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**DIRECTOR OF PUBLIC PROSECUTIONS**

v.

**SATAYA RAJ *alias* DHURUP JAI**

[SUPREME COURT, 1973 (Grant J.), 1st May]

Appellate Jurisdiction

B

*Criminal law—assaulting police officer in the due execution of his duty—police officer requested to enter premises at bidding of owner to evict trespasser—subsequent assault by trespasser—whether police officer acting in due execution of his duty—Penal Code (Cap. 11) s.279 (b)—sentence.*

C

*Police—assault on police officer—lawful entry onto private property to evict trespasser—whether acting in due execution of his duty—Penal Code (Cap. 11) s. 279 (b).*

Police officers, one of whom, was the complainant were called to a private house and on their arrival were invited in by the daughter of the occupier. On entering, the complainant was set upon by the respondent and pushed out of the front door. Later the respondent assaulted the complainant outside the house, kicking him in the genitals resulting in his hospitalisation for 14 days.

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On the facts and on his interpretation of *R. v. Roxburgh* 12 Cox 8, the magistrate found the respondent not guilty of assault on the police officer in the due execution of his duty but guilty of common assault. The respondent was fined and bound over. The Director of Public Prosecutions appealed both against the acquittal and the inadequacy of the sentence.

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*Held:* 1. The facts clearly showed that the respondent did assault the police officer in the due execution of his duty.

2. A police officer is entitled to enter and remain on private property, even in the absence of any licence, in cases where there are reasonable grounds for apprehending a breach of the peace.

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3. *R. v. Roxburgh* is not an authority for the proposition that a police officer is not acting in the due execution of his duty in removing a trespasser from private premises, nor does such a proposition have any application in Fiji if the facts constitute Criminal Trespass contrary to Penal Code (Cap. 11) s. 218.

4. The sentence, in the circumstances, was manifestly inadequate and people who assault police officers, except in special circumstances, should be sentenced to imprisonment.

Cases referred to:

*McArdle v. Wallace* [1964] Crim. L.R. 467.

*Robson v. Hallett*, 51 Cr. App. R. 307; [1967] 2 All E.R. 407.

*R. v. Light* (1857) 169 E.R. 1029; 21 J.P. 758.

*R. v. Prebble* (1858) 175 E.R. 748; 1 F & F 325.

*Duncan v. Jones* [1936] 1 K.B. 218; 154 L.T. 294.

*Piddington v. Bates* [1960] 3 All E.R. 660; [1961] 1 W.L.R. 162.

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*Thomas v. Sawkins* [1935] 2 K.B. 249; [1935] All E.R. 655.

**A** *McGowan v. Chief Constable of Kingston upon Hull* (1967) 117 N.L.J. 1138.  
*Squires v. Botwright* [1973] Crim. L.R. 106.

*Davis v. Lisle* [1936] 2 All E.R. 213; [1936] 2 K.B. 434.

*R. v. Roxburgh* 12 Cox 8.

*Hinchcliffe v. Sheldon* [1955] 3 All E.R. 406; [1955] 1 W.L.R. 1207.

*R. v. Tyson & Nichols* [1966] *The Times*, Feb. 23.

**B** Appeal by the Director of Public Prosecutions against the acquittal of the respondent in the Magistrate's Court on a charge of assaulting a police officer in the execution of his duty.

Grant J. [1st May 1973.]—

**C** On the 10th October 1972 the respondent was charged before Nausori Magistrate's Court with assaulting a police officer in the due execution of his duty contrary to section 279(b) of the Penal Code to which he pleaded not guilty, and after trial he was, on the 11th December 1972 convicted of common assault contrary to section 276 of the Penal Code and sentenced to pay a fine of \$15 and enter into a recognisance in the sum of \$50 to keep the peace and be of good behaviour for twelve months.

**D** The Director of Public Prosecutions on behalf of the Crown has appealed against what was, in effect, an acquittal on the charge laid, upon the ground that the learned trial Magistrate erred in law in not holding that the police officer in question was acting in the due execution of his duty; and has also appealed against the sentence upon the ground that it is wrong in principle and/or manifestly lenient having regard to the nature and circumstances of the offence.

