Escaping, Obstruction, Resisting and Hindering

Sections 58 and 546C of the Crimes Act 1900 (NSW)

The Common Law Indictable Offence of Escape Police

I acknowledge that the land on which I work and live is the traditional land of the Wiradjuri Nation. I pay my respects to the elders, both past and present.

Delivered by:

Silas Morrison
Managing Solicitor
Dubbo Aboriginal Legal Service
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Introduction

Charges of resisting, obstructing, hindering and escaping from police are common accompaniments to our clients' interactions with the NSW Police force. These offences are often presented by the police prosecutor as interchangeable and clear cut. They are in fact nuanced and complex. Obviously this topic feeds into much wider debates about the execution of duty, powers of arrest, lawful custody and specific intent, just to name a few.

This paper focuses on the most commonly averred permutations of sections 58 and 546C of the *Crimes Act* 1900 (NSW) and the common law offence of Escape. There are more rarely particularized versions or the former and statutory versions of the latter. However, this paper will examine the most commonly charged types of each.

Resist

s.58 Crimes Act 1900 (NSW) Maximum penalty 5(2) years imprisonment
s.546C Crimes Act 1900 (NSW) Maximum Penalty 12 months imprisonment or $1,100 fine

Introduction

This is one of the most commonly charged offences in ALS practice. It can be charged under either section 58 of the *Crimes Act* 1900 (NSW)[1] or section 546C of the *Crimes Act* 1900 (NSW). [2] There is no difference in the elements of the offence under either section. However, it should be noted that s.58 allows the averred 'victim' to be a constable, other peace officer, customs house officer, sheriff's officer, prison officer or bailiff. By contrast, section 546C only extends to a 'police officer.'[3]

Elements of the Offence

- The Accused
- **Resisted** the victim
- The victim was a constable, other peace officer, customs house officer, sheriff's officer, prison officer or bailiff
- The **Resistance** occurred while the victim was acting in Execution of their Duty

Mens Rea

To be guilty of resisting, the resistor must actually intend to oppose or restrain a police officer. Therefore, 'specific intent' to oppose a police officer must exist. In *R v Galvin (No.2) 1961* VR 740 at 749 O'Bryan, Dean and Hudson JJ held at lines [9]-[37]:

> *The word "resist carries with it the idea of opposing by force some course of action which the person resisted is attempting to persue. To "resist" such a course of action, the person said to resist must know what that attempted course of action is.* ***This requires the existence of a specific intent on the part of the alleged resistor****. The composite expression "resist a member of the police force in the execution of their duty" connotes an intention to oppose or restrain a member of a particular class in the community and while that member is acting in a particular way… So also with the third of these three offences – 'obstructing'. There the Legislature has introduced the word 'wilfully.' It was probably thought unnecessary to introduce any word before 'assaults' or 'resists' because the crimes of assault* ***and the very word 'resists' already imports the notion of intention****.*

In his separate concurring judgement *R v Galvin (No.2) 1961 VR 740* at 750 Barry J held that:

> *Resistance to another person's action may be active or passive, but* ***it necessarily involves an intention to oppose that other persons will*** *(C/f R v Appleby (1940) 28 Cr App R 1 at 5 on the issue of whether passive action constitutes resistance)*

[1] Hereafter 's.58'
[2] Hereafter 's.546C'
[3] section 546C of the *Crimes Act* 1900 (NSW

In my view, it will often be clearly evident as to the intention of the accused. However, it is important to bear in mind that the onus rests upon the crown to prove that the accused specifically intends to resist the police. In *R v Galvin (No.2)* 1961 VR 740 O'Bryan, Dean and Hudson JJ held at 750:

> *…the onus is on the Crown from first to last to prove that the intention of the accused was in the one case to assault a policeman who was acting in the due execution of their duty, in the second case to resist a police officer so acting…*

Actus Reus

Resistance is defined as opposing by force some course of action. In many ways, resistance is applying active force and doing a positive act. There is some tension between the authorities, but in my view the courts have essentially required 'violence' or a positive action; whereas obstruction can be passive. In *R v Galvin (No.2)* 1961 VR 740 O'Bryan, Dean and Hudson JJ at 749 held:

> *The word 'resist' carries with it the idea of opposing by force some course of action which the person resisted is attempting to pursue.*

In *R v Appleby (1940) 28 Cr App R 1* at [5] Humphreys, Atkinson and Tucker JJ held:

> *This court entertains no doubt that "Violence" used in this connection means real violence, that is to say something more than a mere refusal to submit to arrest. It probably means something more than would be sufficient to justify a conviction of obstructing the police officer in the execution of his duty; violence means violence.*

Wilful Obstruction

s.58 Crimes Act 1900 (NSW) Maximum penalty 5(2) years imprisonment

Introduction:

> *The simple facts which the court has to find are whether the defendant's conduct in fact prevented the police from carrying out their duty, or made it more difficult to do so, and whether the defendant intended that conduct to prevent police from carrying out their duty or to make it more difficult to do so.*
>
> *Lewis v Cox [1985] 1 QB 509* at 516:

Elements of the Offence

- The Accused
- **Willfully Obstructed** the victim
- The victim was a constable, other peace officer, customs house officer, sheriff's officer, prison officer or bailiff
- The **Willful Obstruction** occurred while the victim was acting in Execution of their Duty

Mens Rea: "Wilful" (Includes the concept of Lawful excuse)

Obstruction is the only version of this offence that has the word 'wilfully' added to it. There has been considerable judicial consideration of what this may mean. The consensus seems to be that one must intentionally commit an act without having a lawful excuse for doing so. Recklessness is not sufficient, the offender must actually know that what they are doing will obstruct.[4]

In *R v Galvin (No.2)* 1961 VR 740 O'Bryan, Dean and Hudson JJ held at 749 that:

> *Wilfully means no more than intentionally.*

In *Lewis v Cox* [1985] 1 QB 509 the court held at 513 per Webster J and 517 per Kerr L.J:

> *The word wilfully imports an element of mens rea.*

In Willmott v. Atack [1977] Q.B 498 per Croom-Johnson J at 504-505 and May J at 505 the court held that:

> *Actual obstruction is not enough. Intention to obstruct is necessary.*

This has been confirmed in Australia in the case of *R v Galvin (No.2)* [1961] VR 740 at 751 where the Court held:

> *Obstructing in some situations may be accidental and unintentional and therefore uses the expression, "wilfully obstructs", with the consequence that to constitute the offence there must be present an intention to obstruct.*

[4] See generally *Lewis v Cox* [1985] 1 QB 509.

