prosecution and is indeed established at law.
- 5 Mr Nayel submitted the lockdown was unlawful because the Minister for Health's decision did not declare a state of emergency, in compliance with ss3 and 5 of that Act which state as follows.
- 6 Section 3 of the Act defines a serious risk to public health as:  
  
'A material risk that substantial injury or prejudice to the health of human beings has occurred or may occur having regard to (a) the number of persons likely to be affected; (b) the location and seriousness of the threat to the health of persons; (c) the nature, scale and effects of the harm,

illness or injury that may develop; (d) the availability and effectiveness of any precautions, safeguards, treatment or other measures to eliminate or reduce the risk to the health of human beings'.

7 Section 5 states that:

'Decisions as to (a) the most effective use of resources to promote public health and wellbeing; and (b) the most effective and efficient public health and wellbeing interventions should be based on evidence available in the circumstances that is relevant and reliable'.

8 Section 198(1) of the *Public Health and Wellbeing Act* empowers the Minister for Health to:

'On the advice of the Chief Health Officer and after consultation with the Minister and the Emergency Management Commissioner under *Emergency Management Act 2013* declare a state of emergency arising out of any circumstances causing a serious risk to public health'.

9 Sections 20A, 165AW, 189, 190, 199 and 200 govern the Chief Health Officer's (CHO) exercise of certain powers including his powers to authorise officers to exercise public health risk and pandemic management powers, and describe health risk powers and emergency powers and all based on the CHO's belief in the existence and the need to deal with a 'serious risk to public health'. (For example see s165AW and s189)

10 Evidence of Dr Sutton's written advice to the Minister on which the decision to declare a state of emergency was based was provided by the prosecution. Mr Nayel made submissions critical of that advice. His challenge to the lawfulness of the lockdown conditions centred around the CHO's assessment that COVID-19 presented a serious risk to public health as defined by s3 of the Act which he asserted was not based on 'evidence available in the circumstances that was both relevant and reliable' (see s5.) It was of course on that advice that the state of emergency was declared.

11 Mr Nayel did not challenge other precursory actions required by the Act for a state of emergency declaration, leading then to the exercise of powers and imposition of conditions in response to it.

- 12 In essence however, it was his argument that in proving the charges against the accused at trial, the prosecution must also prove beyond reasonable doubt that the state of emergency was lawfully declared. He submitted it must therefore prove beyond reasonable doubt the CHO's decision that COVID-19 did pose a serious risk to public health and was based on relevant and reliable evidence that was available.
- 13 Mr Nayel submitted that as this was a criminal trial the presumption of regularity as to the CHO's opinion and advice did not apply and cited authority in support of that principle.
- 14 In practical terms therefore it was his submission that the prosecution must present evidence justifying beyond reasonable doubt the basis of that opinion and advice, presumably through the personal testimony of Dr Sutton and other relevant persons. It was clear that on trial if this was so, this would be countered by scientific and medical evidence led by the defence to the contrary. The opposing sets of evidence would then be considered by the jury in determining whether the charges on the indictment had been proved to the required standard.
- 15 Whilst not disputing that the defence was entitled to raise a collateral challenge to the legality of the lockdown on trial, the prosecutor Mr Walmsley KC did dispute that proof of the legality of the state of emergency at the time of the alleged offending required proof that the CHO's opinion and subsequent advice to the Minister that COVID-19 posed a serious risk to public health based on s5 considerations was an element which must be proved in the case against the accused.
- 16 The word 'element' is one that I have used, and used advisedly. The particular issue I have described as raised by Mr Nayel effectively would mean that proof of this matter would become an element in a criminal trial against an accused person. Juries are routinely told that on trial under our system of criminal justice

all criminal charges are made up of elements. That is, there is a requirement that all criminal charges be precisely defined so that the person being charged is entirely aware of what they face and able to mount an appropriate response. This would be impossible, for example, as juries are always told, if a charge was vague and amorphous in the way it was expressed. For example, people cannot be charged with being dishonest or immoral.

