JOHN ALLEN MENDONCA

v.

ATTORNEY-GENERAL & ANOTHER

[COURT OF APPEAL, 1976 (Gould V.P., Marsack J.A., O'Regan J.A.), 26th, 30th July]

Civil Jurisdiction

Tort—false imprisonment and arrest—arrest for behaving in a disorderly manner—whether conduct sufficient to bring it within meaning of Minor Offences Act 1971 s.4.—Criminal Procedure Code (Cap. 14) s. 21(b).

Practice and procedure—guilty plea to a criminal offence—effect of plea on ensuing civil proceedings.

Criminal law—disorderly behaviour—conduct must be disorderly—meaning of disorderly—Minor offences Act 1971 s.4.

The appellant, a business visitor from Hawaii, was incensed by the bad driving of an unmarked police car by a plain clothes police officer. When the cars stopped, the appellant went to the driver's door and remonstrated with him about his driving, in the course of which the appellant used an obscene word. Another police officer in the car joined in the argument and was approached by the appellant. This other police officer arrested the appellant for behaving in a disorderly manner in a public place.

At the hearing before the magistrate within hours of his arrest, the appellant pleaded guilty on the basis that this would be cheaper and more convenient than returning at a later stage from Hawaii to defend the case.

The appellant subsequently sued the arresting officer for false imprisonment and assault which action was dismissed in the Supreme Court.

Held: 1. (Gould V.P. dissenting) The actions of the appellant did not amount to disorderly conduct in that his behaviour did not seriously offend against those values of orderly conduct which were recognised by right thinking members of the public.

2. (Gould V.P. dissenting) Although the appellant had pleaded guilty before the Magistrate's Court, this should not be held conclusive against him as the plea was entered for understandable and reasonable reasons.

3. The arrest was unlawful followed by a technical assault and, therefore, the case would be remitted to the Supreme Court for entry of judgment and assessment of damages.

Cases referred to:

A *Hollington v. Hewthorn* [1943] K.B. 587; [1943] 2 All E.R. 35.
Harvey v. The King [1901] A.C. 601; 17 T.L.R. 601.
Harding v. Harding 34 L.J. Mat. 129.
Gladstone v. Gladstone L.R. 3 P & M 260.
Melser v. The Police [1967] N.Z.L.R. (C.A.) 437.
Blundell v. Attorney-General [1968] N.Z.L.R. (C.A.) 341.
B *Police v. Christie* [1962] N.Z.L.R. 1109.
Jorgensen v. New Media Ltd. [1969] N.Z.L.R. 961.

Appeal against dismissal of the appellant's action in the Supreme Court for false imprisonment and assault.

H. M. Patel for the appellant.
C *M. J. Scott* for the respondent.

The following judgments were read:

O'REGAN J.A.: [30th July 1967]—

D On 28th March 1973, the appellant, a resident of Hawaii temporarily in Suva on business was arrested by the second respondent, then a detective, and charged with behaving in a disorderly manner in a public place contrary to s.4 of the Minor Offences Act 1971. He appeared in the Magistrate's Court within two hours of his arrest. He pleaded guilty to the charge and was discharged without conviction. The offence carries the penalty of imprisonment and had he defended the charge he would either have to stay in Fiji until his case could be heard or, if the terms of bail so E allowed and he left the country, would have had to return, obviously at considerable expense and personal inconvenience, for the hearing. In the event, after taking legal advice on the matter and no doubt weighing up the pros and cons of the situation he elected to plead guilty. As will shortly emerge it will be necessary for us to consider the legal effect of such plea in the present proceedings. Before considering this and the other issues raised in the appeal we record the findings of the basic facts made by the learned judge.

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1. That on 28th March 1972 an unmarked police car in which the second defendant was a passenger crossed from the outer lane beyond the Regal Theatre in Victoria Parade and stopped by the kerb near the A.N.Z. Bank.
2. That during the manoeuvre the police car cut sharply in front of the plaintiff's car which was on the inner lane.
G 3. That the plaintiff had to slam hard on his brakes to avoid colliding with the police car.
4. That the plaintiff was extremely upset by the event.
5. That the plaintiff pulled up alongside the police car and from his own car made disparaging remarks at the police driver.
6. That the plaintiff got out of his car and went round to the police driver who was still in the car and spoke to him about the way he was driving.
H 7. That at that point the second defendant joined in the argument which was now becoming heated.
8. That when the second defendant joined the argument the plaintiff turned his attention to him by going round to the footpath to get close to him; by that

time the second defendant had got out of the car and approached the plaintiff to whom he flashed his identity card after which he arrested the plaintiff and took him to the police station. A

9. That at the police station the plaintiff was charged with behaving in a disorderly manner in a public place contrary to s.4 of the Minor Offences Act 1971.

