

# SUPREME COURT OF QUEENSLAND

CITATION: *Ferguson v State of Queensland & Anor* [2007] QSC 322

PARTIES: **NEIL ROBERT FERGUSON**  
(plaintiff)  
v  
**STATE OF QUEENSLAND**  
(first defendant)  
and  
**MARC ANDREW HOGAN**  
(second defendant)

FILE NO: S15 of 2004

DIVISION: Trial Division

PROCEEDING: Civil Trial

ORIGINATING COURT: Supreme Court at Toowoomba

DELIVERED ON: 31 October 2007

DELIVERED AT: Brisbane

HEARING DATE: 10,11,12,13 July, 6, 7 August 2007

JUDGE: Lyons J

ORDER: **1. Action for damages dismissed.**  
**2. Judgment for the defendants.**

CATCHWORDS: TORTS – MALICIOUS PROCEDURE AND FALSE IMPRISONMENT – FALSE IMPRISONMENT – JUSTIFICATION AND OTHER MATTERS – ARREST AND IMPRISONMENT IN CRIMINAL PROCEEDINGS – where plaintiff was arrested and charged with murder – where plaintiff was subsequently imprisoned – where charge against plaintiff was dismissed and plaintiff was discharged at committal – whether the plaintiff’s imprisonment was unlawful – whether the plaintiff’s imprisonment was negligent

*Carnegie v State of Victoria* unreported, VSC, Full Court, No 998 of 1976, 14 Sept 1989, applied  
*Coleman v Kinbacher & Anor (Qld Police)* [2003] QCA 575, applied  
*Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714, cited  
*Dumbell v Roberts* [1944] 1 All ER 326, applied  
*Hussien v Chong Fook Kam* [1969] 3 All ER 1626, applied  
*Misel v Teese* [1942] VLR 69, applied

*Police Powers and Responsibilities Act 2000, s 198*

COUNSEL: P Nolan for the plaintiff  
P Rashleigh for the defendants

SOLICITORS: Shine Roche McGowan for the plaintiff  
Crown Law for the defendants

- [1] The plaintiff is currently 24 years of age and is claiming damages for what he alleges was his false and wrongful imprisonment by the defendants between 15 May 2001 and 30 May 2001. In the alternative he claims damages on the basis of the negligence of the defendants.

**Background facts**

- [2] In May 2001 the plaintiff was an 18 year old information technology student at the University of Southern Queensland residing with his parents at their home in Toowoomba. His older brother Mark Ferguson resided at a different property at Shennan Street, Toowoomba which was also owned by his parents.
- [3] On 5 May 2001 the unidentified torso of a man was found floating in Lockyer Creek near Helidon. The head, arms and legs had been severed.
- [4] Information gathered by police led them to believe that the body belonged to a missing Toowoomba man called Nicholas Moore. This information indicated that he had been seen with Mark Ferguson around the time of his disappearance. On the morning of 15 May 2001, a severed head and hands were located in the boot of a motor vehicle owned by Mark Ferguson which was parked in the yard of the residence at Shennan Street. Mark was arrested and interviewed by police.
- [5] Later in the day, a witness named Rebecca Smith provided police with a statement that on 4 May 2001 she had seen a person matching the description of Nicholas Moore outside Mark Ferguson's house at Shennan Street, she did not see the man leave and later that night she saw both Mark and Neil Ferguson inside the house. This statement was supported by information given on the same day by another witness Katrina Smith (whilst the surnames are the same the people are unrelated). This was the last time the deceased was seen prior to his body being found in the creek on the morning of 5 May 2001.
- [6] On the evening of 15 May 2001 the plaintiff accompanied police to the Toowoomba Police Station for the purposes of a record of interview. During that interview the plaintiff outlined his recollection of his movements during the preceding fortnight.
- [7] The plaintiff specifically denied any knowledge of or involvement in the death or dismemberment of Nicholas Moore. At the conclusion of the interview the plaintiff was charged with the murder of Nicholas Moore and placed into custody at the Toowoomba Watchhouse. He was subsequently transported to the Arthur Gorrie Remand and Reception Centre at Wacol on 17 May 2001.
- [8] On 30 May 2001 the plaintiff made an application for bail to the Supreme Court and the application was successful.

- [9] On 6 February 2002 in the Magistrates Court in Toowoomba the charge of murder against the plaintiff was dismissed and he was discharged. The plaintiff's brother later stood trial on the charge of the murder of Nicholas Moore.
- [10] The evidence available at the time of the arrest clearly indicated that the motor vehicle in which the head and hands of the deceased were located was owned by the plaintiff's brother, Mark Ferguson. The evidence also established that the deceased was known to the plaintiff's brother and that the deceased had been seen at Mark Ferguson's residence prior to and on 4 May 2001. Clumps of what appeared to be human hair were later found in the backyard of the plaintiff's brother's residence together with chop marks in the lawn of the same area. Blood stains were also found in the residence.
- [11] There was therefore a body of evidence which implicated Mark Ferguson in the death of Nicholas Moore. The question is whether there was evidence which implicated Neil Ferguson to such an extent that his arrest and detention were justified.

### **Issues**

- [12] The claim is both for false and wrongful imprisonment and for negligence.
- [13] An action for false imprisonment is essentially a trespass to the person and an action lies where a plaintiff has been wrongfully restrained.<sup>1</sup> To establish the tort it is necessary to show that the plaintiff has submitted to the defendant's power. It is not necessary however for the defendant to have used force and acts or words are sufficient where a plaintiff believes that force would be used if he does not submit. The imprisonment must also be intentional.
- [14] In relation to the onus of proof it is significant that once the imprisonment is proven by the plaintiff then the onus passes to the respondents and the respondents must then establish that the imprisonment was lawful. In *Carnegie v State of Victoria*<sup>2</sup> the Victorian Full Court held if a plaintiff establishes that there was an imprisonment the plaintiff will succeed in the action unless the defendant establishes that the imprisonment was excused or justified.
- "The gist of the action for false imprisonment is the mere imprisonment. As a result the plaintiff carries the burden of establishing no more than imprisonment. He need not prove it was unlawful. If imprisonment is proved it is for a defendant if he is to escape liability to prove a lawful justification for the imprisonment either at common law or by statute."
- [15] The authorities also establish that once the false imprisonment is established there is no requirement for the plaintiff to prove that actual damage has been suffered as a result of the imprisonment. The mere occurrence of imprisonment is sufficient.
- [16] In Australia there is some authority<sup>3</sup> for the proposition that an action for trespass is also able to be brought in relation to a negligent act but it is unclear where the onus of proof lies in these cases.

---

<sup>1</sup> See generally Australian Torts Reporter at 46-600-940 CCH.

<sup>2</sup> unreported, VSC, Full Court, No 998 of 1976, 14 Sept 1989.

<sup>3</sup> *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714.