In *Ingleton v Dibble* [1972] All ER 280 at 279 the court approved the following statement from *Rice v Conelly* [1969] 3 All ER 1662:

> *Wilful in this context in my judgement means not only "intentional" but also connotes something which is done without lawful excuse, and that indeed is conceded by counsel who appears for the prosecution in this case.*

In *Lewis v Cox* [1985] 1 QB 509 at 518 the Court added that:

> *In the absence of a lawful excuse… if the defendant intentionally does an act which he realises will, in fact, have the effect of obstructing the police in the sense defined above, he will in my view be guilty of having done so wilfully.*

The mere fact that an act *does* obstruct the police is not sufficient. This is best highlight by the case of *Willmott v Atak* [1977] Q.B 498 where the court held that where on intends to assist the police but actually obstructs them, the offence is not made out. This principle is vital where parents, friends or relatives attempt to mediate or assist police but unintentionally impede them. Therefore obstruction where there was no intention to obstruct or there was beneficent intent is not an offence.

In *Willmott v. Atack* [1977] Q.B 498 per Croom-Johnson J at 504-505 with whom May J and Lord Widgery CJ agreed at 505 the court held that:

> *The question is then: Is it necessary for there to have been an intention for the acts of the defendant to have been to make it more difficult for the police to carry out their duties rather than, as appears to have been found by the Crown Court here, an intention on his part to make it more easy for the police to carry out their duties? If there was not hostility so far as the intervention by the defendant was concerned. (and indeed there appears to be a clear finding of fact as to what the intention of the defendant was on each of the occasions when he did interfere), what is the answer to the question should there be an intention not merely to do the act but also that the act should be one of hindering the police rather than helping them?'…*
>
> *It fits the words "Wilfully obstructs' in the context of the sub-section, and in my view there must be something in the nature of criminal intent of the kind which means that it is done with the idea of some form of hostility to the police which the intention of seeing that what is done is to obstruct, and that it is not enough merely to show that he intended to do what he did and that it did in fact have the result of the police being hindered.*

Actus Reas "Obstruction"

Whether an act actually amounts to an obstruction at law is often the most complex issue to resolve with this charge. There is no requirement that the *actus reas* itself be unlawful.[5] An obstructive act has been very broadly defined in *Ingleton v Dibble* [1972] All ER 280 at 278, *Rice v Connelly* [1969] 3 All ER 1662 at 1680 and *Hinchcliffe v Sheldon* [1966] 2 All ER 649 at 651 as:

> *Any act which makes it more difficult for the police to carry out their duty.*

Critically, I know of no case that has held that an *omission* to act constitutes obstruction. I know of no principle of law that requires people to assist police. In fact, in the case of *Ingleton v Dibble* [1972] All ER 280 Bridge J held:

> *For my own part I would draw a clear distinction between a refusal to act, on the one hand, and the doing of some positive act on the other.*

Refusing to render assistance is not automatically an obstruction but positively mislead the police may be. In *Ingleton v Dibble* [1972] All ER 279 Bridge J further approved the comments made in *Rice v Conelly* [1966] 2 All ER 649:

> *Lord Parker went on the consider whether there was a lawful excuse in the circumstances of that case for the appellant refusing to answer the police officer's question, and refusing to disclose his name and address. Lord Parker CJ decided that there was; accordingly in the circumstances no offence of wilful obstruction had been committed. He drew a distinction between a person giving false information to a police constable which he thought would clearly amount to an obstruction, and a person declining to give information which he held could not amount to an obstruction unless the situation was one in which the law placed him under an obligation to give the information required.*

[5] *Ingleton v Dibble* [1972] All ER 280 per Bridge J.

Hinder

s.546C Crimes Act 1900 (NSW) Maximum Penalty 12 months imprisonment or $1,100 fine

Introduction:

Hindrance is the most maligned and misunderstood permutation of these sections. Prosecutors seem to charge hindrance when the conduct in question is quite minor or brief. They also often lay this charge where family members or friends impede the arrest, detention or questioning of suspects or when offenders flee from police. I will say this quite clearly: fleeing from police is not automatically an offence.

Elements of the Offence:

- The Accused
- **Hindered**
- The victim was a Police Officer[6]
- The **Hindrance** occurred while the victim was acting in Execution of their Duty

1. Commentary on the actus reus and mens rea
2. Commonly available defences
3. Issues that regularly arise in criminal practice
4. Special procedural or evidentiary scenarios to be alert for
5. Opportunities for strategic litigation

Mens Rea

In my view, just as with resistance and obstruction, an offender must actually intend to hinder police.

Actus Reus

There is recent binding authority on the *Actus Reas* of hindrance of *Taufahema v The Queen* [2006] NSWCCA 152. The essential facts of the case involved several men fleeing from the police after their car had been stopped. The NSWCCA held:

> *22 …. the Crown prosecutor … relied instead upon an attempt to evade or avoid lawful apprehension.*
>
> *23 The Act creates a number of offences involving attempts to avoid a lawful apprehension: s 33B, dealing with the use (in various ways) of an offensive object to threaten injury to any person or property "with intent to prevent or hinder the lawful apprehension or detention of any person or prevent or hinder a member of the police force from investigating any act or circumstance reasonably calling for investigation"; s58, dealing with assaults, resistance or wilful obstruction of any officer while in the execution of his or her duty or with the intention of resisting or preventing the lawful apprehension or detainer of any person for any offence; and s 546C making it an offence for any person to resist or hinder a member of the police force in the execution of his or her duty.*

[6] As previously mentioned, s.546C only applies to police officers.

