LOCAL COURT

New South Wales

MORUYA

Jurisdiction:	Criminal
Parties:	Sen. Const. Jennifer Westaway, prosecutor
	Ryan Benjamin Castle, accused
Hearing dates:	17th December, 2010, 13th May and 6th June, 2011
Date of Decision:	8th July, 2011
Magistrate:	Christopher J. Bone
Representation:	Sgt. J. Delaroche, police prosecutor, for the prosecutor
	Mr. W. Boom, solicitor, for the accused

Reasons for Decision

1 The accused is charged with failing, without reasonable excuse, to comply with the direction of a police officer and with causing timber to be cut on Crown timber lands. Early in the prosecution case an objection was taken by the police prosecutor to a line of questioning which had been taken by the accused's solicitor. Because of the importance of the issues which were raised at that time, I gave a written judgement in which I indicated that I considered that the line of questioning was appropriate. Much of the contents of that judgement is repeated in this judgement.

Background

2 At about 8am on 27th April, 2010, Sen. Const. Westaway attended Clarkes Road, Greendale, at the request of an officer of Forestry NSW. Clarkes Road is a minor road in the forests of southern New South Wales. The officer came across a group of people near a timber tripod which spanned the entire carriageway. The accused was on top of the tripod. He was asked if he realised that he was in a prohibited zone and that he was obstructing forestry personnel and contractors attending to their work. He replied "yes". He was told that if he remained in the tripod and disobeyed the officer's direction to come down he would be continuing to commit offences. The accused did not descend. Later in the day the accused was told by a police officer "we'll come and get you down". He said "I don't want to". At around 4.30pm two police officers used a cherry-picker machine to remove the accused from the tripod. The accused was arrested and was subsequently charged, among other things, with the following offences:

• "did, without reasonable excuse, refuse or fail to comply with a direction given in accordance with Part 14" (s.199(1) Law Enforcement (Powers and Responsibilities) Act)

• "did cause/knowingly suffer timber, to wit, three green saplings, to be cut/obtained/destroyed on Crown-timber lands, to wit, Mumbulla State Forest old growth forest" (s.27(1)(a)(iii) Forestry Act).

3 The tripod consisted of three logs which met at the apex of the tripod. The stumps of three small trees were located quite close to the tripod. The trees had been freshly cut and the logs which formed the tripod appeared to have come from the three small trees. The stumps were located on Crown timber land.

Logging activities

4 Lee Blessington is a Team Leader employed by Forests NSW. He outlined the procedures relating to the harvesting of timber in State Forests. A harvest plan is prepared by a harvest planning forester, is reviewed by a

harvest planning manager and is then considered by the regional manager. Logging cannot take place unless the plan is approved by the regional manager. One of the issues that must be considered during the process relates to heritage factors. As it turned out, the people who prepared and reviewed the harvesting plan which permitted the logging operation which was taking place on 27th April, 2010, had failed to realise that the land upon which the logging was taking place had been gazetted in 1984 as an "Aboriginal place" (a formal phrase which is defined in the National Parks & Wildlife Act). Mr. Blessington indicated at one stage in his evidence that, because, of that failure, the logging operation was unlawful. He corrected that evidence indicating that he could not say if the logging was unlawful but it was certainly taking place on a gazetted Aboriginal place and that fact had not been mentioned in the harvest plan.

5 The logging operations had commenced in late March and continued (with a break at one stage) until about 4.30pm on 27th April. At that time Mr. Blessington received a telephone call from the regional manager telling him to stop the operation as Forests NSW had realised the area of operations was an Aboriginal place. In June, 2010, a letter of explanation and apology was written by the regional manager to the chairman of the Biamanga Board of Management. A copy of that letter is attached to this judgement.

Evidence of the accused

6 The accused indicated that he had come down to the area about six weeks before his arrest. He was worried about the logging activities on Mumbulla Mountain. He believed that Mumbulla Mountain was a "sacred" mountain, that Forests NSW were not considering that fact and he decided he would protest. He left the area and returned on the Friday before his arrest. He knew that there had been blockades each day and he wanted to be involved in something that would have an impact upon the logging. He had made contact with other protestors and he understood that the area in which the logging was taking place had been gazetted as an "aboriginal sacred place". He was advised that approaches had been made to Forests NSW and to the Environment Dept. to have the logging stopped but got the impression that things had stalled. He went to the logging compartment over the weekend to see for himself what was happening. He decided that he would try to prevent the logging from continuing. He was "was prepared to break the law to prevent a serious crime from being committed".

7 The construction of a tripod had been discussed by protestors on the Sunday. The accused went to Clarkes Road on the Monday morning, arriving before first light. There were some logs on the road. The accused did not know where the logs had come from. Other people constructed a tripod using those logs. The accused volunteered to sit on the tripod.

