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***\*1172* Collins v Wilcock**

Queen's Bench Division

16 April 1984

**[1984] 1 W.L.R. 1172**

Robert Goff L.J. and Mann J.

1984 Feb. 29; April 16

ROBERT GOFF L.J.

16 April. ROBERT GOFF L.J. read the following judgment of the court. There is before the court an appeal by way of a case stated by a metropolitan stipendiary magistrate sitting at Marylebone, under which the defendant, Alexis Collins, appeals against her conviction on 20 January 1983, of assaulting the prosecutrix, Tracey Wilcock, a constable of the Metropolitan Police Force, in the execution of her duty at Craven ***\*1175*** Road, London W.2, on 22 July 1983, contrary to section 51(1) of the Police Act 1964 .

[His Lordship read the facts from the case stated and continued:] Before the magistrate, the contention of the parties were as follows. For the defendant, it was contended that the prosecutrix, W.P.C. Wilcock, was not acting in the execution of her duty at the time when the assault, if any, took place, having gone beyond the scope of her duty in detaining the defendant in circumstances short of arresting her. It was contended by the prosecutrix, on the other hand, that there was on the evidence good ground for her to make inquiries and administer a caution under the Street Offenes Act 1959 , and that she was therefore acting in the execution of her duty at the time when the assault took place. It may be convenient if at this stage we refer to the relevant provisions of the Act of 1959, Section 1 provides:

“(1) it shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution …

(3) A constable may arrest without warrant anyone he finds in a street or public place and suspects, with reasonable cause, to be committing an offence under this section.”

We should also refer to the system of cautioning which is adopted by the police. The procedure in the Metropolitan Police District has been described as follows (see Home Office circular No. 109/1959):

“On the first occasion when a woman who has not previously been convicted of loitering or soliciting for the purpose of prostitution is seen loitering or soliciting in a street or public place for that purpose, the officer seeing her will obtain the assistance of a second officer as a witness, and when both officers, after having kept the woman under observation, are satisfied by her demeanour and conduct that she is in fact loitering or soliciting for the purpose of prostitution, they will tell her what they have seen and caution her. Details of the caution will subsequently be recorded at the police station and in a central register for the Metropolitan Police District. The two officers, after administering the caution, will ask the woman if she is willing to be put in touch with a moral welfare organisation or a probation officer, and invite her to call at the police station at a convenient time to see a woman police officer for these arrangements …”

This system, which has been encouraged by the Home Office as a way of discouraging young women from becoming prostitutes, is extrastatutory. It has nevertheless received statutory recognition in that section 2 of the Act of 1959 provides a procedure for applying to a court for an order that no entry may be made in respect of a caution and that any entry already made be expunged. This procedure enables a respectable woman, who had been mistakenly identified by the police as a common prostitute, to have the records corrected. We were told that, in practice, the system of cautioning is carried into effect as follows. A police officer who observes a woman in a street or public place, whom he believes to be a common prostitute loitering or soliciting there for the purposes of prostitution, will approach her and ask her for her name and address. Having been given it, he will check by radio with the police station to ascertain whether there are any cautions on her record. If there are none, he will caution her; if there is one, he will administer a second ***\*1176*** caution; and if there are two, he will arrest her on suspicion of committing an offence under section 1(1) of the Act of 1959. The system of cautioning, although intended to provide a warning, has the advantage that it will generally avoid any argument on the question whether a woman charged with an offence under section 1(1) is a “common prostitute,” an expression apparently lacking statutory or judicial definition or interpretation. The system also requires the co-operation of the woman in question in providing her name and address; and, since the system is designed to discourage women from embarking upon a career of prostitution, it is understandable that police officers may think it right to persist in an attempt to give the caution, despite initial non co-operation, rather than proceed without more ado to exercise the power of arrest under section 1(3) of the Act of 1959.

We turn back to the case stated by the magistrate. Having referred to certain authorities, the magistrates expressed himself as follows:

“The facts of the case before me disclose that the [defendant] and her companion had, through their observed actions, given the [prosecutrix] and her police colleague good cause for believing that they were soliciting for the purposes of prostitution. Having that belief, the officers were under a clear duty to investigate the question of an offence against section 1 of the Street Offences Act 1959 . The ingredients of the offence include not only the actions of soliciting but also the status of the person concerned. Section 1 of that Act states that it is an offence for a common prostitute to loiter or solicit in a street or public place for the purposes of prostitution. The [defendant], unlike her companion, was not known to the [prosecutrix] to be a common prostitute at the time her actions were observed; accordingly, her status had to be established before a decision could be made as to future action by way of caution or arrest. To establish that status it was necessary to question [the defendant] but [the defendant] was completely unco-operative. I was of the opinion that the [prosecutrix] had a clear duty to persist in her inquiries and to require [the defendant] to remain with her until the inquiry was complete. I considered that in the circumstances the placing of her hand on [the defendant's] arm to restrain her from moving away, yet again, was within her duty and was not unreasonable. Being satisfied that [the defendant] had assaulted the respondent I found [the defendant] guilty and ordered her to pay a fine of 50.”