To such findings it is convenient to add the admission made by the defendant in evidence at the trial that he used the words "I paid my fucking wheel tax".....during the passage of words. Whatever the rights and wrongs of the controversy were, I have no doubt that in the circumstances those words were used they include obscene language. B

The appellant claimed damages for wrongful imprisonment and for assault. The respondents pleaded that the second respondent lawfully arrested him pursuant to the power given by s. 21(b) of the Criminal Procedure Code, which insofar as it is relevant, reads: C

"Any police officer may without an order from the Magistrate and without a warrant, arrest

(a) .....

(b) any person who commits any offence in his presence."

The learned judge held, and we think rightly that the subsection empowers a police officer to arrest a person for any offence committed in his presence. He went on to say: D

"Counsel for the defendants further submitted that the test in deciding whether or not an offence has been committed is a subjective one for the officer concerned. Undoubtedly this is so. But in applying the subjective test the police officer must in my opinion have reasonable grounds for concluding that an offence has been committed in his presence. Whether or not a police officer had reasonable grounds for effecting an arrest pursuant to section 21(b) of the Criminal Procedure Code is for the Court to decide upon the whole of the circumstances of the case." E

We agree with this statement of the law. The learned judge next proceeded to examine the question whether the second respondent had reasonable grounds for concluding that an offence had been committed, and in so doing he bore in mind that the onus of establishing such was on the second respondent. He considered the question whether or not the appellant's conduct was disorderly within the meaning of s.4 and he relied upon dicta of North P. and Turner J. in *Melser v. The Police* [1967] N.Z.L.R. (C.A.) 437. As it is on this aspect of the case that I part company with the learned judge, I set forth in full the passages upon which he placed reliance. First, North P. said: F G

"I agree that a person may be said to be guilty of disorderly conduct which does not reach the stage that is calculated to provoke a breach of the peace, but I am of opinion that not only must the behaviour seriously offend against those values of orderly conduct which are recognised by right thinking members of the public but it must at least be of character which is likely to cause annoyance to others who are present." H

Turner J. (P. 144) said:

A "Disorderly conduct is conduct which is disorderly; it is conduct which, while sufficiently ill-mannered or in bad taste, to meet the disapproval of well-conducted and reasonable men and women, is also something more—it must, in my opinion, tend to annoy and insult such persons as are faced with it—and sufficiently deeply or seriously to warrant the interference of the criminal law. Just as, for obvious reasons, based upon the inherent right of all subjects of the B Crown to make legitimate public protests against courses taken by authority, it is not enough that the conduct charged should be disapproved by the majority as merely ill-mannered or in bad taste, it is also apparent, in any deliberate consideration of the matter, that it cannot on the other hand be necessary to go so far as to prove a likely or imminent breach of the peace. Conduct likely to provoke a breach of the peace may be the subject of another, and more serious charge, and something short of this will, in my opinion, sufficiently support a C charge under the Section now invoked. The position is, I think, that conduct at least causing annoyance to well conducted citizens, but yet short of any likely or imminent breach of the peace, may according to time place and circumstances support a charge under Section 3 D; and whether it does so will in every case be a matter of degree."

I accept these statements of the law without a hint of reservation, I think, D however, that they must be read and considered in the light of the facts that gave rise to them.

The facts recorded in the judgment of Tompkins J. at first instance—[1967] N.Z.L.R. 437—were:

"the four appellants were found by the Police chained to the pillars at the E entrance to Parliament House immediately overlooking the main steps leading to the main entrance to the building. The chains were not only round the pillars but were round the bodies and padlocked in such a way that it was impossible for them to be released without the padlocks being cut or the chains cut. They stated the were demonstrating against the visit of the Vice-President of the United States who was due to arrive at 4 p.m. that day to visit the Prime Minister. When requested to move they not only said that they could not do so but that F they did not intend to do so until after the Vice-President's arrival. They further stated that they were an independent group making a passive demonstration on their own account. They were not demonstrating vocally or acting in an offensive way but standing there quietly, chained to the pillars."