Other evidence

8 There was evidence that there had been protests against the logging operation on a number of days prior to 27th April. Protestors had claimed that the area in which the logging was taking place was an Aboriginal place and there had been some correspondence with government authorities in relation to that fact.

Conclusion as to the charge under the Forestry Act

9 This matter is quite straightforward. It is, in general, an offence to cut down trees in state forests. The prosecution submits that as the accused was complicit in the planning and execution of the enterprise of using the tripod, he is therefore responsible for the cutting down of the trees which formed the tripod and it is clear that those trees were on Crown timber land. The defence submits that guilt can be established only if I am satisfied beyond reasonable doubt that the accused either cut down the trees himself or was a member of an enterprise which contemplated the use of trees situated on Crown timber land. I accept the thrust of the defence submission. There is no evidence that the accused cut down the trees and there is no evidence to indicate that he

had planned with others a course of conduct which involved the taking of logs in Crown timber lands. I cannot reject his evidence that he had no knowledge of the source of the logs which were used to construct the tripod. That charge will therefore be dismissed.

Conclusion as the charge under s.199(1) Law Enforcement (Powers and Responsibilities) Act

10 The powers of a police officer to give a direction to a person in a public place are found in Part 14 of the Law Enforcement (Powers and Responsibilities) Act. Some of the legislation is as follows:

197 Directions generally relating to public places

(1) A police officer may give a direction to a person in a public place if the police officer believes on reasonable grounds that the person's behaviour or presence in the place (referred to in this Part as "***relevant conduct***"):

(a) is obstructing another person or persons or traffic, or

(b) constitutes harassment or intimidation of another person or persons, or

(c) is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness, or

(d) is for the purpose of unlawfully supplying, or intending to unlawfully supply, or soliciting another person or persons to unlawfully supply, any prohibited drug, or

(e) is for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess.

(2) A direction given by a police officer under this section must be reasonable in the circumstances for the purpose of:

(a) reducing or eliminating the obstruction, harassment, intimidation or fear, or

(b) stopping the supply, or soliciting to supply, of the prohibited drug, or

(c) stopping the obtaining, procuring or purchasing of the prohibited drug.

(3) The other person or persons referred to in subsection (1) need not be in the public place but must be near that place at the time the relevant conduct is being engaged in.

(4) For the purposes of subsection (1) (c), no person of reasonable firmness need actually be, or be likely to be, present at the scene.

199 Failure to comply with direction

(1) A person must not, without reasonable excuse, refuse or fail to comply with a direction given in accordance with this Part.

Maximum penalty: 2 penalty units.

(2) A person is not guilty of an offence under this section unless it is established that the person persisted, after the direction concerned was given, to engage in the relevant conduct or any other relevant conduct.

200 Limitation on exercise of police powers

This Part does not authorise a police officer to give directions in relation to:

(a) an industrial dispute, or

(b) an apparently genuine demonstration or protest, or

(c) a procession, or

(d) an organised assembly.

11 The evidence establishes (and it is not contested) that the accused was sitting on top of a tripod, the tripod was blocking the free flow of traffic, the accused was given a direction to come down from the tripod and he failed to comply with that direction.

12 It is the prosecution submission that the elements of the offence are made out and the accused had no reasonable excuse for failing to comply with the direction. It is the defence submission that the direction was not one which could be given under the Law Enforcement (Powers and Responsibilities) Act because the accused was involved in an apparently genuine demonstration or protest but, even if that submission is rejected, he had a reasonable excuse for his failure to comply.

13 Was the direction one which was authorised by the legislation?: the defence submission is as follows. Section 200 of the Law Enforcement (Powers and Responsibilities) Act places limits upon the power of a police officer to give a direction, s.200(b) stating that an officer has no authority to give a direction in relation to an apparently genuine demonstration or protest. There is no doubt that a demonstration or protest was taking place on Clarkes Road on 27th April, 2010. Sgt. Abbott referred in his statement to the presence of "about ten logging protestors and their vehicles". Const. Westaway referred to "Lisa Stone, a protestor". Const Quick referred to the fact that he had been advised by a superior "to attend Clarke Road Greendale which is situated in the Mumbulla State Forest and help with protestors, one in particular who was sitting in a tripod 12 to 16 feet off the ground". Const. Hancock referred to "the protest site". Retired Inspector Megay referred in his evidence to "a number of people around those vehicles and a number of signs protesting against the timber harvesting". Although no evidence has been given by any of those persons, it is reasonable to conclude that the demonstration or protest was apparently genuine. The accused told Const. Westaway that he did not want to answer "legal questions" but he has given evidence that he was concerned about the logging operation and it was his intention to have an adverse impact upon the operation. He was, therefore, a part of the demonstration or protest. I am of the opinion that, in such circumstances, the direction given by Const. Westaway was not a direction authorised by the Law Enforcement (Powers and Responsibilities) Act and the accused cannot therefore be convicted of failing to comply with it.