The magistrate then stated the following question for the opinion of the court:

“The question for the consideration of the High Court is whether a police constable is acting in the execution of her duty when detaining a woman against her will for the purpose of questioning her regarding her identity and her conduct which was such as to lead the constable to believe she may have been soliciting men.”

In considering this question, which is drawn in wide terms, we think it important to observe that in this case it is found as a fact that the police officer took hold of the defendant by the left arm to restrain her. Before considering the question as drawn, we think it right to consider whether, on the facts found in the case, the magistrate could properly hold that the police officer was acting in the execution of her duty. In order to ***\*1177*** consider this question, it is desirable that we should expose the underlying principles.

The law draws a distinction, in terms more easily understood by philologists than by ordinary citizens, between an assault and a battery. An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person; a battery is the actual infliction of unlawful force on another person. Both assault and battery are forms of trespass to the person. Another form of trespass to the person is false imprisonment, which is the unlawful imposition of constraint upon another's freedom of movement from a particular place. The requisite mental element is of no relevance in the present case.

We are here concerned primarily with battery. The fundamental principle, plain and incontestable, is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery. So Hold C.J. held in Cole v. Turner (1704) 6 Mod. 149 that “the least touching of another is anger is a battery.” The breadth of the principle reflects the fundamental nature of the interest so protected. As Blackstone wrote in his *Commentaries* , 17th ed. (1830), vol. 3, p. 120:

“the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.”

The effect is that everybody is protected not only against physical injury but against any from of physical molestation.

But so widely drawn a principle must inevitably be subject to exceptions. For example, children may be subject to reasonable punishment; people may be subjected to the lawful exercise of the power of arrest; and reasonable force may be used in self-defence or for the prevention of crime. But, apart from these special instances where the control or constraint is lawful, a broader exception has been created to allow for the exigencies of everyday life. Generally speaking consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is, within reason, slapped: see Tuberville v. Savage (1669) 1 Mod. 3 . Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life. We observe that, although in the past it has sometimes been stated that a battery is only committed where the action is “angry revengeful, rude, or insolent” (see *Hawkins, Pleas of the Crown* , 8th ed. (1824), vol. 1, c. 15, section 2 ), we think that nowadays it is more realistic, and indeed more accurate, to state the broad underlying principle, subject to the broad exception.

Among such forms of conduct, long held to be acceptable, is touching a person for the purpose of engaging his attention, though of course using no greater degree of physical contact than is reasonably necessary in the circumstances for that purpose. So, for example, it was ***\*1178*** held by the Court of Common Pleas in 1807 that a touch by a constable's staff on the shoulder of a man who had climbed on a gentleman's railing to gain a better view of a mad ox, the touch being only to engage the man's attention did not amount to a battery: see Wiffin v. Kincard (1807) 2 Bos. & Pul, 471 ; for another example, see Coward v. Baddeley (1859) 4 H. & N. 478 . But a distinction is drawn between a touch to draw a man's attention, which is generally acceptable, and a physical restraint, which is not. So we find Parke B. observing in Rawlings v. Till (1837) 3 M. & W. 28 , 29, with reference to Wiffen v. Kincard , that “There the touch was merely to engage [a man's] attention, not to put a restraint upon his person.” Furthermore, persistent touching to gain attention in the face of obvious disregard may transcend the norms of acceptable behaviour and so be outside the exception. We do not say that more than one touch is never permitted; for example, the lost or distressed may surely be permitted a second touch, or possibly even more, on a reluctant or impervious sleeve or shoulder, as may a person who is acting reasonably in the exercise of a duty. In each case, the test must be whether the physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct; and the answer to that question will depend upon the facts of the particular case.