I set out the facts to show the background against which the observations of the North P. and Turner J. were made as to disorderly conduct. In the instant case, the G appellant had what I consider to be an understandable and a not abnormal reaction to the situation of danger to limb and property to which the police driver had suddenly subjected him and were it not for the injection of the obscene word into the homily he delivered I would not, for my part, regard his conduct as other than what one would expect from the generality of mankind in such a situation. Even the obscenity must be judged in perspective. In the sentence preceding the passage quoted above from his judgment Turner J. observed.

H "Whether language is indecent affords another illustration of the same kind of question—it is impossible exactly to define the word "indecent" and whether language will be indecent or not has always been recognised as suitably a matter of degree....So it is with disorderly conduct."

In citing this passage, I am not to be taken as passing a judgment in the degree of obscenity or indecency of the language used by the appellant. I do so merely to illustrate first that in a consideration whether conduct is or is not disorderly is a question of degree and to demonstrate the contrast between obscenity on the one hand and disorderly conduct on the other. A

Neither the facts as found by the learned judge nor the evidence of the second defendant and his driver establish that the appellant's conduct "*seriously* offended against those values of orderly conduct which are recognised by right thinking members of the public (the first of the requisites laid down by North J. supra) nor in my opinion was it such to annoy and insult the persons faced with it "sufficiently deeply and seriously to warrant the interference of the criminal law." (Turner J. supra). His language was in bad taste and his behaviour ill-mannered but such is not enough to establish disorderly behaviour. (Turner J. supra). B

In my view, the second respondent abused his position of authority. I think it clear that he knew his driver had committed a flagrant breach, if not of the law, then of road courtesy. The first three findings of the learned judge leave no room for controversy as to that. He remonstrated with the appellant as to his language not as to his conduct and with unseemly haste arrested him. There is a conflict as to whether the appellant was informed of the reasons for his arrest and the learned judge found himself unable to resolve it. He considered that he might well have been so informed, but in the turmoil of the events either did not hear or did not comprehend. That, however, is of no moment in the resolution of the case. I think the arrest was not made on reasonable grounds or bona fide but in retaliation or defence to the oral attack that was being made on his fellow. To the contrary, I think the making of it was not in the pursuit of law enforcement but in an irregular use of power in an argument in which, when the arrest was made, the second respondent had become personally involved. C D E

Every restraint of the liberty of one person by another is in law an imprisonment and, if imposed without lawful cause, a false imprisonment which is an actionable tort—37 *Halsbury* 3 Ed. 205, or as McCarthy J. put it in *Blundell v. Attorney-General* [1968] N.Z.L.R. (C.A.) 341, 357.

> "One fundamental rule of the common law we have inherited as part of our British system of justice is that any restraint upon the liberty of a subject against his will not warranted by law is a false imprisonment." F

Mr Scott, however, argued that the act of the appellant in pleading guilty to the charge of disorderly conduct was decisive against him. He expressly disavowed submitting that appellant was thereby estopped from maintaining his present action. He contended rather that the fact that the plea was entered was admissible in evidence as a formal and irrevocable confession to the charge. He discussed the difficulties in this area which he considered have arisen from the decision in *Hollington v. Hewthorn* [1943] 1 K.B. 587 and the line of cases in which it has been followed. In that case, the Court of Appeal held that a finding of guilty against a motorist was irrelevant to the questions before the court in a action for damages arising out of the same set of facts. Mr Scott invited us to follow *Jorgensen v. New Media Limited* [1969] N.Z.L.R. 961—in which the Court of Appeal of New Zealand declined to follow the *Hollington* case. Both the cases, however, in contract to the present, involved a finding of guilty by a criminal court after a plea of not guilty as opposed to a plea of guilty by the accused. Were *Jorgensen's* case in point, I would have followed it and declined G H

A to follow *Hollington v. Hewthorn* for the reason that in the former, the Court of Appeal of New Zealand followed (inter alia) *Harvey v. The King* [1901] A.C. 601 a decision of the Privy Council, the decisions of which, of course, are binding on this court.