17 It is therefore clear that the element of an offence is designed to ensure there is clarity and precision in terms of the case faced by an accused person. I am unable to accept Mr Nayel's submission that the particular issue relating to the basis of the Minister's opinion would essentially or should essentially form an element required to be proved beyond reasonable doubt by the prosecution in a criminal trial.

18 In my view this goes too far behind the precursory legislative requirements relating to the declaration of the state of emergency, for those matters to form an element of that which is required to prove the legal operation of the relevant *Public Health and Wellbeing Act* provisions at the time of the alleged offending.

19 There was no challenge by the defence that other formal precursor requirements laid out in the Act such as a provision by and receipt of advice from the CHO to the Minister, consultation by him with other nominated state officials and the like, had not been complied with.

20 I am further comforted in this decision by the wording of s5 which is not worded in mandatory terms. The word 'should' is used as opposed to the word 'must' which in my view is logical particularly when one has regard to s6 which states that:

'If a public health risk poses a serious health threat, lack of full scientific certainty should not be used as a reason for postponing measures to prevent or control a public health risk'.

21 The legislation therefore acknowledges and contemplates the inexactness of medical science and the existence of differing bodies of expert opinion, but

- seeks to ensure that in the unique circumstances of a perceived emergency such as a serious threat to public health, appropriately swift action to reduce its effects can be taken, and not thwarted by drawn out resolution of differing medical and scientific opinion.
- 22 Hence while expressing a desired standard underlying proposed actions in response to a given situation, the Act otherwise gives wide discretionary powers to the CHO both in reaching and once he has reached a view as to the seriousness of a given situation.
- 23 In practical terms, to require a jury to consider whether the CHO's opinion and advice as to the existence of a serious risk to public health was reasonable because it accorded with available evidence that was relevant and reliable would not only vastly extend the length of a criminal trial, as the lay jury considered complex, lengthy and diametrically opposed scientific evidence far removed from the criminal charges, but the necessary determination of this issue could bring about wildly inconsistent results.
- 24 It is quite conceivable different juries faced with determining this issue on precisely the same evidence in answer to such a collateral challenge could come to entirely different findings. Thus in one jury trial, a jury might decide the CHO's advice met the required standard of proof and based on other direct evidence bring back a conviction. Another jury could decide the opinion and advice were insufficiently founded or that the standard had not been reached, or that they could not be satisfied as to the requisite standard of proof and hence enter a verdict of not guilty in a trial without any further consideration of evidence directly led in support of the criminal charges faced by the accused.
- 25 It is my comment that it would be likely impossible for the prosecution to prove this element beyond reasonable doubt. There has been widespread opposition to the prevailing opinion as to the seriousness of the COVID-19 virus and the danger that it presents to the community, so that resolution of the issue may

- prove an impossible task for a jury in determining if the standard of proof required in a criminal trial has been reached, simply because an alternative body of opinion was presented.
- 26 In my view for all the reasons I have stated; the vagueness of this issue were it required to be an element, the way in which the Act is worded, the purport of the Act and the offence to the principle of consistency, means in my view that the issue is too far removed from the question of proper compliance with the Act to form a necessary element of proof, and indeed it is undesirable that it should do so.
- 27 The defence submission that the prosecution must prove the quality and basis of the CHO's opinion in any trial of the criminal charges against the accused is therefore rejected.

**B. S138 CHALLENGE**

- 28 I now turn to the second issue raised by defence in pre-trial. That relates to the question of inadmissible evidence. This is a defence challenge to the admissibility of evidence of the physical encounter between Mr Patterson, Mr Roob and police on 29 May 2021 which gives rise to the criminal charges faced by each. Mr Patterson and Mr Roob are claiming self-defence, both of themselves against police violence, and of another member of their group, Jason Reeves, who they claim had first been physically attacked by police to which attack they responded in order to defend him.
- 29 The evidence complained of comprises footage from body worn cameras of around 26 police who attended and then followed the accused who were in the group of about 15 people who came to the Melbourne CBD in the early afternoon of 29 May 2021. It also consists of written statements by those police members.