24 The Crown contended in this Court that the foundational crime was that created by s 546C of the Crimes Act 1900. Whilst not resiling, in terms, from the case put below, that the foundational offence was evading arrest, the Crown prosecutor in this Court contended that another available offence was that of hindering the officer in the execution of his duty...

25 It was submitted that the word "hinder" is a word of ordinary parlance without any special meaning and that its usual definition (for example, that in the Shorter Oxford English Dictionary) is "to keep back, delay, impede, obstruct, prevent". By not stopping the Commodore when Senior Constable McEnallay signalled that he should do so by operating the siren and the flashing lights on his vehicle, it is submitted that the appellant sought to delay or impede an impending lawful arrest. (I interpolate that, the officer undoubtedly wished the vehicle to heed the signals and stop but whether he was then intending to arrest anybody is uncertain.) The Crown also contends, relying on the fact that all four offenders fled the scene, that they had agreed that they would run away from the officer and that the agreement to run away was an agreement to "hinder" in the sense, again, of delaying or impeding and hopefully preventing their arrest. The researches of counsel did not produce any authority stating or approving such a wide use of "hinder". If correct, it would mean, for example, that an offender in Sydney who heard that a warrant for his arrest had been issued in Perth and left his place of residence to hide from the police would be guilty of an offence where the effective changing of his address was, in fact, to delay, impede or prevent it. (I mention that – as appears from the trial judge's directions extracted below – the Crown case at trial was not merely that the occupants of the car agreed to evade the officer, but that they had agreed to avoid arrest. There was no evidence, as stated above, that the officer was intending to arrest anyone when he was killed.)

26 In Leonard v Morris (1975) 10 SASR 528, Bray CJ (at 531) described the actus reus of the offence established by section 546C as "any active interference or obstruction which makes the duty of the police officer substantially more difficult of performance". This passage was adopted as correct by Sully J in Worsley v Aitken & Anor (1990) 9 Petty Sessions Review 4074. Worsley, it was alleged, took hold of the police officer's jacket when the officer was endeavouring to assist another officer then in the course of arresting another person during a melee, saying to the officer "leave him alone, he's done nothing". The officer desisted from his attempt to assist with the arrest of the suspect and pushed Worsley away before returning to his task. Of course, Sully J was there considering an actual physical interference by the accused person with the arrest which the officer was about to effect. That is not the use of hinder upon which the Crown relies in this case.

27 The description of the actus reus of this offence given by Bray CJ in Leonard v Morris has been regarded, in my experience, as applicable in this State for decades and I would not be prepared to extend the offence any further by a wider use of the word "hinder" than that which it has hitherto been understood to have. I am of the view that the actus reus of the offence created by s 546C is indeed that ascribed to it by Bray CJ in Leonard v Morris. It follows that the foundational offence upon which the Crown relied did not exist. In the circumstances, this conclusion is fatal to the correctness of the conviction.

Now *Taufahema v The Queen* [2006] NSWCCA 152 was overturned on appeal in *The Queen v Taufahema* **[**2007] HCA 11. However, in my view, the majority actually referred to the conclusion of the NSWCCA that no hindrance pursuant to s.546C had occurred with approval.

In *The Queen v Taufahema* **[**2007] HCA 11 per Gleeson CJ and Callinan J at 21:

> ***[21]*** *There was a legal problem with the way the case was left to the jury.* ***Evading apprehension by a police officer is not itself a crime.*** *There are certain crimes that a person might commit in the course of evading apprehension. Section 33 of the Crimes Act makes it an offence maliciously to shoot at any person with intent to resist lawful apprehension. Section 33B makes it an offence to use, or attempt to use, or threaten to use an offensive weapon with intent to prevent or hinder lawful apprehension. There are other cognate offences, one of which was raised in argument in the Court of Criminal Appeal. The way in which the prosecution originally put its case identified a joint enterprise which, if it existed, was criminal. However, it may have been harder to establish factually. Ultimately, the enterprise relied on was expressed in a way that was open to legal criticism. Trial counsel for the respondent complained about this change in the prosecution case, but to no avail.*

In *The Queen v Taufahema* **[**2007] HCA 11 per Gummow, Hayne, Heydon and Crennan JJ at 46 and 51:

> ***[46]*** *The prosecution case at the trial. The prosecution put its case in two ways at the trial. It opened the case to the jury by saying that the accused was party to a joint criminal enterprise, namely one involving the use of a firearm to prevent the lawful arrest of the men in the car by the police.* ***But the prosecution case by the end of the trial as put by prosecution counsel to the jury and as explained in the trial judge's summing up was that there was a joint enterprise to evade arrest, involving the shooting of a police officer as a foreseen possibility****.*
>
> *...*
>
> ***[51]*** *Secondly, whether or not one chooses to call the errors identified by the Court of Criminal Appeal "blunders", they were certainly "technical", and they were errors by the trial judge rather than by the prosecution. For it was the trial judge rather than the prosecution who bore primary responsibility for the circumstances which led the Court of Criminal Appeal to allow the appeal.*[30] ***Apart from the errors in summing up criticised by the Court of Criminal Appeal, it was by reason of the trial judge's influence, in a long debate with counsel for the prosecution after the evidence had closed but before final addresses, that the prosecution ended up not pressing its original case as opened to the jury, instead relying only on a case turning on a "foundational crime" of evading lawful apprehension which does not exist.*** *The fact is that the trial which took place was a flawed one. The question is whether an order for a new trial is a more adequate remedy for the flaws in that trial than an order for an acquittal — that is, an order terminating the possibility of any investigation by a jury, in an unflawed fashion, of the accused's role in the circumstances leading to Senior Constable McEnallay's death.*