14 Reasonable excuse: having reached the conclusion which is outlined in the prior paragraph, it is not necessary for me to consider this issue as the charge must be dismissed for the reasons set out in that paragraph. As the issue is, however, one which was the subject of a lot of debate during the hearing, I will now address it.

15 It is convenient to indicate at the outset that a person is not entitled to take the law into his or her own hands. If I see a car which is illegally parked I would not be entitled as a private citizen to move that car. There are, however, circumstances in which a private citizen may justifiably do something which, in the absence of those circumstances, would be a crime.

16 Some, but not all, of those circumstances are as follows:

- a person is entitled to use force to defend himself or herself (there are some limitations upon the force which may be lawfully used depending upon the circumstances but I am stating the principle of self defence in a general way)
- a person is entitled to use force to arrest a person who is committing a crime (a "citizen's arrest")
- a person is entitled to use force against someone trespassing upon the person's property
- a person is entitled to break the window of a house which is on fire in order to attempt to rescue a person or property inside the house
- a person is justified in committing a crime, e.g. a theft, if under some form of dire threat, e.g. "if you do not go and steal those jewels I will shoot your spouse" (duress).

• a person is justified in committing a crime in circumstances of necessity (e.g. speeding to take an injured person to hospital).

17 There are, as previously indicated, limitations upon what a person can do when embarking upon actions which otherwise would be a crime. In almost all of these situations the person's action must be reasonable. For example, a person who was being stabbed by another might be entitled to hit that other on the head with a hammer in self defence; a person who was being poked in the chest by the finger of another who was engaging in a nasty argument would be entitled to push that other person away in self defence but would not be entitled to hit that other person on the head with a hammer. In almost all of these situations the accused must raise the issue (there is said to be an "evidentiary onus" upon the accused). If a person, for example, commits what otherwise would be a crime because he or she is under duress, it is the obligation of the accused to raise that issue - once raised, it must then be negatived beyond reasonable doubt if there is to be a conviction. If the issue is not raised then it obviously cannot and does not need to be addressed. In almost all of these situations the concern of the person must relate to something which is imminent. If a person applies violence to someone assaulting the person's spouse, for example, such use of violence may well be justifiable; if, on the other hand, the person applied violence to someone whom the person believed was going to assault the person's spouse tomorrow, such use of violence would almost certainly be unjustifiable.

18 There are quite a number of authorities relating to the concepts of lawful and reasonable excuse. I consider, however, that cases which involve an element of protest activity are the most helpful when dealing with this issue. The cases include:

19 **R. v. Bacon & ors**. (1977 NSWLR 507): the accused in that case had remained in buildings at Victoria Street, Darlinghurst. The buildings were due to be demolished and the area re-developed. The accused were concerned for the rights of the few people who were still resident in the buildings and were concerned about the methods being used by the owner to oust those residents. The accused therefore decided to "squat" in the buildings. They were convicted of trespass and the matter came before the Court of Criminal Appeal. Although the appeals were (in all but one case) dismissed, the court held that the genuine beliefs of the accused were matters relevant to be considered on the issue of "without reasonable cause".

20 **Devlin v. Armstrong** (1971 NILR 13): the accused in that case was Bernadette Devlin who was at the time a Member of the House of Commons. She was one of a number of people who had built a barricade in order to keep police officers from entering Bogside, an area in Londonderry in Northern Ireland. She did so because she maintained that, had the officers entered that area, they would have assaulted people and would have unlawfully damaged property. She was convicted of various offences and appealed to the Northern Ireland Court of Appeal. There was a suggestion from the court that a citizen might have the right to take action which would otherwise be criminal in some circumstances. The court referred to a comment by Lord Mansfield in a case from 1779 in which he said "*you may suppose a possible case, but ..... it must be imminent, extreme, necessity; there must be no other remedy to apply to for redress; it must be very imminent, it must be very extreme .....* " The court in 1971 said "*it is one thing to act for the best in some case of extreme necessity, where the forces of law and order are absent ..... It is quite another to fight against and seek to expel a lawfully constituted constabulary while acting as such in the execution of its proper functions*".

21 **Darcey v. Pre-Term Foundation Clinic** (1983 NSWLR 497): the accused in that case had been charged with trespass. He was found on the premises of a clinic in which he believed unlawful abortions were being carried out. He refused to leave when directed to leave. His motive for being on the premises was to collect evidence. Hunt, J. indicated that the appellant had no right to enter or remain on the premises for that purpose but suggested that a person might have the right to enter or remain on the premises "*to prevent the commission of a felony*".