- 30 I have observed all the footage relied upon by the prosecution. I have also had regard to all the statements of police.
- 31 What I am now going to describe I regard as uncontroversial in terms of the fact scenario leading up to the eventual physical confrontation between the accused and police in Victoria Street. As I have said, a group of about 15 people attended the Melbourne CBD in the early afternoon. They were not wearing masks. It is not disputed that at the corner of King and Dudley Street they met with Inspector Goldsmith, where there was a conversation between he and Mr Patterson.
- 32 Inspector Goldsmith told the group that they were in breach of CHO's directions, and risked being arrested by police, to which Mr Patterson replied, 'Don't recognise 'em'. Finally he said, 'We are happy to arrest you if we have to, but we'd prefer to give you the opportunity to leave now'. Mr Patterson argued the legalities of the situation to which Inspector Goldsmith replied, 'You will be given 5-10 minutes to move on'.
- 33 The group then began to walk around the Flagstaff Gardens perimeter, from the corner of Dudley and King Street, south along King Street, east up La Trobe Street, and in a northerly direction along William Street. At all times they were accompanied by lines of police who walked alongside them on the inside of the pathway around the Flagstaff Gardens effectively preventing the group from entering the gardens.
- 34 The group continued north along William Street over Dudley Street, and continued north up Capel Street to Victoria Street where they crossed the road to the northern side of Victoria Street. There the group split up and essentially dispersed with about five or six people, including both accused, heading west along the northern Victoria Street footpath towards the intersection with Leveson Street.

- 35 Police continued walking in the same direction as these members of the group, but on the southern side of Victoria Street. During the walk, which took about half an hour by the time the group reached Victoria Street, there was some jeering and taunting by group members of police, but no more interaction until the group moved onto the road at one point. Police shouted “Move!” ordered them onto the footpath and pushed some members of the group in that direction quite roughly.
- 36 There was some angry argument and protest in response but those directions were obeyed and essentially there was not a violent response, I am satisfied, to police direction.
- 37 Then near the intersection of Capel and Victoria Street, police formed a line across Capel Street which brought about some confrontation essentially of a verbal nature, but ultimately group members walked around the line and police took no action in relation to that, and group members then crossed over Victoria Street where they split up.
- 38 As those walking on the northern side approached the intersection with Leveson Street, police led by Acting Inspector Chapman, suddenly veered across the road. He was closely followed by Leading Senior Constable Gabb, and both Mr Chapman and Mr Gabb ran to and confronted Jason Reeves, a member of the group who was walking on his own along Victoria Street a few metres ahead of about four or five other group members including the accused.
- 39 I now turn to an examination of the arrest of Mr Reeves and the confrontation with the accused.
- 40 Excerpts from the body worn camera footage showed the physical confrontation between Mr Gabb, Mr Chapman and Mr Reeves. Excerpts of that footage were played in slow motion by defence during the pre-trial hearing. Mr Reeves also gave evidence on the pre-trial hearing and was cross-examined.

- 41 In my view footage from Officer Griffith's body cam (Exhibit 10) gave the clearest view of the confrontation between Officers Chapman and Gabb and Mr Reeves. It was unclear from all the footage why police chose to suddenly cross Victoria Street when they did, however 19.22 minutes into the Griffiths footage someone can be heard identifying Mr Patterson calling him 'the leader of the group' pointing him out by reference to his black top and indicating he was clearly known to police, as the voice in question also described him as 'the one who owns the gym... he's got the mashed ears'.
- 42 During the hearing counsel for Mr Patterson, Mr Prus tendered police briefing documentation relating to that day in which under the heading 'target person profile' a headshot of Mr Patterson was included along with his name and address. He was described in that documentation as a frontline member of the Australian Peacemakers, a group known to object to and take action against state lockdowns. Mr Patterson was also described as someone who would resist what he saw as unlawful arrest.
- 43 At about 20 minutes into Officer Griffith's footage, and the walk being undertaken by the group, a male voice can be heard (and I am presuming this is the voice of a police member) 'We've got the least number of police members up here and they want us to arrest them'.
- 44 Police then continued, as I have said, to walk on with the group without any interference until they formed the line across Capel Street, which again as I have said was essentially traversed by the group without further action by the police who then kept up with the group members heading west along Victoria Street, but on the opposite side of the road.
- 45 The footage then shows Officer Chapman closely followed by Leading Senior Constable Gabb and other police veering diagonally across Victoria Street towards Mr Reeves who was wearing a red top and as I have said walking