In *The Queen v Taufahema* **[**2007] HCA 11, even Justice Kirby agreed at 97:

[97] *The reference to s 5(1) is a reference to the right of appeal enjoyed by a person "convicted on indictment" where the appeal is taken to the court "(a) against the person's conviction on any ground which involves a question of law alone". The respondent's appeal to the Court of Criminal Appeal was such an appeal. He successfully alleged that there was "no evidentiary basis for a conclusion that [the respondent] was party to an agreement that all four men would attempt to evade the police officer, as distinct from having made a decision that he would attempt to do so and knew that the others would do the same".*[83] *The Court also held that the prosecution case, based on s 546C of the Crimes Act, as propounded on appeal, was not that which had been propounded at trial. Thus, it held that it should not "order a new trial to permit such a different case to be put".*[84] ***Critically, the Court found that running away did not amount in law to "hindering" a police officer within s 546C of the Crimes Act.*** *Hence, the "foundational offence" necessary to establishing a joint criminal enterprise involving the respondent was non-existent in each of the ways the prosecution had earlier sought to express its case.*[85]

…

[130] *It was after the close of the evidence in the trial, and before the addresses, that the trial judge proposed an alternative foundational offence to the prosecutor as the basis for the invocation of the doctrine of joint criminal enterprise and extended common purpose responsibility. This was the offence of "avoiding lawful apprehension". The trial judge suggested that this could be attractive to the prosecution as it would permit the prosecutor, in his closing address, to "start off with a virtual no contest".*

[131] *It was in this way, on the following day in the trial, in his closing address to the jury, that the prosecutor proceeded to alter his case to assert a joint criminal enterprise of escaping from lawful apprehension****. It was put to the jury that the respondent contemplated, in company with the other occupants of the vehicle, that a firearm might be used to effect escape from apprehension and that there was a risk of death or serious injury resulting, even if without specific intention on the part of the respondent or even the principal offender to kill the deceased or cause really serious injury.***[120]

[132] As the Court of Criminal Appeal demonstrated (and is not now in dispute in this application), there was no such offence, as suggested by the trial judge, known to the law of the State.[121] ***It was not a common law offence. Nor was it an offence within the terms of ss 33B, 58 or 546C of the Crimes Act. To the extent that the prosecution belatedly advanced that theory, in the course of the trial and in the closing address to the jury, it erred****.*

Miscellaneous Questions:

Why do we have s.546C and s.58?

My understanding is that s.564C, due to its maximum penalty cannot be prosecuted on indictment. It is also not a "serious indictable offence." Therefore, s.58 exists, and covers similar ground, so that it can form a component of more serious offences.

I was Drunk, I didn't mean it. Is this an offence of specific intent or what?

This question involves a complex interaction between the law of Specific Intent as outlined by s.428 of the Crimes Act. S.428 does specifically mention s.58, but only 'to the extent that an element of the offence requires a person to intent to cuase the precific result necessary for the offence.' The specific omission of the other formulations of s.58 or of any variants of s.546C might auger against these sections being found to be offences of specific intent.

However, in my view, the case law on these sections makes it quite clear that not only must one actually impede the police but one must intend to do so. That may be the 'specific result' necessary to fall under this section.

I'm not aware of any decided superior court cases directly on this section. However, the case of *Harkins v R* [2015] NSWCCA 263 at [31]-[37] the court held:

> *In the terminology of He Kaw Teh, reflected in Mr Whelan's speech, the requirement under s 33B that the accused intended "to prevent or hinder lawful apprehension or detention" is a requirement of specific intent because the relevant intention is to cause a particular result. Understandably, s 33B is therefore characterised by s 428B(2) as an offence of specific intent.*
>
> *As the trial judge in the present case pointed out, another type of intent must also be proved under s 33B, namely, to use something as an offensive instrument. This is a "general or basic intent" relating to the doing of the act in question. As Brennan J pointed out in He Kaw Teh, "proof of an actual desire or wish to do an act of the prescribed character is proof of a general intent" (at 570). As his Honour also pointed out in the passage quoted in [28] above, the need to prove such a general intent is distinct from the additional requirement that the relevant act be voluntary.*
>
> *The question that remains is how, if at all, Part 11A deals with this basic or general intent element of a provision that also requires proof of a specific intent and that is characterised as creating an offence of specific intent. Section 428C does not address this question, at least not expressly, as it is only concerned with the relevance of intoxication in determining whether the accused had "the intention to cause the specific result necessary for an offence of specific intent". This does not encompass the basic or general element of s 33B to which I have referred.*
>
> *Nor does s 428D, at least not expressly, address this question because that section concerns the determination of "whether a person had the mens rea for an offence*

other than an offence of specific intent". Section 33B however creates an offence that ***is*** *of specific intent.*
Furthermore, s 428G does not assist in answering the question because it is concerned with the determination of whether the relevant conduct was voluntary. As Brennan J pointed out in He Kaw Teh, voluntariness and basic or general intent are distinct concepts (see [28] above).

Section 428H is similarly unhelpful, although in stating that the common law relating to the effect of intoxication on criminal liability is "abolished" it indicates that recourse cannot be had in answering the present question to the common law principle stated in The Queen v O'Connor [1980] HCA 17; 146 CLR 64 that evidence of self-induced intoxication is relevant in determining whether a person accused of a criminal offence had the mental element prescribed in respect of that offence.

In my view, the reasoning that leads to the correct answer to the present question is as follows.
Considered as a whole, Part 11A manifests a legislative intention to preclude intoxication from being taken into account except in the circumstances identified in that Part. This is most clearly evident from s 428H which, as discussed above, abolishes the common law principle allowing intoxication to be taken into account in determining criminal liability. Mr Whelan's Second Reading Speech provides further evidence of this policy (see [30] above). The only exception to the policy is that stated in s 428C which permits intoxication to be taken into account in determining "whether the person had the intention to cause the specific result necessary for an offence of specific intent". For the reasons given above, the intention presently in question, namely, to use the vehicle as an offensive instrument, is not intention of that type, although the intention to which s 33B also refers, namely, of preventing or hindering lawful apprehension or detention, is. However, that latter intention is not in issue as the trial judge's finding that it was present was not challenged.