- [17] Quite apart from the tort of trespass an action may also be brought under the general principles of negligence and the plaintiff has done so in this case. For that action to be successful the plaintiff must prove that there was a duty of care owed to him which was breached.
- [18] In reality the two torts will often merge and on many occasions negligence will in fact be part of the false and wrongful imprisonment.
- [19] The usual defence to an action for false imprisonment is that the defendant has not acted unlawfully because the imprisonment was authorised or justified by law. In this case the first defendant is a police officer who was one of a team who were investigating the death of Nicholas Moore.
- [20] Police have powers of arrest and the *Police Powers and Responsibilities Act 2000* (“PPRA”) sets out these powers. Essentially for an arrest of a person to be lawful under the then provisions of s 198 of the PPRA, the police officer had to reasonably suspect that the person has committed or was committing an offence and it was reasonably necessary to arrest the person for one of the reasons set out in the section which included the prevention of further offences, the preservation of evidence or simply “because of the nature and seriousness of the offence”.
- [21] In this particular case there was no confession by the plaintiff and there were no admissions in his record of interview. Accordingly the essential issue is whether there was sufficient evidence to reasonably suspect that he had committed murder either as a principal or a party.
- [22] In order to determine if either of the torts has been established on the evidence, given that many of the issues merge, I have broken the issues in this case into a series of questions as follows:
- (i) Has there been an intentional imprisonment?
  - (ii) Has the defendant shown that the imprisonment was lawful? In particular was the arrest on the basis that there was a reasonable suspicion that the plaintiff had murdered the deceased? These questions go to the tort of false imprisonment.
  - (iii) Were the arrest and imprisonment negligent? This involves an examination of the duty of care owed to the plaintiff and a determination of whether the arrest was made after a proper assessment of the material before the police. Was the information so deficient that in fact it was negligent to arrest the plaintiff? These questions go to the tort of negligence.
- [23] The answer to the first question is clearly in the affirmative. The fact of an intentional imprisonment is obviously established by the evidence.
- [24] In relation to the second question it is clear that the defendant has the onus of establishing that there was a lawful justification for the imprisonment. In order to answer the remaining questions it is necessary to examine in some detail the information upon which the charge was based.

### **Information that formed the basis of the charge**

#### **(i) First phase of the investigation prior to identification**

- [25] The body was found about 9.50 am on Saturday 5 May 2001 by Michael Johnson whilst he was out walking his dogs in the park at Helidon Creek. His dogs had jumped into the creek and he saw a black plastic bag which appeared to be floating on the left side of the weir and/or up against the weir. As he pulled back the plastic he saw what looked like a human body that did not have any legs. Mr Johnson then alerted police who were nearby on the highway.
- [26] An examination of the “Running Sheet” for the operation, which was code named “Spent”, indicates that the first phase involved the location of the body, the setting up of the crime scene and the attendance of scientific officers. The body was retrieved and was found to be the torso of a male person and “...the deceased’s head, hands and legs had been removed. The only distinguishing feature identified on the body was a small heart shaped birthmark located on the lower abdomen of the body.”<sup>4</sup> By early afternoon a door knock of the area had commenced as had a search of the Helidon dump and a SES search of the vicinity of the crime scene.
- [27] By mid afternoon Detective Noel Ragh had taken charge of the investigation and established the Major Incident Room (MIR). Media releases were issued requesting assistance from the public. A nationwide search was then instituted in relation to missing persons and a check was done on all released prisoners and those on home detention.
- [28] This initial phase also involved following up a number of leads which had come via Crimestoppers and following up on numerous pieces of information provided by the public through routine inquiries, many of which were of no assistance. Police also followed up missing person reports in an effort to identify the torso. The first part of the inquiry therefore was focused on the identification of the body, gathering of evidence and following up on information which had been supplied.
- [29] Early leads were followed up including information given on 6 May by a witness who described crossing the causeway on Thursday morning 3 May at 4.00 am and seeing a man stopped on the weir with his car door open. On her return that evening she had seen a large black plastic bag in the creek. Other information revealed that a group of TAFE students had taken water samples from the weir on 3 May 2001 and those samples revealed that the oxygen content of the water that day was 22 when it was normally 60. The decrease in level is associated usually with either algal bloom or a decomposing carcass.
- [30] The initial post mortem conducted at the John Tonge Centre on 6 May 2001 failed to establish a cause of death but indicated that the body “had been deceased and disposed of not more than 72 hours prior to it having been discovered”.<sup>5</sup>

### **The second phase following the preliminary identification on 11 May 2001**

- [31] On 11 May police interviewed Christine Moore, the mother of the deceased, who indicated that her son was missing. She had not seen him since 26 April 2001 when she had dropped him off for an appointment at the Toowoomba Hospital. He was described as having an upside down heart shaped birthmark on his stomach. She also indicated that he had a black “staffy” dog that accompanied him everywhere. DNA swabs were taken from Mrs Moore for DNA profiling. Information revealed

---

<sup>4</sup> Exhibit 2 - Memo to State Crime Operations Command dated 7 May 2001.

<sup>5</sup> Exhibit 2 - Memo to State Crime Operations Command dated 7 May 2001.

that Nicholas Moore was a known drug user, a drug supplier and that he had an extensive criminal history for drugs and property offences to support his habit.<sup>6</sup>

- [32] On 13 and 14 May a number of Moore's friends were interviewed and many stated that the last time they had seen the deceased was at a party he held on the evening of 24 April 2001.<sup>7</sup> There were then some further contacts with drug associates around Anzac Day with the last contact being on 26 April.<sup>8</sup> These inquiries revealed that many of Moore's drug associates had no liking for him. Some of these associates provided false information to police. The information however did establish that Moore owed money to a number of people and that a drug dealer named Field met with Moore on 27 April. Field and Moore then met a woman named Nicole Bousen and they had all gone to Nicole's house. Later that day they met a man named Mark and Moore then stayed with Mark.<sup>9</sup>
- [33] On 14 May police made a decision to find the identity of the person Mark that Moore had stayed with. They also decided to place Moore's associates under surveillance and to interview up to 25 of these associates on 15 May.<sup>10</sup>
- [34] When interviewed on 15 May Nicole Bousen stated that the last time she saw Moore was on the Monday or Tuesday before Anzac Day (this date was changed to 2 May in a statement dated 16 May) when she saw him and a woman called Geraldine Field at Westridge. They had all gone to her house and then Moore had gone to Mark Ferguson's house in Shennan Street, Toowoomba. The deceased had his dog with him at the time. Ms Bousen stated that she lived just around the corner from Mark Ferguson and that later that day Moore and Mark Ferguson came to her home. Ms Bousen stated that when the men left later that night Moore indicated that he was staying with Mark Ferguson for a couple of days and that he was trying to obtain drugs.
- [35] Ms Bousen stated that later that night she saw Moore again at Mark's house and that they were still waiting for the drugs. This was the last time that Ms Bousen saw the deceased. When she went to Mark's the following morning Mark and Moore's dog were there but Moore was not. Mark told her that Moore had taken off during the night but had left his dog behind. She was told "Nick probably did the runner from Max because he owes him a lot of money and Max has been around looking for him."<sup>11</sup>
- [36] This information therefore indicated that Moore had been alive as at 27 April. Information then established that he had been known to be staying with Mark Ferguson after this date. Whilst Ms Bousen later stated that she was a week out with her dates and had last seen Moore on 2 May, it would appear that this was not known to police at the time of the arrest of the plaintiff on 15 May 2001.
- [37] Police attended Mark's home at Shennan Street on 15 May 2001 at 9.30 am and detected a strong smell of decomposition coming from the boot of a Ford Falcon in the back yard. An examination revealed what appeared to be the head of a person in

---

<sup>6</sup> Exhibit 2 - Memo to State Crime Operations Command dated 13 May 2001.