somewhat ahead of other group members. The shouted words 'form a line, form a line' are heard, however no line was formed in front of Mr Reeves.

46 At this point as I have said, I am particularly referring to the footage of Officer Griffiths which view most clearly depicts what happened next. Officers Chapman and Gabb took up a position in front of Mr Reeves saying something like, 'All right, mate' [as far as I could make out] and one of them immediately pushed him backwards. Mr Reeves in my view looked startled and took a further step back. The two officers then stepped forward and Officer Gabb then tried to put an arm around Mr Reeves' neck in what seemed to be a move to place him in a headlock. Mr Reeves pushed back and then Officer Chapman punched him twice to the face, while Officer Gabb continued to grab him and he was brought to the ground with police on top of him.

47 This scenario as I have described it took about 10 seconds. A short time later Mr Reeves was seen standing in handcuffs facing a wall and bearing a contusion around his eye. It was in my view clear from all footage of the incident that the group behind Mr Reeves including the accused ran forward after police began grappling with Mr Reeves but were met by other police and a flurry of punches exchanged.

48 While this was occurring other police deployed OC spray on them before Mr Patterson and Mr Roob were taken to the ground and handcuffed. It was not disputed that during this process Mr Patterson's arm was dislocated and he was eventually taken to hospital by ambulance.

49 The entire incident, from the initial confrontation with Mr Reeves to the point where Mr Patterson and Mr Roob were taken to the ground and handcuffed lasted just short of 30 seconds.

50 In my view the clearest footage of the accused men's response to the incident between police and Mr Reeves was seen on footage from the body cam worn by Officer Harris (Exhibit 20).

- 51 In this footage both accused with two or three others can be seen on the footpath several metres back from Mr Reeves watching the initial police interaction with him but then running forward at the point when Officer Gabb column Mr Reeves around the neck and Officer Chapman punched him. They were immediately surrounded by other police who physically sought to stop them and punches were exchanged, and Mr Patterson in particular can be seen punching and being punched by police.
- 52 At no stage in any of the footage of this incident could I discern police speaking to Mr Reeves beyond the several words I have described before launching into physical action which I would describe as immediate and violent.
- 53 Mr Reeves gave evidence of his physical confrontation with police which was largely consistent with my observations of the body cam footage of the event.
- 54 He said he and the remaining members of the group who were heading west along Victoria Street were going to where their cars were parked in order to go home. He said he had arranged by phone for his girlfriend to bring his car to the Leveson Street intersection with Victoria Street and pick him up there. Mr Reeves said while the group walked along Victoria Street they were calling out to police that they were going home.
- 55 3.07 seconds into the footage of Officer Granville (Exhibit 7) which depicts the walk along Victoria Street, a voice can be heard calling 'why are you following us, we're going home'.
- 56 In other footage of Mr Roob lying face down and handcuffed on the ground, he can also be heard saying, 'We were trying to get to our cars'. For example, see the footage of Officer Chetcuti (Exhibit 17, 31 minutes in).
- 57 Given it is also generally accepted from what I can see from the statements of police that the original protest group split up at the Capel and Victoria Street intersection and that footage showed remaining group members were walking

in a somewhat strung out fashion along Victoria Street, as opposed to the passage of the larger and more obviously cohesive group shown in footage up to then, I accept Mr Reeves' evidence that he and the accused had completed their protest action and were walking to their cars to go home at the time of the confrontation with police.