Can I be charged for multiple offences in the same Act?

In *R v Galvin (No.2)* 1961 VR 740 the court held that, just as for goods in custody charges, resisting, obstructing and assaulting are three separate offences notwithstanding that they appear in the one section. It follows that if they are charged simultaneously there could be latent duplicity.

If I resist or hinder more than one officer simultaneously do I get charged for each officer?
If I get charged with Resistance and Assault for the one set of actions can I be convicted of Resistance and Assault?

No and No.

The case of *Hull v Nuske* (1974) 8 SASR 587 is widely cited as authority for these propositions:

1. That a plea in bar to resist does not invalidate the concomitant assault charge
2. That multiple police officers being resistance gives rise to one charge of resistance rather than a charge for each officer.

In my view one act or course of conduct of resistance should give rise to a single charge with each officer resisted so particularized. I disagree with the suggestion that *Hull v Nuske* (1974) 8 SASR 587 is authority for the proposition that a plea in bar to resist does not invalidate the concomitant assault charge. In fact the South Australian Supreme Court has specifically ruled against both this interpretation of *Hull v Nuske*.

In my view, and in the view of Bray CJ of the South Australian Supreme Court in *Hallian v Samuels 1978 17 SASR 558 at 563*:

A man's resistance to arrest may take the form of assaulting the police officers attempting the arrest; it may take other forms such as the mere refusal to move. If the resistance to arrest alleged is simply the use of force against the police officers, then the defendant cannot be convicted both of assault on them and of resistance to arrest.[7]

And

In my view the true proposition, instead of the one in the head note (of Hull v Nuske), should read as follows:

"Where a defendant has been charged upon two counts, first resisting a police officer in the execution of his duty, and second, assaulting a police officer in he execution of his duty… and the acts alleged to constitute the resistance are the same as the acts alleged to constitute the assault, a conviction on one charge is a bar to a conviction on the other."[8]

In my view an assault and resistance charge for the one act or course of conduct means that one is bad for duplicity. [9] The correct approach is that there is a plea in bar to one charge upon a plea of guilty to the other. [10]

In my view multiple resistance and assault charges against multiple officers in the same course of conduct are duplicitous. [11] The correct approach is to have one resistance charge and particularize the names of all police within that one charge. [12]

Try negotiating with the prosecutor first but failing that enter a plea of guilty to the blanket resistance charge and submit that there is a plea in bar to the other. In a hearing, submit that a conviction leads to the other being dismissed.

[7] *Hallian v Samuels* 1978 17 SASR 558 at 563.
[8] *Hallian v Samuels* 1978 17 SASR 558 at 564.
[9] *Hull v Nuske* [1974] 8 SASR 587 and *Hallian v Samuels* 1978 17 SASR 558 at 564.
[10] *Hull v Nuske* [1974] 8 SASR 587 and *Hallian v Samuels* 1978 17 SASR 558 at 564.
[11] *Hull v Nuske* [1974] 8 SASR 587 and *Hallian v Samuels* 1978 17 SASR 558 at 564.
[12] *Hull v Nuske* [1974] 8 SASR 587 and *Hallian v Samuels* 1978 17 SASR 558 at 564.

Escape

Escape (Common Law) 10 years imprisonment.[13]

Introduction:
Escape at Common Law is: *"The essence of the Offence is going at large out of Actual Custody then existing."* Scott at [1967] VR at 284.

Therefore it is submitted that the elements of the offence are:

1. Knowingly
2. Exiting from **lawful actual custody**
3. Escaping
4. Regaining liberty/ **being 'at large'**

Elements:
The essence of escape was best encapsulated by Smith J in R v Scott 1967 VR 276:

The definitions for the crime of escape (by a prisoner) that are to be found in the books indicate that **the essence of the offence is the act of going at large out of an actual custody then existing.** *Thus in Stephen's Digest of Criminal Law, 3rd ed. (1883), art 152, it is said that the crime is committed by a person "who, being lawfully in custody for a criminal offence, escapes from that custody". In Russell on Crime, 11th ed., p. 359, it is said that "an escape is when one who is arrested gains his liberty before he is delivered by due course of law"; and reference is then made by the author to the use of the terms "escape", "prison-breaking" and "rescue" to describe different ways in which "the liberation ... is effected". In Archibold, Criminal Pleading, Evidence and Practice, 35th ed., s3421, it is stated that it constitutes an indictable misdemeanour for a prisoner "to escape without the use of force from lawful custody on a criminal charge... and whether from gaol or in transit thereto".* **And in s3428 of the same work it is stated that to support a charge of negligently permitting an escape it must be proved that the prisoner was in "actual custody".**

Furthermore, in Hawkins, Pleas of the Crown, vol 2, ch19, s14, it is stated that an indictment for escape against a gaoler must expressly show that the prisoner was "actually in the defendant's custody" and that he "went at large". *To the same effect is Chitty's Criminal Law, 2nd ed, vol 2, p172 (n). And this view is confirmed by the old precedents of indictments for escape by a prisoner, which normally allege, inter alia, that at a specified time and place the defendant whilst in the custody of a named person escaped and went at large from and out of that custody: compare Citty, op. cit., vol 2, pp158, 161, 171, 191-2: Burn's Justice of the Peace, 29th ed. (1845), vol 2, pp346-9.*[14]

It is clear also, I consider, that the element of going at large out of an actual custody, which is essential to constitute an escape, must be a conscious act done by the prisoner with the intention of liberating himself from that custody. This conclusion is supported by the general principles of the common law; for it is a "cardinal rule" that "the intent and the act must both concur to constitute the crime": *see R v Reynhoudt (1962) 107 CLR 381, at 386; [1962] ALR 483 at 484; and compare Hardgrave v R (1906) 4 CLR 232 at 237; 13 ALR 206 at 207. It is true that in the law of larceny this rule has not always*