<sup>7</sup> Statements of Jamie Richards dated 13 May 2001, Brett Stark dated 14 May 2001, Thomas O'Laughlin dated 14 May 2001.

<sup>8</sup> Statement of Darren Pound dated 14 May 2001.

<sup>9</sup> Exhibit 2 - Memo to State Crime Operations Command dated 14 May 2001.

<sup>10</sup> Exhibit 2 - Memo to State Crime Operations Command dated 14 May 2001.

<sup>11</sup> Statement of Nicole Bousen dated 15 May 2001.

an advanced state of decomposition in a black plastic bag in the boot. Another black plastic bag was also located in the boot containing bloody bed linen.<sup>12</sup>

### **The third phase after the location of the head and hands on 15 May 2001**

- [38] This phase commenced after the location of the head and hands in the boot of Mark Ferguson's car.

### **The statement of Mark Ferguson**

- [39] Mark Ferguson gave a statement to the police dated 15 May which indicated that he was 23 years of age and that he lived at the house at 44 Shennan Street, Toowoomba which is around the corner from the McDonalddtown shopping centre. He indicated that he owned three cars namely a Honda Civic which was light green as well as two 1981 Fords namely a blue and white Ford Panel Van and a blue Ford Falcon Sedan. He advised that the sedan was not registered and was not driveable as the gear box didn't work.
- [40] Mark Ferguson indicated to police that he knew Nicholas Moore and that whilst he had known him since school days they were not good friends. He also advised that he knew Moore had Hep C and knew he used drugs but he did not know what he was "shooting up". He told police that he had met up with Moore and a girl at the McDonalddtown shops the day after Moore had been "kicked out" of the house he had been living in (which would appear to be 27 April as his mother had dropped him at the hospital on 26 April after a falling out). He invited Moore to his home and Moore had turned up with his dog which he led around on a piece of string.
- [41] Mark Ferguson indicated that they mainly sat around watching TV and he let Moore stay two nights. He indicated that on either that day or the day after, a couple, Max and Angelique, came to his house at 8.00 or 9.00 pm also looking for a place to stay. He thought that Max was a drug dealer. While Max, Angelique and Nick were at his house they used cannabis. Max and Angelique stayed two nights in total but left pretty quickly. He suspected them of stealing his Play Station and laptop computer.
- [42] Mark Ferguson advised that Moore had only stayed two nights and then left. When he got up at about lunch time and Moore was not there he presumed that Moore had gone off to get his dole as it was his dole day. He left without telling Mark what he was doing and he left his dog behind. The following day Max and Angelique left Mark's house and the woman whose home Mark had been to with Moore came around to his house checking on Moore.
- [43] Mark Ferguson told police that he had a drug habit and was using a painkiller oxycodone, valium and an anti-depressant called seniquin.

### **The interview with Rebecca Smith**

- [44] At 2.50 pm on 15 May 2001 police interviewed Rebecca Smith aged 18 who had previously lived at 40 Shennan Street, two houses away from the house occupied by Mark Ferguson. Rebecca indicated he came to live at the house in about October

---

<sup>12</sup> Exhibit 2 - Form 4 Report *Coroners Act*.

1999 and that she saw a fair bit of him until she moved out of her mother's home in March 2001.

- [45] Rebecca indicated she would go to Mark's house nearly every day until she split up with her boyfriend in March 2000. She also indicated that she knew Neil Ferguson because he would go to the house nearly every day after he finished school. She indicated that at the house she frequently saw needles on the floor, clip seal bags containing powder and she had observed Mark Ferguson weighing powder on scales and putting it into bags.
- [46] She remained friends with her neighbours at 42 Shennan Street, Corey and Katrina Smith who lived next door to Mark Ferguson. Their lounge room faced onto Mark's and on some days she had seen up to 30 different people come and go from Mark's house.
- [47] She visited this address frequently and on Wednesday 2 May she visited after she finished work at 3.00 pm. She was certain of the date because the State of Origin Match was on the following Sunday. When she visited that day she looked out the window and noticed Mark Ferguson walking down the driveway with an unknown man who was leading a small dog. This man was slim, about six feet tall and was wearing a dark coloured track suit and a blue checked flannelette shirt. When she got up the next morning she noticed the dog was still there, tied to a tree.
- [48] Rebecca stated that on the following day Thursday 3 May she finished work again at 3.00 pm and also went to visit again. When she arrived she observed the dog still tied to the tree and at 4.30 pm she saw Mark and the same man walk into Mark's house. She visited again the following day Friday 4 May at about 5.00 pm and when she arrived she observed the man's dog and Mark's dog playing at the back of the house. At about 5.30 pm she saw the man who owned the dog walk up the driveway and he was looking into some of the side windows. He then walked around the back of the house and she presumed that he went into the house. She did not see this person ever again. Rebecca Smith indicated that about an hour later she saw Mark park his car in the driveway. His brother Neil was with him and they went into the house via the front door.
- [49] Rebecca Smith stated that at about 9.45 pm that night she decided to go over to Mark's and ask him over for a couple of drinks. When she walked up on to the patio she noticed the lounge room light was on and she knocked on the screen door. Mark did not open the door initially but eventually opened the main door but not the screen door. She spoke to him through the screen door and observed Neil sitting on the lounge chair watching TV. When she asked if she could come in she was refused entry.
- [50] Rebecca stated that at 6.30 am the following day she got up and as she left the house she noticed that Mark's green car was gone from the driveway which she thought was unusual because Mark normally slept in and did not get out of bed until late in the morning. The small dark dog belonging to the man was still in the back yard.

#### **The information provided by Katrina Smith**

- [51] Ms Katrina Smith also provided information to the police on 15 May but she did not sign her statement until 16 May. This information indicated that she had seen a person matching Moore's description at her home with Mark and her husband when

she returned after a business meeting on the evening of 3 May. She further advised that on Friday 4 May she had seen this person walking his dog with Mark. She also stated that later on that Friday night Rebecca had gone over to Mark's place. She had subsequently also gone to Mark's place with Rebecca and she had seen Neil sitting in the lounge.

### **The formal interview with Mark Ferguson**

- [52] Later that day Mark Ferguson was formally interviewed by police. The transcripts indicate that the first interview commenced at 6.22 pm on 15 May and a second interview commenced at 9.00 pm on that date. Early in the interview the current state of the investigation was put to Mark and he was told "Nick's head has been found in the boot of your blue car"<sup>13</sup> and "Well, you're the one in the box seat at the moment?.....Your house, your car, Nick's dog?....Nick's body down at Helidon?.... Nick's head in your car?....Blood stained clothing in the garage."<sup>14</sup>
- [53] In the interview Mark agreed that Moore had stayed with him two or three weeks previous to the interview and it had been "two days before his dole day". A perusal of the transcript of the interview however reveals that there was no further information forthcoming from him other than that Mark indicated that all his keys had gone missing prior to the location of the head in the car. He intimated that anyone could have therefore put the head in his car. He denied any knowledge in relation to the death of Moore. Apart from this information Mark declined to provide any further assistance to police.
- [54] The transcript also reveals that Mark Ferguson was on strong painkillers and that he was in need of them at the time of the interview.<sup>15</sup> The interview was not videoed as the equipment was not apparently working at that time. Having listened to the tape recording it is apparent that Mark was not well at the time and that the police had some concerns about Mark's physical and mental state during the interview. I note that he sounds frail and weak on the tape and I have similar concerns about his mental state at the time.