As to the legal effect of a guilty plea in circumstances such as here obtain, *Phipson* 11 Ed. para. 1404 has this to say:

B "A pleads guilty to a crime and is convicted. The record of the judgment upon this plea is admissible against him in a civil action as a solemn judicial confession of the fact."

Harding v. Harding 34 L.J. Mat. 129 and *Gladstone v. Gladstone* L.R. 3 P & M 260 are cited as authority for this proposition.

C *Cross on Evidence* 3 Ed. 378 is to like effect. He puts it:

"In cases where there was a plea of guilty, the plea may by the existing law be received as an admission under an exception to the rule against hearsay."

I accept then that evidence of the appellant's plea is thus receivable in evidence. I am reinforced in that view by an observation to like effect, albeit obiter, by Turner J. D on p. 994 in *Jorgensen's* case (supra). What then the effect of so receiving it? It is not, I remind myself, an estoppel. The situation as to such evidence is akin to that of the reception in evidence of the finding of guilt as permitted by the Court of Appeal of New Zealand in *Jorgensen's* case (supra) and I think it appropriate to apply the same basis in the present case. At p. 980 North P. said:

E "In my opinion then the question submitted to this Court should be answered thus: in the present case proof of the conviction of the plaintiff.....while not conclusive of this guilt, is evidence admissible in proof of the fact of guilty. Whether such evidence discharges the evidentiary burden at any stage of the trial will be for the Court to decide on the evidence tendered."

Applying these consideration, I think that on the evidence tendered at the trial F by the appellant as to the reasons which moved him to plead guilty to the charge (which I think were understandable and reasonable in the circumstances), such plea should not be held conclusive against him, and I hold accordingly.

In the result then I think that the appellant must succeed in the cause of action as to false imprisonment.

G The plaintiff also sought damages for assault. Having found that the arrest was unlawful, it follows that the trespass to the person involved in it, and subsequent to it, constitutes assault.

There was, however, a debate before us whether the learned judge was right in holding that subsequent to the arrest no more than reasonable force was used, and H as this question could well have a bearing on the issue of damages, we must deal with it. In my view had the arrest been lawful and regualr, the amount of force used by the second respondent was not excessive in the circumstances. The argument on this topic proceeded solely on the finding of the learned judge that in this respect "there

was a technical assault." These words however, are immediately followed by the words "necessitated by the act of arrest of the plaintiff" and a finding that it was "not of sufficient gravity or unduly violent as to enable to plaintiff to succeed in an action in tort for assault." A

I think it is manifest from the language thus employed by the learned judge and the text of the preceding part of the same paragraph of his judgment that he held that the act of arrest was, as it must needs always be, a trespass on the person, but that the force used was not excessive in the circumstances. I would therefore reject the submissions advanced on this topic by Mr Patel. B

For the foregoing reasons, I would allow the appeal and remit the case to the Supreme Court for the assessment of damages and entry of judgment for the appellant and I would order the respondents to pay appellant's costs in this court and the court below. C

MARSACK J.A.

The judgment of Mr Justice O'Regan which I have had the advantage of reading sets out the facts fully and I do not find it necessary to repeat them. It is clear from the learned trial judge's findings that the originating cause of the trouble which ensued on the day in question was the action of the driver of the unmarked police car in swerving across in front of the appellant's car and putting that in imminent danger of a collision. The appellant's action in leaving his car, going across to the other vehicle and upbraiding the other driver, was understandable; even though his use of the obscene word employed cannot be condoned. The action of the second defendant in leaving the police vehicle and speaking sharply to the appellant seemed an aggravation rather than an attempt to restore peace. His immediate arrest of the appellant and the manner of that arrest—twisting the appellant's arm painfully behind his back—would appear to have been actuated more by personal annoyance than by any desire to serve the interests of the general public. D E

Even so, such action would not give rise to a claim for damages for wrongful arrest if in fact the police officer was able to say that the appellant had committed an offence in his presence. The offence alleged, as the appellant was informed at the police station, was behaving in a disorderly manner in a public place. F

Mr Justice O'Regan has concluded, for reasons set out in his judgment, that the actions of the appellant did not amount to disorderly conduct. In this respect I should like to refer to the judgment of Henry J. in *Police v. Christie* [1962] N.Z.L.R. 1109. In the course of that judgment he said:

> "There are certain manifestations of conduct in a public place which are an affront to and an attack upon recognised public standards of orderly behaviour which well-disposed persons would stigmatise and condemn as deserving of punishment. The standard fixed ought to be reasonable and such as not unduly to limit freedom of movement or speech or to impose conditions or restrictions that are too narrow. The conduct must be serious enough to incur the sanction of a criminal statute. A conviction ought not to be entered unless the conduct or behaviour is such that it constitutes an attack upon public values that ought to be preserved." G H

A I would respectfully adopt that passage as correctly setting out the attitude the court should take. Applying that to the facts of the present case I am of the opinion that my brother O'Regan is right in holding that the offence charged had not been committed, and therefore the action of the police officer in arresting the appellant was not justified.

With regard to the question whether the plea of guilty entered by the appellant that same day was a definite acknowledgement by the appellant that he had com-
B mitted the offence of which he was charged, it is in my view necessary to consider the whole of the circumstances. In the course of his evidence the appellant explained that he had received a call from the president of his company asking him to come as soon as possible; that his solicitor thereupon advised him to plead guilty as any penalty he had to pay would be substantially less than the cost of waiting or returning for a defended hearing, particularly if a lengthy journey might have been
C involved. In my view therefore the appellant in pleading guilty had taken what seemed the most convenient way out, and should not from that plea be held in these proceedings to have acknowledged that he had committed the offence charged.

For these reasons I am in agreement with the judgment of O'Regan J. and with the order which he considers should be made.

D GOULD V.P.

I have had the advantage of reading the judgment of O'Regan J.A. in which the facts are related, and I am conscious of the strength of the reasoning which has brought him to the view that the appeal should be allowed. It is therefore with some diffidence that I say I am not sufficiently persuaded to the same effect. The issue is a very narrow one. It is whether the second respondent believed that an offence had been committed in his presence and if so, whether his belief was based on reason-
E able grounds. There is no doubt about the second respondent's own belief and I would think that to provide reasonable grounds for it, it is not necessary to show that an offence actually had been committed. The extracts from the judgments in *Melser v. The Police* [1967] N.Z.L.R. 437 quoted by O'Regan J.A. and by the learned judge in the Supreme Court show the delicate distinctions that are necessary to decide whether a case is one of disorderly conduct or not. I doubt whether the second res-
F pondent, as a detective, would be expected, or have the knowledge, to concern himself with theoretical questions such as whether the conduct taking place was so annoying and insulting as to "warrant the interference of the criminal law." If the second respondent saw the appellant acting threateningly and heard him using offensive language, even if his assessment of that conduct as amounting to "disorderly" conduct was thought to be faulty, that would not, in my view, necessarily mean that he had formed an unreasonable opinion.

G In addition to the fact that the learned judge in the Supreme Court saw and heard the participants in this episode and could form a better view of their personalities than we can, there are two matters of evidence which impress me. The first is that on the findings of fact it was the appellant who was eager to confront the others. It was he who got out of his car and approached the other driver, and when the second respondent said something it was the appellant who went around to get
H close to him. In examination in chief the appellant said he "feared fisticuffs might ensue," yet he did not return to his own vehicle. If there was such a danger the responsibility for it appeared to be his, even though, as a driver, it is clear that he had been provoked.

The second matter is that of the plea of guilty to a disorderly conduct charge by the appellant. This is an admission by him of such conduct and its weight must be a matter of opinion. His explanation is that it would have been highly inconvenient to have fought the case. There may be something in that explanation in the circumstances but it is hard to accept that he would have chosen such a course if he considered his conduct had been free from blame. In my opinion this matter weighs against him at least to a degree sufficient in my mind to turn the scales in favour of the constable who arrested him. The latter is entitled to ask with some force whether it is reasonable to hold that he had no reasonable cause for an arrest which was followed by such a plea.

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For these reasons I would myself be in favour of dismissing this appeal but as my opinion is in the minority the order of the court is that the appeal is allowed with the consequent orders for the case to be remitted to the Supreme Court and for costs, proposed in the judgment of O'Regan J.A.

C

Appeal allowed. Case remitted to Supreme Court for entry of judgment and assessment of damages.