[13] Although a district court Judge I recently appeared before indicated that as a common law offence there is no maximum penalty…
[14] Emphasis added.

prevailed. But I see no justification for introducing into the law of escape the artificialities of the law of larceny. Furthermore the conclusion stated is supported by precedents of indictments and informations for escape in which the word "wilfully" or the word "voluntarily" commonly appears: see, for example, Burn's Justice of the Peace, 29th ed., vol 2, pp346, 349: Chitty, Criminal Law, 2nd ed., vol 2, pp161, 171, 191-2 and vol 4, p78. It finds support, too, in the case of R v Martin (1811), Russ. & Ry. 196; 168 ER 757.[15]

On behalf of the Crown it was argued that escape is an offence which continues to be committed until the prisoner is retaken. The case of R v Tommy Ryan (1890), 11 LR (NSW) 171, in which it was so held was relied upon; and it was said that it follows from this principle of continuance that here, when the appellant became conscious and decided not to give himself up, he committed the crime of escape. I am unable, however, to see force in this argument; for if the offence of escape was not committed by the appellant at Beechworth on 2 May, there was no starting point from which the offence could be regarded as still continuing at the time when he became conscious.
Furthermore, I am not able to regard the case of R v Tommy Ryan, supra, as a satisfactory authority; and as it was strongly relied upon by the Crown I think that I should indicate why I find it unsatisfactory.

In the first place, the view there adopted, that the offence of escape continues to be committed until recapture, would involve that, years after a prisoner had regained his freedom, any person who, with knowledge of the escape, helped him to avoid detection, would be a principal offender in an offence of escape then and there being committed; yet in the long history of this crime there is not, so far as I have seen, any indication that such a charge has ever been laid in respect of such assistance. Secondly, the suggested doctrine of continuance is contrary to the view which has long been settled law in New Zealand: see R v Keane [1921] NZLR 581; R v Otto [1951] NZLR 602, at 615; R v Kafka [1962] NZLR 351. Thirdly, the reasoning by which the conclusion as to continuance was supported in R v Tommy Ryan, supra, does not appear to me persuasive.

It was there said that in theory the imprisonment of an escapee continues after he has gained his freedom. But if this fiction were adopted it would not be easy to see how the crime of escape could exist. Moreover, the authorities that were cited in support of the fiction appear, upon examination, to do no more than support two much narrower propositions. Of these the first is that, where a gaoler recaptures his prisoner after an escape, the prisoner cannot rely upon the fact that he was at large in a different county when retaken, or upon that fact that the gaoler has been punished for negligently permitting the escape, as making the retaking and subsequent imprisonment unlawful. The second is that a gaoler who has recaptured his prisoner after an escape may dispose of him as though he had never escaped, because after such a recapture "in supposition of law he was always in custody" of that gaoler: see Hale P.C. vol. 1, pp. 581, 602: Hawkins P.C. vol 2, Ch 19, s12; Anon., 6 Mod, Case 339; Sir William Moore's Case (1704), 2 Ld. Raym. 1028; 92 ER 183. If for these particular purposes there is a fiction as between prisoner and gaoler that the actual custody continues, then the case, as it appears to me, is one for the application of the principle stated in Hawkins P.C. vol 2, ch18, s14, that "fictions of law are never carried farther than the necessity of those particular cases, which were the cause of the inventing them, doth require." Compare also R v Tommy Ryan (1890), 11 LR (NSW) 171, per Foster J, at 215.[16]

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[15] Emphasis added.
[16] *R v Scott 1967 V.R 276* per Smith J at 284-286.

Mens Rea

Knowingly:

One must intentionally or knowingly escape to satisfy this element. Merely finidng oneself at liberty is insufficient. In *Scott* Smith J clearly found that one had to *knowingly* escape to be found guilty at law:

> *It is clear also, I consider, that the element of going at large out of an actual custody, which is essential to constitute an escape, must be a conscious act done by the prisoner with the intention of liberating himself from that custody. This conclusion is supported by the general principles of the common law; for it is a "cardinal rule" that "the intent and the act must both concur to constitute the crime."*[17]

[17] *R v Scott 1967 V.R 276* per Smith J at 284-286.

Actus Reas

Lawful Actual Custody:

An escape can only actually occur where the offender was in Lawful Actual Custody. What may actually constitute an arrest may or may not create *actual* lawful custody. There needs to be a proper distinction between arrest, actual custody and lawful custody. Obviously, if the arrest, detention or custody is unlawful then this too may provide a defense. This issue is critical because so many escape cases occur in the early stages of a stop, arrest or detention.

The case of *Eatts v Dawson* (1990) 21 FCR 166 has helpfully isolated three dictionary definitions of "Custody":

Reference was made before the Royal Commissioner to the Oxford English Dictionary and to the first two meanings it gives to the word
"custody". They are:
"1. safe-keeping, protection, defence; charge, care, guardianship ...
2. the keeping of the officers of justice (for some presumed offence against the law); confinement, imprisonment, durance."
We should add that in the Macquarie Dictionary, custody is defined as follows:
"1. keeping; guardianship; care: in the custody of her father.
2. the keeping or charge of officers of the law: the car was held in the custody of the police.
3. imprisonment: he was taken into custody."
Further, in Webster's New International Dictionary (2nd ed), the three meanings given for "custody" are:
"1. a keeping or guarding; care, watch, inspection, for keeping, preservation or security.
2. judicial or penal safe-keeping; control of a thing or person with such actual or constructive possession as fulfils the purpose of the law or duty requiring it; specif., as to persons, imprisonment, durance; as to things, charge.
3. state of being guarded and watched to prevent escape.[18]

The law of arrest was recently considered in *Wilson v New South Wales* (2010) 278 ALR 74.[19] In this matter two sheriffs attempted to enforce a property seizure order. The sheriff told Mr Wilson words to the effect "you've assaulted me and you're under arrest". In the New South Wales Court of Appeal it was held that the absence of touching or submission an arrest had not occurred:

> *In my opinion, there was not a completed arrest of Mr Wilson on the verandah. The requirements for an arrest are (1) communication of intention to make an arrest, and (2) a sufficient act of arrest or submission.*
>
> *As regards (1), if the arrest is to be lawful, this should normally include informing the person that he or she is arrested and informing the person of the reason for the*

[18] *Eatts v Dawson* (1990) 21 FCR 166 parras p.173.
[19] Hereafter '*Wilson*.'

arrest: Christie v Leachinsky *[1947] AC 573 at 587–93 ; [1947] 1 All ER 567 at 572–5 (*Christie*). However, this is not necessary if the circumstances make these things obvious, or if the person arrested prevents it:* Christie *at AC 587–593; All ER 572–5,* R v Hoar *[1965] NSWR 1167;* Woodley v Boyd *[2001] NSWCA 35 at [38] (*Woodley*).*
As regards (2), a touching on the shoulder can be a sufficient act of arrest, and even this is not necessary if the arrested person submits: Alderson v Booth *[1969] 2 QB 216 at 220,* Hatzinikolaou, Woodley *at [38]*.

In this case, on the findings of the primary judge, on the verandah Mr Davies clearly conveyed to Mr Wilson his intention to arrest him and the reason for the arrest, telling him "you assaulted me and you're under arrest". However, by this time Mr Wilson was inside the house. There was no physical contact that could amount to an act of arrest, and no submission. Rather, Mr Wilson then went further inside the house. In my opinion, in the absence of a physical act of arrest and of submission, there was not an arrest completed at this stage.[20]

The interactions between an offence of escape and the power of arrest were also considered in *Alfio Licciardello v R [2012] ACTCA 16.*[21] In this case two constables stopped a person after he ignored a traffic signal. A police officer testified that he told the appellant that "he would be coming with us". The appellant remonstrated, stating words to the effect of "I can't go back, I can't go back to gaol, please don't arrest me." A police officer then said "You will be coming with us". The appellant replied "Does that mean I'm under arrest?" to which the police officer replied "Yes, you are under arrest. You will have to accompany us to the City Station." The appellant then ran away. The offence provision relevnatly provided:

Escaping
A person who has been lawfully arrested, is in lawful custody, or is lawfully detained during pleasure, in respect of an offence against a law of the Territory, a State or another Territory and who escapes from that arrest, custody or detention commits an offence. Maximum penalty: 100 penalty units, imprisonment for 5 years or both.

It was held by Higgins CJ, Penfold and Cowdroy JJ that:

In the present appeal, the evidence at trial establishes that the constables informed the appellant that he was under arrest and of the reason for his being under arrest. However no physical restraint was imposed on the appellant. Furthermore, the appellant did not submit to being arrested, as his actions in departing the scene make clear. Accordingly, the second element necessary to complete an arrest has not been established. Upon these facts it cannot be said that the appellant was guilty of escaping arrest, as the arrest had not been effected prior to the appellant fleeing.[22]

1. However, it was also held by Higgins CJ, Penfold and Cowdroy JJ that:

When Senior Constable Young made it clear to the appellant that the appellant was not free to leave and "He would be coming with us", the appellant was by words restrained from moving anywhere beyond the Senior Constable's control. Thus the action of the appellant in

[20] *Wilson v New South Wales (2010) 278 ALR 74* at 97 per Hodgeson JA.
[21] Hereafter '*Licciardello.'*
[22] *Alfio Licciardello v R [2012] ACTCA 16* at 30.

running away prima facie constitutes escaping from custody. The indictment was therefore not defective in that respect.
It is evident that s 160 of the Act encompasses both escape from lawful arrest and escape from lawful custody. However, the fact that the indictment alleged that the appellant escaped from arrest, rather than from custody, means that the prosecution was unable to prove the charge, since it is an essential element of that charge that the arrest be lawful. The appellant was in custody but he was charged not with escaping from custody but with escaping from arrest, and, as found above, the arrest was unlawful.[23]

On the one hand the case of *Liccadello*, and the ACT legislation it arises from, clearly demonstrate that custody and arrest are separate concepts. They are not concomitant concepts. But the court in *Licciardello* also held that "custody" arose from the mere words of restraint. Yet this is simply because, In the ACT context, only lawful custody is required. The common law provision in NSW requires something more: *Actual* Custody.

The boundaries of "Custody" were explored in *Eatts v Dawson* (1990) 21 FCR 166[24] where Morling and Gummow JJ held at 178:

Further, in some contexts, custody may subsist without immediate physical control and police may have a person in custody without first having arrested that person…Elements in the lexical meanings of "custody" include the notion of dominance and control of the liberty of the person, and the state of being guarded and watched to prevent escape. To confine the meaning of "custody" to "that state which follows arrest or similar official act", as the first respondents would have it, is, in our opinion, to pay too close a regard to legal forms rather than the substantive character or quality of police activity.[25]

Beaumont J in separate concurring opinion also opined:

The meaning of "police custody" in the Letters Patent
It is common ground that the phrase "police custody" where used in the Letters Patent is not a term of art. The argument centered on the meaning of "custody" in the present context.
One of the definitions of "custody" offered by the Macquarie Dictionary is:
"3. imprisonment: He was taken into custody."
The Macquarie Dictionary defines "imprison" as follows:
"1. to put into or confine in a prison; detain in custody. 2. to shut up as if in prison; hold in restraint."
In my opinion, if a person was shut up by a police officer as if in prison or held in restraint by a police officer, that person would be held in "police custody" for the purposes of the Letters Patent. This is essentially a question of fact.[26]

In my view, the common law escape diverges from the ACT code because it requires *actual* lawful custody. Consequentially, the level of custody required to ground an offence of escape at ***common law*** in this state is that actual *'notion of dominance and control of the liberty of the person, and the state of being guarded and watched to prevent escape.'*

[23] *Licciardello* parras 38-39.
[24] Hereafter *Eatts*.
[25] *Eatts v Dawson* (1990) 21 FCR 166 p.178-179.
[26] *Eatts v Dawson* (1990) 21 FCR 166 per Beaumont J p.190.