58 Mr Reeves was eventually charged with affray and other offences, to which he pleaded not guilty. They were ultimately withdrawn and his legal costs paid by police and it is my observation that the relevant footage showed no basis whatsoever for the laying of that charge against him.

59 At the time of this incident, lockdown restrictions prohibited persons from leaving their homes unless shopping, undertaking care giving duties, exercise, authorised work or permitted study, to receive a COVID-19 vaccination, to visit an intimate partner, a single social bubble friend or due to an emergency. Face masks were to be worn at all times. People leaving home for shopping or exercise could not travel more than 5 kilometres from their premises. People were forbidden from intentionally attending a gathering with any other person for a common purpose at a place.

60 Those breaching these restrictions could be charged under s203(1) of the *Public Health and Wellbeing Act* should they 'refuse or fail to comply with the direction given to the person or a requirement made of the person in the exercise of the power under an authorisation given under s199'. The maximum penalty is set at 120 penalty units.

61 Mr Nayel submitted that police had no basis to arrest any of the members of the group. I will go to that scenario of arrest in a little more detail, but I am satisfied that members of this group met to publicly protest against the restrictions and that in doing so they did breach a number of those restrictions. However, that is not the issue.

- 62 It is the defence submission that the actions of police in relation to Mr Reeves and then the accused constituted an impropriety such that pursuant to s138(1)(b) of the *Evidence Act* any evidence of the physical confrontation giving rise to the charges either by way of verbal testimony or video footage should be ruled as inadmissible. That impropriety is said to lie in the violent confrontation with Mr Reeves.
- 63 Section 458 of the *Crimes Act* allows all persons including police to apprehend without warrant and take before a bail justice or the Magistrates' Court any person (a) he finds committing whether an indictable offence or an offence punishable on summary conviction where he believes on reasonable grounds that the apprehension of the person is necessary for any one or more of the following reasons, namely (i) to ensure the attendance of the offender before a court of competent jurisdiction; (ii) to preserve public order; (iii) to prevent the continuation or repetition of the offence or the commission of a further offence; or (iv) for the safety and welfare of the members of the public or of the offender.
- 64 In his statement, Acting Inspector Chapman relied on Ground iii, the prevention of the continuation of an offence as the basis for seeking to arrest the remaining group members who were walking along Victoria Street. As I have said, I am satisfied those group members had breached lockdown restrictions during the day and were liable to be charged under s203(1) of the *Public Health and Wellbeing Act* and again I note the maximum penalty for such a breach is 120 penalty units.
- 65 There are a number of ways in which the charging of the accused could have taken place. It could have been done by the issuing of infringement notices at any stage during the half hour walk leading up to Victoria Street. It could have been done by way of stopping the accused and other members of the group informing them that they were in breach of the restrictions and that they were to be placed under arrest.

- 66 However police chose not to respond that way. I am satisfied that in arresting Mr Reeves, police used unnecessary and unwarranted force and violence. Footage of the group's walk in the half hour leading to the arrest revealed no behaviour which would give rise, in my view, to an apprehension that they would engage in violent behaviour. Certainly in the police briefing information was given to police about Mr Patterson, but my observation of Mr Patterson's behaviour during the walk including one part of the walk where he intervened to stop other members of the group arguing with police, provided no grounds for an apprehension by police that an arrest of Mr Patterson or the other persons he was with required the violence that was displayed.
- 67 At the time he was confronted by police Mr Reeves was simply walking along. I accept as I have said that he was heading to his car to go home. While police may or may not have been aware of that fact, or accepted what was called out, if they did hear those words, I am satisfied that at the point of confrontation Mr Reeves was not protesting but was on his way to leave the scene. I am satisfied that he had breached the lockdown conditions but he was not displaying any behaviour, in my view, which justified what police then did.
- 68 Given Mr Chapman's stated desire to arrest the members of the group to prevent continuation of an offence pursuant to s458(1)(iii) of the *Crimes Act*, as I have said this arrest could have been effected by non-violent means such as asking Mr Reeves to stop, telling him he was under arrest and then giving him information as to why in accordance with the long established principle handed down in the House of Lords decision *Christian & Ors v Leachinski* [1947] AC573. Or presuming that police had seen the group had split up and heard the remaining members calling out they were going home, police could have continued to surveil them to see if that in fact was so.
- 69 Again they chose instead to initiate what I am satisfied was a violent and unwarranted confrontation with Mr Reeves. I am satisfied that Officers Chapman and Gabb were the aggressors in the situation and that they