22 **R. v. Hewke & ors**. (unrep. Caddick, J. The Crown Court, Kent 8th Sept., 2008): the accused in that case were Greenpeace protestors who had entered a power station in Kent because of their belief that the station was emitting carbon dioxide at a rate which was endangering the environment. They committed some damage while in the power station, mostly by painting political slogans on parts of the power station. His Honour, Caddick, J., was the trial judge. He made the following comments in his summing-up. "*in this country we have a long and honourable history of not just free speech but accommodating protests and demonstrations by those who, on conscientious grounds, wish to affirm and draw attention to their belief in a cause ..... This is so even though such protests may involve considerable nuisance and inconvenience to other citizens, but it does not extend to breaking the law. So if the defendant goes over the permissible line, then he is still guilty of the relevant criminal offence, conscientious protestor or not*". The judge indicated that, for a defence to be available, the accused would need to hold an opinion that what he or she was doing was necessary to provide the environment with immediate protection and that the opinion was, in the circumstances, reasonable.

23 **Taikato v. The Queen** (186 CLR 454): the accused in that case had carried a pressurised canister of formaldehyde in her handbag. She carried the canister in order to defend herself if someone attacked her. A person possessing such an item was guilty of a crime unless the person satisfied the court that the person had a reasonable excuse for possessing it or possessed it for a lawful purpose. The majority held that the accused did not have a reasonable excuse for the possession nor did she carry the item for a lawful purpose because the existence of a right to self defence cannot be determined until after the fact of a particular attack or threatened attack and there was no attack or threat of attack when the accused was carrying the canister.

24 **DPP v. Wille & Others** (1999 47 NSWLR 255): in that case the accused had entered a work site relating to the construction of Sydney's Eastern Distributor and had chained themselves to a crane. They had done so because they wished to protest against the construction of the road and in particular the fact that it involved the destruction of trees in Moore Park and a loss of part of the park for public recreational purposes. In holding that the accused had not acted lawfully, Kirby, J. said:

> *entry to the premises by these defendants was not necessary to accomplish their purpose. Their purpose was to show their opposition to the proposed road. They could have protested outside the perimeter fence. Such a protest may not have been as dramatic, but that cannot matter. Were it otherwise, a person could invade another's property because their purpose might be better accomplished in that location rather than elsewhere. Upon that basis someone would be entitled to enter inclosed land, publicly or privately held, to sunbathe, or hold a dinner party, because they preferred that location to another area, not enclosed.*
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> *..... the person who entered the land, in each of the cases referred to, did not have a criminal purpose. That, however, is not determinative, although it is relevant. Effecting entry itself may involve a crime (such as malicious damage to the fence). It would obviously be relevant for the prosecution to prove that the defendants had committed a crime in gaining entry, or intended to commit a crime once on the premises. In either case, and certainly in the latter case, it is difficult to see how a person who entered in such circumstances could assert that they had a lawful excuse. It is possible, perhaps, to imagine circumstances of necessity where beyond the fence there is a person in distress, such that damage to the fence, and entry, is necessary to alleviate that distress. Damage to the fence in such circumstances would not be malicious. Such person, in any event, would have lawful excuse for entry (cf the defence of necessity) "*

25 The logging operation which is the subject of the current case had been approved and undertaken on a flawed basis as the National Parks and Wildlife Act imposes certain restrictions upon activities which may be undertaken in Aboriginal places. The accused suspected that the logging operation was unlawful and his action

in sitting upon the tripod was intended to impede the operation. The operation was taking place when he was on the tripod. Earlier in this judgement I quoted the words of Lord Mansfield who said in 1779 "*you may suppose a possible case , but ..... it must be imminent, extreme, necessity; there must be no other remedy to apply to for redress; it must be very imminent, it must be very extreme .....* " and the words of the Northern Ireland Supreme Court in 1971 which said "*it is one thing to act for the best in some case of extreme necessity, where the forces of law and order are absent ..... It is quite another to fight against and seek to expel a lawfully constituted constabulary while acting as such in the execution of its proper functions*". It would, in most circumstances, be unreasonable to erect and mount a tripod and fail to comply with the direction of a police officer on the basis that it was necessary to remain on the tripod to prevent an unlawful action from taking place. Law enforcement is, in essence, a matter for police and/or other properly accredited and authorised persons and if those persons are present or can easily be called it would ordinarily be unreasonable for a person to take action to stop the activity. The legality of matters relating to logging in State Forests is obviously a complex issue. It would, in my opinion, be reasonable for a police officer to accept the proposition that, if a Forests NSW representative was indicating directly or by inference that a logging operation was lawful, the operation was indeed lawful and had been properly approved. In the present case there is evidence that the proper authorities had been alerted to the questionable legality of the logging operation but the operation was continuing. The fact is that shortly after the accused's arrest the operation was halted. Under such circumstances, I accept that the accused's action was reasonable and he therefore had a reasonable excuse for doing what he did.