### **The interview with William Ferguson**

- [55] On 15 May 2001 the police interviewed William Ferguson, the father of Mark and Neil. He indicated he was a real estate salesman and that he resided at the family home in Toowoomba with his wife and his son Neil. He stated that Mark was charged with possession of marijuana at 18 years of age and that on another occasion during a break-in at their house Mark was stabbed and nearly died. He had been in intensive care for about a week and told his family that after that he needed drugs to mask the memory of this incident. He also advised that Mark had told them he had a degenerative disease of the spine and needed medication for the pain. It would seem that in the stabbing Mark was stabbed in the upper left back and the knife had pierced his lung and his spleen.
- [56] He stated that Mark had been living in the house at Shennan Street by himself for about 18 months. Mr Ferguson indicated that Mark owned three vehicles, an XD sedan, an XD panel van and a Honda Civic. He indicated that the sedan was blue

---

<sup>13</sup> Transcript of Record of Interview with Mark Ferguson dated 15 May 2001, p 2, l 28.

<sup>14</sup> Transcript of Record of Interview with Mark Ferguson dated 15 May 2001, p 2, ll 55-60; p 3, ll 1-3.

<sup>15</sup> Transcript of Record of Interview with Mark Ferguson dated 15 May 2001, p 6, l 10.

and had one white door on the driver's side but it was not registered and had not been moved for 18 months. He knew this was the case because he mowed the lawn and he regularly mowed the grass underneath the car. The panel van was white and whilst it was parked usually on the verge outside the property he did not think that car had been moved for about two months because the registration ran out in March 2001.

- [57] He stated that he and Neil had keys to the house at Shennan Street and that he regularly cleaned the house with last occasion being Saturday 12 May 2001. He did the washing up, cleaned the bathroom, the stove and benches, vacuumed the house and collected a garbage bag of rubbish. He then took Mark's dirty clothes home and washed them. Neil cleaned the lounge room.
- [58] Mark stayed in the spare room at their house from time to time and would also come around to have a shower. When his wife had found ammunition in the spare bedroom on Sunday 13 May he had hidden it by burying it in the back yard of their home. Mr Ferguson also said that when he was cleaning up Shennan Street he discovered that Mark had an unlicensed rifle in the house.
- [59] He suspected Mark was using drugs. He had always used marihuana and Mark had told him he had tried heroin. Mark had been seeing a Dr. Montgomery a psychiatrist at St. Andrew's Hospital for depression and had been placed on medication. Mr Ferguson knew that Mark had been taking a lot of tablets for his back pain and that his wife was concerned as they were usually prescribed for people dying of cancer and terminal illness and she was concerned that he should not be taking them.
- [60] Mark had told him that he would rather be dead than go into drug rehabilitation and that he had been thinking of ending his life over the last couple of days. Mr Ferguson also stated that Mark and Neil had a disagreement two or three weeks previously and Mark told Neil not to visit him again. He confirmed that Mark had a dog but there had been another dog, a Staffordshire terrier crossbreed, around over the last couple of weeks and Mark had told them a person called Nick had left it at his place without even a goodbye.
- [61] Mr Ferguson indicated that Mark had stayed with them the previous night and that the police arrived about 8.30 am on 15 May and Mark had left with the police at that time.

### **The interview with Neil Ferguson**

- [62] On the afternoon of 15 May the plaintiff returned home from university and as it was cordoned off as a crime scene, he went to his sister's home. The field tape of the attendance of police at this residence at 7.40 pm indicates that his sister Michelle said "Has something been found down at the house, at Mark's house?" and then she repeated "Has something been found at Mark's house?" When the officer replied "yes" an unidentified speaker says "What, blood on the lawn?" The officer then replied "A head in the boot of the car ...". The plaintiff was then asked to attend the station for questioning. Whilst the plaintiff agreed to accompany the police to the station and to make a statement it would appear he was not under any suspicion but was simply assisting with inquiries.

[63] As they were leaving there was a discussion about getting medication for Mark Ferguson from his parents' home. The speaker also asked whether or not Mark had made any admissions. It appears that the unidentified speaker is Mr William Ferguson and he was concerned that they obtain medication for Mark and Neil. Mark required medication twice a day as did the plaintiff, namely tegretol, for epilepsy. There was an attendance at the house to get the medication.

[64] The record of interview commenced at the station at 8.30 pm. Neil indicated that he knew Nicholas Moore through his brother who had been at school with him. He indicated that it was years since he had last seen him but it was possible that he had seen him in recent weeks. He indicated that he had last been to his brother's house on Saturday 12 May and that on that date he had simply watched TV and that a man named Max had also come around during that day.

[65] He indicated that previous to that the last occasion he had been there was "probably a week or so before that." He agreed that this would have been about 5 May. When asked what day it was he indicated "I knew it couldn't have been a Thursday, that's the only day it couldn't have been." When asked who else was there he initially said he didn't think anyone else was there. He thought only his brother was there. He then clarified and said "It wouldn't have been the 5<sup>th</sup>" he said "actually no it would have been the 3<sup>rd</sup>." He was asked:<sup>16</sup>

"How do you know it was the 3<sup>rd</sup>? --- No, it was the 3<sup>rd</sup> because when the officer came around this afternoon, um, I used my laptop and my timetable at uni and my assignment schedules to, ah, look at the last – the day that I - the first day that I went back there, and that would have been the 3<sup>rd</sup>.

The first day you went back to where? - - Well, um, about a month before that, me and my brother had, like, disagreements and I didn't – had – didn't go round for about a month, and that would've been the first day I went back to – 3<sup>rd</sup>.

... So you had a disagreement about one month ago? - - Yeah.  
And you hadn't been back to the house ---? -- Until the 3<sup>rd</sup>.

----- until the 3<sup>rd</sup>, and then the next time after the 3<sup>rd</sup>? - - The 12<sup>th</sup>, 15<sup>th</sup>.

The 12<sup>th</sup>. And then when was it – was there any time after the 12<sup>th</sup>? - -- The 15<sup>th</sup>.

That's today?-- Oh, okay then. Um, the 12<sup>th</sup> then. Third and the 12<sup>th</sup>. Yeah, the 12<sup>th</sup>. The 3<sup>rd</sup> and the 12<sup>th</sup> then.

Okay. So one month, the 3<sup>rd</sup> and then the 12<sup>th</sup>? - - Yeah.

Okay. And you're – you're sure about the 3<sup>rd</sup>? - - Yes.

And how – how can you tell that from your university ----? - -

<sup>16</sup> Transcript of Record of Interview with Neil Ferguson dated 15 May 2001, p 5-6.

Um, like, I've got assignment – when assignments were due, my timetable at uni and my schedule for, like, when I did them.

Yeah? - - So I can work out what days I would have been free and what days I could've gone round there.

Right? - - And that was the only one.

So we're sure about the 3<sup>rd</sup>? - - Yeah.

Is that right? Yeah? - - Yeah.

And we're sure about a month ago? - - Yeah.

And you haven't been there between the month and the 3<sup>rd</sup>, and then the next time was about the 12<sup>th</sup>? - -Yeah.

Three days ago? - - Yeah.”

[66] The interview continued and when Neil was asked if he was there on 4 May he answered “probably not”. Neil indicated that when he was at the house on 3 May the dog had already been left behind by Moore. He also indicated that he didn't know Rebecca Smith very well and that “she rarely comes around to Mark's place, that's for sure.”