employed unjustified violence on Mr Reeves in effecting the arrest. They did not wait for a line to be formed across the footpath which could have been observed by Mr Reeves. They did not speak to him and inform him he was under arrest and then inform him why. They simply confronted, pushed, and attacked him before bringing him to the ground. In my view, they used unlawful violence in arresting Mr Reeves.

70 I am also satisfied that the accused acted as they did in direct response to the unwarranted violence perpetrated on Mr Reeves which they first observed before taking action. As they ran forward the accused were met with physical intervention by other police members who sought to stop them and they fought back before being overpowered and brought to the ground and handcuffed.

71 In other words I am satisfied that by their unlawful violence police instigated the response by the accused which underlies the charges they now face.

72 The prosecutor Mr Walmsley conceded the accused's actions 'might have been partially at least in response to what was happening in front of them', (transcript 495). However he submitted that closer frame by frame examination of the footage of the accused showed that their conduct went 'quite a distance beyond any expected or desired reaction to what they seen happened to Reeves', (transcript 496). He described the actions of each accused as 'not only excessive but discreetly and separately criminal'.

73 This would seem to indicate that part of the prosecution position is that even if directly the result of what I have found to be unwarranted police violence, the actions of the accused in the way they sought to defend Mr Reeves were excessive.

74 I have also had regard to the written police statements describing the incident. In his statement, Acting Inspector Warren Chapman who was leading police flanking the group said that as the smaller group walked west along Victoria Street he instructed police 'to keep pace with the group with a view to

intercepting the protest group to prevent the continuation of the offending'. Then he gave a verbal command to form a line ahead of the group.

- 75 He then states, 'I observed a male who I now know to be Jason Reeves who was wearing a distinctive fluoro windcheater and black pants failed to stop when he observed the police line'. From the footage it is clear no line had in fact been formed for Mr Reeves to see or that he saw one. Indeed, no police line across the footpath on which he was walking was evident at any stage of the footage of the confrontation.
- 76 Mr Chapman continued. 'I observed Leading Senior Constable Gabb push Reeves away from the line at which point Reeves menaced police in a threatening stance and pushed PORT members away'. In fact on my observations on being pushed, Mr Reeves took a further step back away from police and stayed away with his arms relatively down while police advanced upon him. He took no threatening stance.
- 77 Mr Chatman continued. 'Verbal directions were given to Mr Reeves to get on the ground however he refused to comply. I saw Senior Constable Gabb attempt to effect the arrest of Reeves using standard contact tactics, mainly contact head control, however Reeves resisted and broke free of his grip. Reeves immediately escalated his use of force throwing a combination of punches at port members with his left and right hands. Following the punches I grabbed a hold of Mr Reeves' right arm and assisted by other PORT members pulled Reeves through the police line and forced him to the ground'.
- 78 I find Mr Chapman's statement to be disturbingly different to the scene revealed by police footage and containing no mention whatsoever of the two punches he clearly inflicted upon Mr Reeves. The footage contained no escalation of violence by Mr Reeves involving a combination of punches. Nor was Mr Reeves told to get on the ground. Nor was he pulled through a police line but was downed where he stood. I have read other police statements in relation to

this confrontation and found them to be similarly inaccurate when compared to the body cam footage.