**E** A perusal of the record and of the judgment of the trial Magistrate satisfies me that he accepted the prosecution evidence which established the following facts beyond reasonable doubt:—

(1) the occupier of the house outside which the offence was committed was the father of the respondent;

**F** (2) three police officers (one of whom was the complainant) were detailed to proceed to the house on the night in question as a result of a request for police assistance telephoned to Nausori Police Station by the daughter of the occupier (the reference to her in the eighth paragraph of the trial Magistrate's judgment as being the "accused's daughter" being a lapsus calami), the occupier subsequently confirming that he required the presence of the police officers on his premises;

(3) the police officers proceeded to the house, which the complainant was invited to enter by the daughter of the occupier;

**G** (4) upon the complainant entering the house he was set upon by the respondent who pushed him outside the house and shut the door;

(5) the respondent then went up to the complainant while he was outside the house and kicked him on the genitals, necessitating the complainant being taken to hospital in considerable pain where he was found to be bleeding via the penis and unable to pass urine. He was sedated and the following day it was necessary to administer a general anaesthetic and insert a urinary tube into the bladder which was left in place for several days. He was not discharged from the hospital until fourteen days later when he was advised to attend surgical clinic for reassessment of his condition;

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- (6) at no time was the complainant trespassing;  
 (7) the respondent was the assailant throughout.

Applying the law to these facts there can be no doubt that the respondent assaulted—indeed viciously assaulted—the complainant while he, a police officer, was in the execution of his duty.

The complainant as a police officer had a duty to enquire into the circumstances giving rise to the request for police assistance, he had a licence to enter the premises in question for this purpose, and until such time as the licence was withdrawn by the occupier or by a member of his family with his authority (which it was not), he was entitled to remain there (*McArdle v. Wallace* [1964] Crim. L.R. 467; *Robson & Anor. v. Hallett* (1967) 51 Cr. App. R. 307). A police officer as conservator of the peace has authority, where there is reasonable ground to believe that a breach of the peace will be committed, to apprehend a person or take such other steps as on the evidence before him he thinks proper to prevent anything which in his view would cause that breach of the peace, and he is acting in the execution of his duty when so doing (*R. v. Light* (1857) 169 E.R. 1029; *R. v. Prebble* (1858) 175 E.R. 748; *Duncan v. Jones* [1936] 1 K.B. 218; *Piddington v. Bates* [1960] 3 All E.R. 660). Further, he has ex virtute officii full right to enter and remain on private premises, even in the absence of any licence express or implied, in cases where there are reasonable grounds for apprehending a breach of the peace (*Thomas v. Sawkins* [1935] 2 K.B. 249; *McGowan v. Chief Constable of Kingston upon Hull* (1967) 117 N.L.J. 1138; and see also the penultimate sentence of the judgment of Diplock L.J. in *Robson & Anor. v. Hallett* (supra) at page 316: "They were entitled, once the breach of the peace occurred, to be on the premises for the purpose of preventing it or stopping it." The respondent had already committed a breach of the peace by attacking the complainant inside the house before he assaulted him outside the house, and the time for considering whether a police officer is acting in the execution of his duty is when he is assaulted (*Squires v. Botwright* [1973] Crim. L.R. 106).

I have not overlooked the case of *Davis v. Lisle* [1936] 2 All E.R. 213, in which police officers were held not to be acting in the execution of their duty and to which the authorities above cited should be compared; but in that case there was no question of a breach or apprehended breach of the peace, the police officers had no statutory authority to enter and remain on the private premises in question, and any licence express or implied to do so had been expressly revoked by the occupier. That authority has no application to the facts of the case the subject matter of this appeal.

The trial Magistrate in arriving at the conclusion which he did may well have been misled by a statement in paragraph 2718 of Archbold's Criminal Pleadings, etc. (37th Edition), the fifth paragraph of his judgment being in similar terms, and which reads:—

"Although a police constable may not be bound, in the execution of his duty, to assist the occupier of a house in putting out an intruder, yet he may lawfully do so, and if he is assaulted by the intruder while so doing, the latter, though he may not be indictable for assaulting a constable in the execution of his duty, will be liable to a conviction for an assault, as he cannot justify resistance to the force lawfully used to eject him: *R. v. Roxburgh*, 12 Cox 8."