[67] He also denied being in Mark's car or arriving with Mark in his car. When it was put to him that Rebecca Smith saw him at the house on the fourth he stated that it could have been the fourth but he stated “I'd say it was the 3<sup>rd</sup>.” He also denied seeing Rebecca Smith on 3 May unless he glimpsed her through a window. He subsequently stated that it was in fact 4 May he was there because he had uni all day Thursday. He also specifically denied seeing Rebecca Smith at Mark's door on that evening.

[68] When the detectives then put to Neil that Rebecca Smith had seen him at the house that evening about 9.45 pm when she went over to ask them to come over he stated “Actually, I had to have been there more than the third and the 11<sup>th</sup> and 12<sup>th</sup>” and subsequently stated:

“anywhere from three or four to five or six, you know-I'm not sure what-its-I go round to my- I used to go round to my brother's quite regularly, like once or twice-like once every couple of days, and so I'm not sure how many times I went round there during this –like period.”

[69] He then agreed that it was possible that Rebecca had come but he was not sure.

[70] He also stated “He doesn't have any sheets, he never has.” He also agreed that there was a rifle in the house and that he had probably touched it. He also stated that Mark had apparently fired the rifle out a back window at the house on about 11 or 12 May. He also agreed that he had touched the axe.

[71] The plaintiff at the end of the interview expressly denied any involvement with the death or dismemberment of Moore

### **Relevant factual findings re the record of interview and the basis for suspicion**

- [72] Having listened to the tape there are issues which arise in relation to the plaintiff's honesty given his evasiveness during the interview and given that he changed his story whenever he was pressed with an alternate version of events.
- [73] These concerns can be summarised as follows:
- When the plaintiff was first spoken to at the house it is clear that the family knew more than they were saying, given the question as to whether anything had been found at the house and whether there was blood on the lawn.
  - The family including Neil did not react to information that a head had been found in Mark's car.
  - Neil's vagueness about knowing Moore at all and whether he had seen him recently.
  - The constant changing of Neil's answer to the questions as to how often he had been at Mark's house between 3 May and 15 May. It went from the definite initial statement of once or twice to virtually every second day.
  - The statement that it "couldn't have been Thursday".
  - Neil's Denial of having seen Rebecca Smith on the night of 4 May.
  - The unsolicited statement that Rebecca rarely visited the house.
  - The statement that Mark didn't own any sheets.
  - The statement that his epilepsy and the drugs he took affected his memory when this only seemed to relate to information relevant to the death.

### **Was the arrest lawful or was the plaintiff wrongfully arrested?**

- [74] The plaintiff has clearly suffered psychological injuries as a result of his arrest. The plaintiff spent two days in the Toowoomba watch house and then almost two weeks in jail and was traumatised by his incarceration. He was frightened of sexual assault whilst in jail and was kept in a separate part of Arthur Gorrie in the suicide watch area although there is no evidence he was considered a suicide risk. Whilst there he heard two people attempt to commit suicide and he observed several violent altercations.
- [75] The plaintiff has suffered from stress, continues to have nightmares and essentially avoids people and social situations. His studies suffered, he is several years behind in his studies and he required counselling over an 18 month period. Whilst he has psychological injuries there is some divergence in the psychiatrists' opinions as to long term effects on the plaintiff with Dr Andrew Byth stating that he will be left with mild depressive symptoms and Dr Donald Grant stating that he continues to show features of a chronic adjustment disorder.
- [76] The question however is not whether he suffered the injuries because he was arrested, because he clearly has, but whether these injuries occurred as a result of

his wrongful or unlawful arrest. The central issue therefore is the wrongfulness or unlawfulness of the arrest.

[77] As set out previously the provisions of the PPRA at the time provided that for an arrest to be lawful the police officer had to reasonably suspect that the person had committed or was committing an offence and it was reasonably necessary to arrest the person for one of the reasons set out in the section which included the prevention of further offences, the preservation of evidence or the nature and seriousness of the offence.

[78] The extent of a police officer's power to arrest without warrant was discussed in the 1944 decision of *Dumbell v Roberts & Ors.*<sup>17</sup> In that case Scott LJ stated that:<sup>18</sup>

“The power possessed by constables to arrest without warrant, whether at common law for suspicion of a felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt.

That requirement is very limited. The police are not called on before acting to have anything like a prima facie case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.”

[79] The essential issue therefore is what is meant by the terms “reasonable grounds for a suspicion”. In the decision of *Hussien v Chong Fook Kam*<sup>19</sup> in the Privy Council Lord Devlin stated:<sup>20</sup>

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; “I suspect but I cannot prove”. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrests before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar. There is no serious

<sup>17</sup> [1944] 1 All ER 326.

<sup>18</sup> [1944] 1 All ER 326 at 329.

<sup>19</sup> [1969] 3 All ER 1626.

<sup>20</sup> [1969] 3 All ER 1626 at 1630.

danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control. There is first the power, which their Lordships have just noticed, to grant bail. There is secondly the fact that in such countries there is available only a limited period between the time of arrest and the institution of proceedings; and if a police officer institutes proceedings without prima facie proof, he will run the risk of an action for malicious prosecution. The ordinary effect of this is that a police officer either has something substantially more than reasonable suspicion before he arrests or that, if he has not, he has to act promptly to verify it.”

- [80] Lord Devlin went on to discuss the decision in *Dumbell v Roberts* and the further statement by Scott LJ that the police are not called upon before acting to have anything like a prima facie case or conviction:<sup>21</sup>

“Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. There is a discussion about the relevance of previous convictions in the judgment of Lord Wright in *McArdle v Egan*. Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case. Thus the fact that the accused has given a false alibi does not obviate the need for prima facie proof of his presence at the scene of the crime; it will become of considerable importance in the trial when such proof as there is is being weighed perhaps against a second alibi; it would undoubtedly be a very suspicious circumstance.”

- [81] Prior to 15 May 2001 the police knew nothing about Neil Ferguson. They were however aware of his brother Mark and when the head of the deceased was found in Mark Ferguson’s car which was parked and locked at his residence, he was obviously and immediately a suspect. There was no evidence at all in relation to Neil Ferguson being involved in Moore’ death at that point.
- [82] The critical evidence would seem to be the interview with the plaintiff when he gave answers that the police were not satisfied with, as well as the statements of Rebecca Smith and Katrina Smith. The importance of these statements is that they identify the plaintiff being at his brother’s residence on the afternoon and evening of 4 May which was the last time the deceased was seen alive.
- [83] Furthermore there is the evidence of both women that the plaintiff was seated on a couch at the home of Mark Ferguson at 9.45 pm on the evening on 4 May when Mark was reluctant to allow entry to the residence.
- [84] As set out in the cases a decision to arrest is exercised in circumstances where there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police inquiries are examples of those factors. Were the circumstances here such that the discretion was appropriately exercised?
- [85] Counsel for the plaintiff stated that the evidence of Rebecca Smith assumed particular relevance to the police simply because it fitted their theory, not because it

<sup>21</sup> [1969] 3 All ER 1626 at 1631.

by itself contained significant information. In particular counsel submitted that if the statement of Rebecca Smith was taken out of the equation there was virtually no evidence to link the plaintiff with the crime.