- 79 The defence have relied on s138(1)(b) of the *Evidence Act* which states that “Evidence which was obtained in consequence of an impropriety or of a contravention of an Australian law is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way the evidence had been obtained.”
- 80 Generally speaking the impropriety complained of relates to the manner in which the evidence has been obtained, such as unlawful force used to gain an admission or evidence obtained as a result of an unlawful search. Here the evidence complained of was not compiled by means which in themselves constituted an impropriety or contravention of the law. The video footage was obtained by use of police body worn cameras which were activated in what Mr Walmsley described as a “stereotypical” turning on of the police cameras.
- 81 Unsatisfactory as I might find the police statements to be, the making of them did not involve unlawful means which amounted to an impropriety or a contravention of the law.
- 82 There was nothing unlawful in the way the incident was filmed. It was done in an entirely conventional manner and in accordance with police procedure. Again, nor were police statements about the alleged events created by impermissible means.
- 83 Mr Walmsley for the prosecution submitted that for these reasons s138(1)(b) did not have application to the evidence objected to. The defence argument is that the content of the footage and police statements arose from unlawful behaviour by police and the evidence of this unlawful behaviour was thus in consequence of an impropriety or contravention of the law and so inadmissible.

84 In the decision of *R v Kaba* [2014] VSC 52, evidence of offending which was consequent upon and reactive to unlawful action by a police officer towards an accused was objected to by the defence as inadmissible evidence pursuant to s138(1)(b). At paragraph 337 of his judgment, His Honour Bell J noted that:

'The precise nature of the causal relationship between the obtaining of the evidence and the impropriety or contravention "is a matter of some difficulty".'

85 (His Honour was referring there to Odgers' text book 'Uniform Evidence Law in Victoria' at p829.)

86 His Honour continued:

'However on the authorities it seems to be clear that it is not necessary for the causation to be direct and that a chain in causation linking the obtaining of the evidence and the impropriety or contravention is sufficient'.

87 At paragraph 338 His Honour stated:

'In the present case the evidence concerned is evidence of Mr Kaba's offending. It was contended for him that the evidence was obtained in consequence of the improper or unlawful conduct of police because the offending itself occurred in consequence of that conduct.'

88 In that sense the case of *Kaba* is on all fours with the case before me and the question that has been raised. His Honour continued at paragraph 339:

'Under s138(1)(b) obtaining evidence of offending which was itself caused by impropriety or contravention can be characterised as obtaining evidence in consequence of that impropriety or contravention'.

89 In that case the accused faced charges of offensive behaviour and assault, and after undertaking the balancing exercise required by the section, His Honour ruled that the evidence complained of which was police testimony of the offending and the entire case against the accused was inadmissible on that ground.

90 In *Slater (a pseudonym) v The Queen* [2019] VSCA 213, the Victorian Court of Appeal did not dispute the trial judge's reliance on *DPP v Kaba* for the proposition that s138(1)(b) did not require the causal link between an

impropriety or contravention and the obtaining of evidence to be direct and that a chain of causation linking the two would suffice. At paragraph 44 their Honours also stated that the degree of connection between the evidence obtained in consequence of an impropriety or contravention could also bear on the decision as to why the desirability of admitting the evidence outweighed the undesirability of admitting evidence obtained in the way the evidence was obtained. They said:

'If the impropriety or contravention bears only a distant causal connection to the evidence, the public interest in deterring impropriety or contravention of the law by obtaining evidence in the manner concerned might be thought more likely to be outweighed by the public interest in admitting probative evidence. Conversely exclusion of evidence closely connected to the impropriety or contravention might more obviously serve the public interest in deterring the obtaining of evidence in that manner'.

91 During the pre-trial hearing I was very much of the view and I expressed it on a number of occasions to defence counsel, that s138 was limited to the contravention or impropriety being attached to the mode of collection of the evidence if you like. Having reconsidered the matter and having had regard to these authorities, I am however satisfied there was a chain of causation between police impropriety in the form of unlawful violence perpetrated on Mr Reeves and the evidence of the alleged offending by the accused.

92 I am satisfied as I have said that the accused's actions were in direct response to the unlawful violence perpetrated by police on Mr Reeves and but for that violence the alleged offending would not have occurred. I am satisfied that violence constituted an impropriety pursuant to s138 and that the evidence of the accused's actions were obtained in consequence of that impropriety.