This statement in Archbold is taken from the headnote of the law report of the case of *R. v. Roxburgh*, but a perusal of the full report reveals that the facts do not justify the headnote. Briefly, a publican requested a police constable named Chalmers to assist in removing the prisoner, who was the worse for liquor, from

**A** the public house and the constable used force in attempting to eject him. The prisoner in resisting the constable injured him. The prisoner was not indicted for assaulting a police officer in the execution of his duty and thus the question of whether or not the constable was acting in the execution of his duty did not fall to be considered. The prisoner was indicted for feloniously assaulting one Chalmers with intent to do him grievous bodily harm, and at the trial the point in issue was the prisoner's intention in inflicting the injury, upon which the jury was unable to agree. The prisoner then offered a plea of guilty to common assault, which plea

**B** was accepted by the trial judge, £250 being paid by the prisoner to Chalmers as compensation. In the course of proceedings the trial judge was quoted as saying that although Chalmers might not have been acting—strictly speaking—in the execution of his duty as a police officer, since he was not actually obliged to assist in ejecting the prisoner, yet he was acting quite lawfully in doing so. This comment, quite apart from it being obiter, is not an authority for any proposition of law.

**C** Although the trial judge was the then Lord Chief Justice of England, an admonition by the late Sir Travers Humphreys is none the apposite: "Every passing observation made by the presiding judge upon the facts of the case being tried is not necessarily a decision of law likely to be found useful by his successors." Further, it should be borne in mind that on the facts of that case the police constable was not acting under any statutory authority (c.f. *Hinchcliffe v. Sheldon* [1955] 3 All E.R. 406 where the police had a statutory duty to enter licensed premises if they thought it likely that an offence might be committed), that no breach of the peace was apprehended, and that criminal trespass is not an offence known to English

**D** law.

The penultimate paragraph of the judgment of the trial Magistrate, together with the final paragraph, reads as follows:—

**E** "However I do not find that the accused committed the assault on the Police Constable whilst such police constable was in the execution of his duty (*Regina v. Roxburgh*, supra); all that the Police Constable was doing was to attempt to eject at request of the father Chandrapal, the accused, whom the father no longer wanted in the house—accused thereby becoming a trespasser—which house I have already held was the accused's father's.

**F** I am satisfied beyond all reasonable doubt of the guilt of the accused for the offence of Assault, contrary to Section 276 of the Penal Code and he is convicted for such offence which is contained in Section 279(b) the first offence not being proven."

**G** It appears to me that whatever approach is adopted to the penultimate paragraph of the trial Magistrate's judgment, it cannot be supported. Firstly, the case of *R. v. Roxburgh* there cited is not an authority for the proposition that a police officer is not acting in the execution of his duty in removing a trespasser from private premises. Secondly, such a proposition has no application in Fiji if the facts constitute Criminal Trespass contrary to Section 218 of the Penal Code, a cognisable offence. And thirdly, I hold as a matter of law that taking the facts as found, there is no material upon which the conclusion reached by the trial Magistrate can be based. On the evidence accepted by the trial Magistrate the only conclusion which he could properly come to was that the respondent assaulted the complainant while he was acting in the execution of his duty as a police officer.

**H** As to the sentence, it is in the circumstances manifestly inadequate. In *R. v. Tyson & Nichols* [1966] *The Times*, February 23, the English Court of Criminal Appeal stated that fines were not appropriate for people who assaulted the police and that, except in special circumstances, such people must be sentenced to imprisonment, a view which I respectfully endorse.

The conviction for common assault and the sentence imposed are quashed and in substitution therefor the respondent is convicted of assaulting a police officer in the due execution of his duty contrary to section 279(b) of the Penal Code and is sentenced to nine months' imprisonment.

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*Appeal allowed; conviction of common assault quashed and conviction for assaulting a police officer in the due execution of his duty substituted and a sentence of nine months' imprisonment imposed.*

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