- [86] In order to arrest and lay charges the police must be satisfied that they have a reasonable suspicion that the person arrested committed the crime. The police are required to analyse the evidence in relation to the particular charge preferred which in this case was one of murder. The Code sets out quite clearly the elements of the offence of murder in s 302 as follows:

**302 Definition of *murder***

- (1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say—
  - (a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;
  - (b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
  - (c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;
  - (d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);
  - (e) if death is caused by wilfully stopping the breath of any person for either of such purposes;
 is guilty of *murder*.
- (2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.
- (3) Under subsection (1)(b) it is immaterial that the offender did not intend to hurt any person.
- (4) Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

- [87] The party provisions of the code must also be considered.

**7 Principal offenders**

- (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
  - (a) every person who actually does the act or makes the omission which constitutes the offence;
  - (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
  - (c) every person who aids another person in committing the offence;

- (d) any person who counsels or procures any other person to commit the offence.
- (2) Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission.
- (3) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
- (4) Any person who procures another to do or omit to do any act of such a nature that, if the person had done the act or made the omission, the act or omission would have constituted an offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission; and the person may be charged with doing the act or making the omission.

[88] The plaintiff submits that in all the circumstances the police could not possibly have had sufficient evidence to indicate that the plaintiff had any of the relevant intentions.

[89] Turning then to an analysis of the evidence upon which the arrest was formed. It is essential to examine the information, which has been set out above, which is the material the police actually had in their possession at the time the decision was made to arrest. Secondly it is important to understand the process of decision making that actually took place in order analyse how the decision that was made was actually reached.

#### **The decision to arrest**

[90] The interview with Neil finished about 9.00 pm after which there was a meeting briefing the other members of the investigative team. A number of officers discussed the evidence and a decision was made to arrest both Neil and Mark Ferguson.

[91] The objective evidence on which the police made their arrest can be conveniently summarised as follows:

1. On 5 May a torso was found in the creek at Helidon.
2. The initial post mortem on 6 May indicated that the torso was less than 72 hours old. The cause of death was not able to be established.
3. On 13 May there was a preliminary identification of the torso as being that of Nicholas Moore.
4. After 13 May there were extensive discussions with the known associates of Nicholas Moore which led to a body of evidence that Moore had been last seen by a group of people around Anzac Day and that Moore had been seen staying with Mark Ferguson after 27 April.

5. On 15 May the inquiries led the police to Mark Ferguson. A search of the yard of his home indicated a foul smell coming from a car parked in the yard.
6. On 15 May the head and hands of Nicholas Moore were found in the boot of Mark Ferguson's car at the residence that he occupied.
7. There were chop marks found in the lawn as well as matted hair, blood, a pick and an axe.
8. Mark Ferguson gave a statement on 15 May admitting that Moore and his dog had been staying with him at his house. Later that day he took part in a record of interview.
9. On 15 May Rebecca Smith gave a statement that she saw a person matching the description of the deceased at Mark Ferguson's residence on Wednesday 2 May, Thursday 3 May and Friday 4 May. She stated that on 4 May she saw the deceased and his dog at the house at 5.30 pm while she was at Katrina Smith's house.
10. Rebecca Smith stated she saw the plaintiff arrive at the house with Mark in the afternoon of 4 May and that at 9.45 pm she went over to the residence but was not allowed entry. She observed the plaintiff sitting on the couch.
11. At 6.30 am on Saturday 5 May Mark Ferguson's car was not in the driveway which was unusual given that he never got up early.
12. The description of Nicholas Moore given by Mark was that he was about 6 foot, scruffy looking with dark hair. This matched the description given by Rebecca Smith that the person she saw with Mark Ferguson was 6 feet, scruffy looking and with a dog.
13. Katrina Smith was spoken to by police on 15 May and signed a statement dated 16 May which stated that on Thursday 3 May she had seen a person matching the deceased's description with Mark Ferguson at her home talking to her husband and that on the afternoon of Friday 4 May she had seen both Mark and the deceased walking their dogs. She had also gone over to Mark's that evening and had also been denied entry. She saw Neil sitting on the couch.
14. The field tape of the interaction between the police and the Ferguson family at Michelle Ferguson's home indicated that Michelle asked whether something had been found at the residence and Mr William Ferguson asked if there was blood on the lawn.

15. When the family were told that a head had been found in the boot of Mark's car there was no reaction.
16. Neil Ferguson took part in a record of interview dated 15 May which raised a number of concerns about the truth of his statements as set out in paragraph 73.
17. In the interview the plaintiff minimised his attendances at his brother's residence.
18. There were inconsistent accounts of the number of occasions the plaintiff went to the residence in the two week period between 3 May and 15 May. The plaintiff changed his mind as to the frequency of his visits, initially indicating two visits but ended up by indicating that he could have been there up to every second day.
19. The plaintiff claimed to have a poor memory due to his epilepsy whenever it related to his involvement with the house but he otherwise had a good memory for other matters.
20. The plaintiff denied arriving in the car when he was seen to do so.
21. The plaintiff indicated that his brother did not own sheets. The head and hands of the deceased were found wrapped in bedding.
22. The plaintiff distanced himself from any recent meeting with Moore.
23. The plaintiff admitted to having used the axe recently and knew about a rifle at the house.

[92] The plaintiff's counsel submitted that the police started with a preconceived mind set in relation to the plaintiff and that they simply wanted to get the evidence to fit their theory.

[93] In essence the plaintiff's counsel submits that the police theory was two fold. Firstly, there were two people involved in Nicholas Moore's murder. This was based on the weight of the torso and the plaintiff's brother's own physical frailty. Secondly, the police had formed a view, based on their belief that the remains had not been in the causeway for any length of time and the fact that the post mortem revealed that death had occurred after 3 May, and that the murder had occurred a short time previous to the finding of the torso. The plaintiff's submission is that he was arrested because the police believed it had taken two people to commit the crime, his brother was the prime suspect because the deceased's head and hands were found in his car at his home and he was the logical person to fit in with the two person theory. The essence of the plaintiff's submission would seem to be that this theory was not based on the evidence and was not reasonable in the circumstances.

[94] The plaintiff also states that when he attended at the police station he was being interviewed not as a suspect but simply to assist police with their inquiries. However, as a result of that interview, even though no further evidence was forthcoming and even though there were no admissions, the police formed a view about the guilt of the plaintiff.

[95] Counsel submitted that in order for the plaintiff to have been connected with the murder there had to have been some evidence that he was involved. However all the police had was a suspicion that he was not being truthful and that he was protecting his brother. The submission is in essence that there was no real evidence of his involvement at all.

### **The detectives' reasons for arrest**

[96] The senior officers who were involved in the investigation gave evidence at the hearing and outlined the basis for the arrest of the plaintiff.

[97] Sergeant Marc Hogan gave evidence that he had been to Helidon where the torso was found and formed the view that it would take two people to put the torso of a man into the creek particularly because the bag it was wrapped in was still intact showing that it had not been dragged. He also described the finding of the head in the car at Shennan Street and stated it was wrapped in bedding. He also referred to chop marks in the lawn as well as photos of human hair matted with blood and bone chips in the backyard. He also described seeing beds in the house but that there was no bedding.

[98] Sergeant Hogan also stated police had received information from Rebecca Smith and Katrina Smith on 15 May although Katrina's statement was not actually signed until 16 May. He stated that although the plaintiff was initially saying he was only at the house on 3 May and 11 May, they had witnesses who were saying otherwise. Katrina Smith and Rebecca Smith had both seen the plaintiff at the house on 4 May. They therefore had two witnesses clearly stating that the plaintiff was there on 4 May.