93 I therefore accept that on its face that evidence is inadmissible under s138(1)(b). I must then of course undertake the balancing exercise as to the desirability of admitting the evidence outweighing the undesirability of admitting it.

- 94 Section 183(3) lists a number of matters which must be taken into account in making that decision. Having had regard to those matters which are contained in paragraphs (a) to (h) I am satisfied that the evidence obtained of the confrontation both by way of video footage and police statement should be ruled as inadmissible in the proceedings against Mr Patterson and Mr Roob.
- 95 Referring to each of those matters which I must in setting out the reasons for my ruling, paragraph (a) talks of the probative value of the evidence which I regard as high in that it underlies the basis of all charges against the accused. However unusually it also provides a basis for the defence of self-defence.
- 96 In relation to paragraph (b) it is clear the evidence compromises the whole of the prosecution case against the accused, however this was also the case in *R v Kaba*.
- 97 Turning to paragraph (c) the nature of the offending, whilst not to be dismissed as trivial, compromises a 30 second incident from start to finish. The alleged injuries fell at the more minor end of the scale. It is to be noted that the authorities make it plain that the gravity of the alleged offending is a significant matter to be taken into account. Thus where significantly grave offences are being considered such as murder, the infliction of serious injury or serious drug offences, the discretion is less likely to be exercised in favour excluding the impugned evidence. In my view the charges faced by Mr Patterson and Mr Roob do not fall into that category.
- 98 Turning to paragraph (d) in my view the gravity of the impropriety was concerning involving as it did the unjustified infliction of violence by police who bear particular responsibility by reason of their office and the powers imposed in them, and in a situation where their numbers greatly exceeded the group of persons involved in the protest. It was in my view clear from the footage that the numbers of the group protesting were vastly exceeded by the number of police present.

- 99 As to paragraph (e) at the very least in my view the impropriety by police was reckless. The actions of Mr Reeves and the accused during the day presented no threat to police and did not warrant the violence they eventually inflicted upon Mr Reeves. Given the briefing police received in relation to Mr Patterson, it should also have been clear to police that in treating Mr Reeves as they did, they would most likely incite responsive action by Mr Patterson.
- 100 Additionally, I am satisfied that police were cavalier in the way they delivered information to those men they had arrested of the grounds for that arrest. At one stage a police officer is heard saying, 'There will be a lot of charges that you face'. That would seem to be in relation to Mr Patterson and Mr Roob. At another stage well after he had been arrested, and was in fact standing up and facing a wall, Mr Reeves was informed that he would be charged with affray. This was well beyond the permissible time limit or opportunities said by the authorities to constitute an appropriate period of time for information about the grounds for arrest to be made known to the subject of that arrest.
- 101 In relation to paragraph (f) Mr Nayel made a number of submissions about the unlawfulness of the arrest of Mr Reeves referring to the Charter of Human Rights, specifically ss21 and 22. Section 21 deals with the right to liberty and security. S21(2) states a person must not be subjected to arbitrary arrest or detention. I am satisfied that in the way that police behaved towards Mr Reeves, he was subjected to arbitrary arrest and detention.
- 102 Further s21(3) states a person must not be deprived of that person's liberty except on grounds and in accordance with procedures established by law. I am satisfied that police failed to have regard to the grounds and procedures established by law in the way they arrested Mr Reeves.
- 103 Paragraph (g) is not relevant to my consideration. No such other proceedings are flagged at this time.

104 Paragraph (h) relates to the difficulty of obtaining the evidence without the impropriety. In my view this evidence would not have come into existence but for the impropriety I have found.

105 In all the circumstances I am satisfied that the evidence was obtained in consequence of an impropriety and it is also my view the undesirability of admitting this evidence obtained as it was as a direct result of unlawful police violence outweighs the desirability of admitting it.

106 As I have said, I rule that this evidence is inadmissible at trial. That includes both the video footage and the statements by police. Thank you.

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