ESCAPE

The key confusion within this charge is misunderstanding the nature of escape and conflating it with the concept of being 'at large.' Extensive judicial analysis has been expended on determining precisely when an escape has commence, continues or has concluded. In my view, 'escaping' is a process which only a concludes, at law, when one has actually regained ones freedom. The exact distinction of when this occurs is a matter of considerable debate.

2. The *Macquarie Dictionary (revised edition)* defines escape variously as:
    a. ***To slip or get away, as from confinement or restraint; gain or regain liberty.***
    b. ***To slip away from pursuit or peril; avoid capture, punishment or any threatened evil.***
    c. *To issue from a confining enclosure as a fluid*
    d. *to grow wild*
    e. ***to slip away from or elude (pursuers, captors, etc)***
    f. ***to succeed in avoiding (any threatened possible danger or evil)***
    g. ***to elude (notice, search, etc)***
    h. ***to fail to be noticed or recollected by (a person)***
    i. ***to slip from (a person) inadvertently, as a remark***
    j. ***an act or instance of escaping***
    k. ***the fact of having escaped***
    l. *a means of escaping: a fire escape*
    m. *avoidance of reality*
    n. *leakage, as of water, gas, etc*
    o. *a plant originally cultivated now growing wild*
3. *–escapable, escapeless adj, escaper n*

The legal meaning of the phrase "escape" has been considered by the Supreme Court of Victoria in *R v Ryan and Walker* 1966 VR 553. In this case three prisoners had escaped from a Victorian Prison. The Victorian Supreme Court was called upon to decide what exactly "escape" means. In this case several prisoners were in the process of escaping a prison. The escapees had stolen a firearm, scaled the wall, exited through a gate and were out on the street outside and in the vicinity of the jail. Warders of the jail were in pursuit of the prisoners when they stopped a car in the street and killed a pursuing warder.
The question was:

1. Were they still in the process of escaping?
2. Or was the offence completed when they exited the physical jail premises?

In *Ryan* the offence of escape had been codified pursuant to s.35 of the *Gaols Act VIC 1958* which provided:

> *Every male person lawfully imprisoned for any crime or misdemeanour or offence by the sentence of any court of competent jurisdiction, or employed at labour as a criminal on the roads or other public works of Victoria, who escapes or attempts to escape from any goal or from the custody of any member of the police force, gaoler or other officer in whose custody he may be, shall be guilty of felony.*

The judge at first instance made the following finding:

> *Upon the proper constructions of this section the offence created by the words "who escapes from any gaol" may be established by proof of conduct on the part of the prisoner which takes place even after he has succeeded in getting outside the confines of the gaol in which he is incarcerated; that* ***the offence of escaping from gaol involves as one of its essential elements the regaining by the prisoner of his liberty; that this element is not satisfied the moment a prisoner sets foot outside the walls of his gaol if he is followed immediately by his gaolers in pursuit of him who have not lost sight of him and are hot on his heels****.*[27]

The Full Supreme Court of Victoria held:

> *The view may be accepted that a prisoner who without such authority succeeds in leaving the gaol by complete emergence there from has incurred the penalty imposed on him by the section, but it does not necessarily follow from this that he is not still committing the offence at the stage when he is in the ac of making good his escape after his emergence…****We have reached the conclusion that the felony created by s.35 was still being committed by the applicants at the time when they were endeavoring to elude pursuit outside and in the immediate vicinity of the gaol.***

At first blush this finding by the Victorian Supreme Court may appear to actually support the proposition that, once someone has emerged from a gaol, that the offence is complete. Certainly it is possible that if one emerged from gaol, and one was outside the sight or control of warders and there was no pursuit or anything of that nature, then the offence would be completed. However, if there is a pursuit or a hunt still in progress this means that the offence has not been completed until liberty has actually been restored.

Certainly the *Ryan's case* is also authority for the fact that precise moment that one regains liberty is a question for the tribunal of fact and will vary based on the factual matrix:

> *Although it was not raised as a ground of appeal, it was argued before us that on this interpretation of the section the question whether the applicants had completed the process of escaping from gaol prior to the shooting or were still on the process of escaping at that moment was a question of fact for the jury to determine…But… having regard to the evidence [a] jury properly instructed could not reasonably have failed to draw the inference that the applicants were still in the process of escaping from gaol at the time of the shooting.*[28]

[27] *R v Ryan and Walker* 1966 VR 553 at p.562.
[28] Ryan walker at 583.

Regaining liberty or being 'at large'

Regaining one's liberty, in essence, marks the end of the *process* of escaping. One has not escaped until one has been free again. The fact that one must actually meaningfully regain one's freedom is the least appreciated, and most vital element, of this charge.

Ryan's Case is authority for the principle that an integral aspect of escape is the actual regaining of liberty and of being "at large":

> ***the offence of escaping from gaol involves as one of its essential elements the regaining by the prisoner of his liberty; that this element is not satisfied the moment a prisoner sets foot outside the walls of his gaol if he is followed immediately by his gaolers in pursuit of him who have not lost sight of him and are hot on his heels***.[29]

The above position is supported by the case of *R v Keane* (1921) NZLR 581 where the New Zealand Court of Appeal held that 'if a prisoner has regained his liberty by getting away from the precincts of the prison, and *also from the sight and control of all the prison officials*,[30] he then has made his escape, and is no longer in lawful custody.' Thus the court held that regaining ones liberty was an element of the offence and that an escape was completed when this occurred.

Silas Morrison
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[29] *R v Ryan and Walker* 1966 VR 553 at p.562.
[30] *R v Keane* (1921) NZLR 581 at p.583. Own emphasis.