[99] Hogan stated that these two witnesses had both seen the plaintiff there around 10.00 pm on 4 May and that Mark was acting suspiciously and not letting them in the house. The evidence of these witnesses was that Mark Ferguson was heavily affected by drugs at that time of night. Hogan stated that he was convinced that two people were involved. The plaintiff was at the house late at night on the last evening Moore was seen alive. He was also at the house when Mark would not let the two Smith women into the house. Not only was Mark affected by drugs at the time but he was also suffering from a degenerative back disorder and Sergeant Hogan was clearly of the view that Mark was incapable of putting the body in the creek by himself.

[100] Hogan stated that at that point the evidence showed that Moore was alive on Friday afternoon and he was last seen with Mark and the plaintiff. He had gone into the home on Friday evening and the next thing he was found dead in the creek. The plaintiff had been seen at the house late that night. There was no sign of a struggle and the body had been moved without dragging. The evidence indicated that the body had been put near the shed door, as there was a lot of blood around that spot, and that it was dismembered on the lawn which he considered would have taken a lot of effort. At that stage the cause of death was not known but he considered that

those who had cut up the body were responsible for the death as the severing of the head and hands was designed to avoid identification. Hogan stated that given the dismemberment of the body murder was implicit.

- [101] Moore's torso was then found on Saturday morning and the indications were that the death had occurred within the last two days. Hogan believed that this amounted to sufficient evidence that there was a reasonable suspicion that the brothers were involved together.
- [102] Furthermore he did not consider that the plaintiff was being truthful in the interview and it was clear the family knew more than they were revealing. He considered that Mr William Ferguson could not have known about blood being found on the lawn and was suspicious that he knew this.
- [103] Hogan stated that as well as forming a reasonable suspicion about the plaintiff's involvement there were other factors which influenced their decision. There was primarily the nature and seriousness of the offence and also a concern about witnesses. The next door neighbour Corey Smith was to be a witness and information indicated that the plaintiff and Corey had been involved in an altercation with a samurai sword a few days earlier. He also had concerns about the disposal of evidence given Mrs Ferguson had been seen going to the house on 15 May and removing items.
- [104] Hogan indicated that there were reasonable grounds to charge both brothers together because the only difference between the two was the fact that Mark was the occupier. The plaintiff had keys and ready access to the house. There was no evidence of anyone else being at the house at the relevant time. The brothers were therefore conjointly charged.
- [105] Hogan advised that the decision to arrest was discussed amongst the team and it was made by the team. Whilst he was the person delegated to effect the arrest of the plaintiff he stated he would not arrest a person unless he was satisfied that it was appropriate. He agreed that the arrest depended on the evidence of Katrina Smith and Rebecca Smith. He also advised that a search of the Centrelink details revealed that whilst Moore's pension had been put into his bank account on 30 April, this account had not been accessed since 20 April.
- [106] Evidence was also given at the hearing by Detective Inspector Michael Niland, Detective Timms and Detective Noel Ragh in relation to the basis of the arrest. These officers confirmed that the information which formed the basis of the arrest was discussed during a two hour meeting by the senior police personnel involved in the investigation late in the evening of 15 May. The officers essentially outlined the same information provided by Sergeant Hogan as to the reasons why it was considered that there were reasonable grounds to arrest both Mark Ferguson and the plaintiff.
- [107] Detective Timms<sup>22</sup> also referred to the fact that he considered it significant that the plaintiff could not remember things like a sword fight or installing surveillance equipment that had occurred in the weeks leading up to the interview but he could remember dates which seemed to distance him from the house. He was concerned that whenever they pressed the plaintiff on dates he advised that his epilepsy had an

---

<sup>22</sup> Transcript of Proceedings, 12 July 2007, p 84.

effect on his memory. He considered that Neil's memory loss was essentially selective and suited towards the evidence he was giving. He was also concerned that the plaintiff was not shocked by the incidents they were dealing with and the information they were giving him but rather there was simply no reaction. Detective Timms considered this behaviour was consistent with prior knowledge of the head in the boot.

- [108] Detective Ragh outlined the procedure involved in coming to the decision to arrest the plaintiff and confirmed that before a decision can be made to arrest someone for an offence which attracts life imprisonment, he had to be consulted. He indicated that the team of senior officers thoroughly discussed all the evidence and there was agreement from all present that there was sufficient evidence to establish a reasonable suspicion that the plaintiff and Mark Ferguson were responsible for the murder of Nicholas Moore.

### **Conclusion**

- [109] The issue of whether the arrest was reasonable in the circumstances essentially comes down to whether the police were acting reasonably in relying on the identification of Moore by the Rebecca Smith and Katrina Smith on a particular date and the fact that the death and disposal would have taken two people.
- [110] Rebecca Smith and Katrina Smith saw Moore go into the house but there was no evidence in relation to how the death occurred. The evidence of Rebecca Smith and Katrina Smith simply puts Moore at a house at a particular time.
- [111] I accept that, given the dismemberment, it was reasonable to hypothesise that Moore had been murdered given the efforts taken to dispose of the body and avoid the identification of the body. These actions do give rise to a reasonable assumption that a crime had been committed at the house.
- [112] The next issue is was it reasonable for the police to rely on the evidence of Rebecca Smith and Katrina Smith that Moore was last seen at the house on 4 May when there was a body of evidence that he had not in fact been seen since about 27 April. This was the evidence of Bousen and Field which corroborated the last sightings by his friends around Anzac Day. There was also evidence that a drug dealer Max Martin had been at the house with Moore and Mark and he stated that the date was about 29 April. Mark could not put a date on when he had seen Moore but said he had met up with him a day or so after his disagreement with his mother which had been on 26 April. He also states that he did not see Moore after Moore's dole day on 30 April.
- [113] There was also evidence gathered early in the investigation that the death had occurred prior to the evening of 4 May. One witness had indicated that on Thursday morning 3 May at 4.00 am she had seen a man stopped on the weir with his car door open and that later that evening she had seen a large black plastic bag in the creek. Other information revealed that on 3 May 2001 water samples revealed the possibility of either algal bloom or a decomposing carcass in the creek.
- [114] Accordingly there was some evidence which cast doubt on the evidence of Rebecca and Katrina Smith of them sighting Moore on 4 May. Police chose however to rely on the statements of Rebecca Smith and Katrina Smith indicating the last sighting was 4 May not the week before as some of the evidence was suggesting.

- [115] I consider in the circumstances it was reasonable to give particular weight to their evidence and I consider that the police were reasonable in concluding that Rebecca Smith and Katrina Smith were reliable witnesses. Their evidence seemed objective. There was no apparent reason for them not to tell the truth. Both women were able to give a definite sighting of the deceased on the night before his body was found. In particular Katrina Smith could link her sightings of the deceased to the date of a business meeting and Rebecca Smith could link her sighting to a date consistent with a State of Origin football match. Given the fact there were two independent witnesses who could substantiate the dates they gave, it was clearly reasonable for the police to rely on this evidence.
- [116] The fact that these witnesses may not have subsequently come up to proof at the committal is a completely separate and entirely different matter. The issue to be determined in this case is whether it was reasonable for the police to rely on the statements given by Rebecca Smith and Katrina Smith as at 15 May. On balance I consider that it was reasonable to do so.
- [117] I also consider that the police had reasonable grounds to discount the evidence that the body was in Helidon Creek prior to 4 May. This was based on the view formed by experienced police officers that when the body was found on 5 May it had been recently placed and had not been in the creek for any period of time. I accept the evidence of the officers in this regard. Having viewed the photos of the torso when it was found I consider that it was reasonable for police to conclude that the body had not been in the creek since the morning of 3 May which was some 48 hours earlier.
- [118] As previously indicated it is not necessary that the police have a prima facie case before they can arrest but they must simply have a reasonable suspicion.
- [119] I consider that the evidence indicated that there were reasonable grounds to suspect that the deceased had died at the house the night of 4 May.
- [120] Given the very obvious physical frailty of Mark Ferguson due to his degenerative back condition, his chronic pain, drug use and mental health issues I also consider that it was reasonable for the police to believe that two people were involved in the death, dismemberment and disposal of Moore's body.
- [121] There was no evidence of any other person at the house with Mark Ferguson on the night of 4 May other than Neil who was seen there at 9.45 pm.
- [122] It must also be remembered that all of the evidence to inculcate Mark Ferguson and the plaintiff had really been discovered during the course of one day, namely 15 May. The case changed quite quickly during the course of that day. Sergeant Hogan gave evidence that there was a concern about disposal of evidence and interference with witnesses.
- [123] It is clear that when the plaintiff accompanied police to the station around 7.00 pm on the evening of 15 May he was not a suspect however some two hours later he was a suspect. I consider that the behaviour of the plaintiff at the interview, particularly the evasive and changing answers that he gave as well as his inability to remember recent events, was such as to lead police to the view that he was not being completely honest in his answers. Having listened to the tape I consider that these answers and his inability to remember related specifically to his involvement with

Moore, his visits to the house, his contact with Rebecca Smith and Katrina Smith, the nature of the bedding and any knowledge whatsoever of the circumstances surrounding the last sightings of Moore.

- [124] Furthermore I consider that his conduct during the interview was such that it gave rise to an inference that he had knowledge which was consistent with a guilty knowledge of what had occurred. This went to distancing himself from the house, the deceased, the witnesses and in particular led to an inference which indicated that he knew the deceased's head and hands had been wrapped in bedding. As Detective Timms put it, by his answers the plaintiff was "extricating himself from some form of trouble".<sup>23</sup>
- [125] I consider that based on the evidence the detectives had obtained from Rebecca Smith and Katrina Smith prior to the interview with the plaintiff and given his behaviour at the interview there were reasonable grounds to be suspicious of the plaintiff. Given this suspicion and given the other evidence linking him to the house at the estimated time of death I consider that on the evidence it was reasonable for the police to have formed a suspicion that Moore was killed at the house and that both brothers were involved in the death and disposal of the body.
- [126] It must also be remembered that suspicion can take into account matters that may not be admissible as evidence at all when a matter comes to trial.
- [127] In determining the ultimate issue then as to whether there has been an unlawful imprisonment it is clear that the plaintiff has been imprisoned. However I consider that the defendant has established that the detention was lawful given that I consider that the arrest was based on a reasonable suspicion that the plaintiff was responsible for the death of the deceased.
- [128] In the decision of *Coleman v Kinbacher & Anor (Qld Police)*<sup>24</sup> Chesterman J stated:  
 "The submissions by the applicant fundamentally misunderstand the law. It is not the law that an arrest is only lawful if ultimately the person arrested is found to be guilty of the alleged offences which was the basis of the arrest.

Section 198 of the *Police Powers and Responsibilities Act 2000* (Qld) provides:

**'198 Arrest without warrant**

(1) It is lawful for a police officer, without warrant to arrest a person the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary for 1 or more of the following reasons –

(a) to prevent the continuation or repetition of an offence or the commission of another offence;

...

<sup>23</sup> Transcript of Proceedings, 12 July 2007, p 84, l 13.

<sup>24</sup> [2003] QCA 575.

- (g) to preserve the safety or welfare of any person including the person arrested.

...’

That section:

- (a) Gives a power to arrest dependent upon a police officer forming the belief prescribed by the section;
- (b) The existence of the power to arrest is distinct and independent from any ultimate determination of guilt;
- (c) Provided the police officer holds the requisite belief and the power of arrest therefore arises, the arrest is lawful notwithstanding that there is ultimately an acquittal of the defendant of the offence for which he was arrested and the arrest is lawful even if the police officer’s belief was founded upon some mistake of fact or law.

The arresting officer Kinbacher had clearly formed the view:

- (a) That the applicant had committed the offence of disorderly conduct;
- (b) That he was going to repeat the offence; and

The state of mind was reasonably held given the applicant’s conduct up to that point in time.

On that basis the arrest was lawful. It was not rendered unlawful by the Magistrate ultimately having a reasonable doubt as to the applicant’s criminal liability for the secondary fire. Indeed, even if he was acquitted of the charge of disorderly conduct the arrest was still lawful and he would be guilty of the other charges.”

[129] Events subsequently showed that the evidence upon which the police formed their belief did not ultimately come up to proof. That does not mean that the belief was not well founded at the time the decision was made. As the decision in *Dumbell v Roberts*<sup>25</sup> establishes, the police are not required before acting to have anything like a prima facie case for conviction. Rather police have the duty of making such inquiry as the circumstances of the case ought to reasonably indicate.

[130] Whilst the suspicion must be that of the defendant it is clear that the standard is an objective one. *Misel v Teese*<sup>26</sup> held that reasonable cause would exist where suspicion was based on certain facts which if they actually existed were such as would lead an ordinary prudent and cautious person in the position of the policeman to the conclusion that the person arrested was probably guilty of the offence. I consider that this has been established in the circumstances of this case.

---

<sup>25</sup> [1944] 1 All ER 326.

<sup>26</sup> [1942] VLR 69 at 72.

- [131] Furthermore I consider that pursuant to s 198 of the PPRA police were justified in arresting the plaintiff given the seriousness of the offence, the fear that evidence would be disposed of and that witnesses yet to be interviewed could be interfered with particularly as some parts of the body had still not been found.
- [132] Furthermore given these conclusions I do not consider that the plaintiff has established that the information upon which the decision to arrest was made was so deficient that it was a breach of their duty of care to the plaintiff and therefore negligent to do so.
- [133] In answer then to the questions posed earlier I indicate as follows:
- (i) Has there been an intentional imprisonment? Yes
  - (ii) Has the defendant shown that the imprisonment was lawful?  
Yes.  
In particular was the arrest on the basis that there was a reasonable suspicion that the plaintiff had murdered the deceased? Yes
  - (iii) Was the arrest and imprisonment negligent? No.  
In particular was the charge made after a proper assessment of the material before the police? Yes
- [134] Accordingly I do not consider that it is necessary to consider the plaintiff's claims for damages based on the torts of unlawful arrest and negligence to any further extent. Having determined that the imprisonment was lawful and that the arrest was made after a proper assessment of the evidence I do not consider that either claim can be established on the evidence and that it is not necessary to precisely examine the nature and extent of the duty of care owed to the plaintiff.
- [135] The plaintiff's action for damages should therefore be dismissed. There will be judgement for the defendants.
- [136] I will hear counsel as to costs.