The distinction drawn by Parke B. in Rawlings v. Till is of importance in the case of police officers. Of course, a police officer may subject another to restrain when he lawfully exercises his power of arrest; and he has other statutory powers, for example, his power to stop, search and detain persons under section 66 of the Metropolitan Police Act 1839 (2 & 3 Vict c. 47), with which we are not concerned. But, putting such cases aside, police officers have for present purposes no greater rights than ordinary citizens. It follows that, subject to such cases, physical contact by a police officer with another person may be unlawful as a battery, just as it might be if he was an ordinary member of the public. But a police officer has his rights as a citizen, as well as his duties as a policeman. A police officer may wish to engage a man's attention, for example if he wishes to question him. If he lays his hand on the man's sleeve or taps his shoulder for that purpose, he commits no wrong. He may even do so more than once; for he is under a duty to prevent and investigate crime, and so his seeking further, in the exercise of that duty, to engage a man's attention in order to speak to him may in the circumstances be regarded as acceptable: see Donnelly v. Jackman [1970] 1 W.L.R. 562 . But if, taking into account the nature of his duty, his use of physical contact in the fact of non-co-operation persists beyond generally acceptable standards of conduct, his action will become unlawful; and if a police officer restrains a man, for example by gripping his arm or his shoulder, then his action will also be unlawful, unless he is lawfully exercising his power of arrest. A police officer has no power to require a man to answer him, though he has the advantage of authority, enhanced as it is by the uniform which the state provides and requires him to wear, in seeking a response to his inquiry. What is not permitted, however, is the unlawful use of force or the unlawful threat, actual or implicit, to use force; and, excepting the lawful exercise of his power of arrest, the lawfulness of a police officer's conduct is judged by the same criteria as are applied to the conduct of any ordinary citizen of this country.

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We have been referred by counsel to certain cases directly concerned with charges of assaulting a police officer in the execution of his duty, the crucial question in each case being whether the police officer, by using physical force on the accused in response to which the accused assaulted the police officer, was acting unlawfully and so not acting in the execution of his duty. In Kenlin v. Gardiner [1967] 2 Q.B. 510 , is was held that action by police officers in catching hold of two schoolboys was performed not in the course of arresting them but for the purpose of detaining them for questioning and so was unlawful: see *per* Winn L.J. at p. 519. Similarly, in Ludlow v. Burgess (Note) (1971) 75 Cr.App.R. 227 , 228, it was held that “this was not a mere case of putting a hand on [the defendant's] shoulder, but it resulted in the detention of [the defendant] against his will,” so that the police officer's act was “unlawful and a serious interference with the citizen's liberty” and could not be an act performed by him in the execution of his duty: see *per* Lord Parker C.J. at p. 228.

In Donnelly v. Jackman [1970] 1 W.L.R. 562 , the police officer wished to question the defendant about an offence which he had cause to believe that the defendant had committed. Repeated requests by the police officer to the defendant to stop and speak to him were ignored. The officer tapped him on the shoulder; he made it plain that he had no intention of stopping to speak to him. The officer persisted and again tapped the defendant on the shoulder, whereupon the defendant turned and struck him with some force. The justices convicted the defendant of assaulting the officer in the execution of his duty, and this court dismissed an appeal from that conviction by way of case stated. The court was satisfied that the officer had not detained the defendant, distinguishing, at p. 565, Kenlin v. Gardiner [1967] 2 Q.B. 510 as a case where the officers had in fact “detained” the boys. It appears that they must have considered that the justices were entitled to conclude that the action of the officer, in persistently tapping the defendant on the shoulder, did not in the circumstances of the case exceed the bounds of acceptable conduct, despite the fact that the defendant had made it clear that he did not intend to respond to the officer's request to stop and speak to him; we cannot help feeling that this is an extreme case.

Finally, in Bentley v. Brudzinski (1982) 75 Cr.App.R. 217 , it was found by the justices, at p. 219, that the police officer, having caught up with the defendant, said “Just a minute”; then, not in any hostile way but merely to attract attention, he placed his right hand on the defendant's left shoulder. The defendant then swore at the police officer and punched him in the face; and a struggle ensued. The justices considered that the act of the police officer amounted to an unlawful attempt to stop and detain the defendant, and so dismissed an information against the defendant alleging that he assaulted the police officer in the execution of his duty. This court dismissed the prosecutor's appeal by way of case stated; it appears that they considered that, having regard to all the facts of the case as found by the justices, they were entitled to hold that the police officer's act was performed not merely to engage the attention of the defendant, but as part of a course of conduct in which the officer was attempting unlawfully to detain the defendant.

We now return to the facts of the present case. Before us, Mr. Armstrong, for the woman police officer, sought to justify her conduct, first by submitting that, since the practice of cautioning woman found ***\*1180*** loitering or soliciting in public places for the purposes of prostitution is recognised by section 2 of the Act of 1959, therefore it is implicit in the statute that police officers have a power to caution, and for that purpose they must have the power to stop and detain women in order to find out their names and addresses and, if appropriate, caution them,. This submission, which accords with the opinion expressed by the magistrate, we are unable to accept. The fact that the statute recognises the practice of cautioning by providing a review procedure does not, in our judgment, carry with it an implication that police officers have the power to stop and detain women for the purpose of implementing the system of cautioning. If it had been intended to confer any such power on police officers that power could and should, in our judgment, have been expressly conferred by the statute. Next, Mr. Armstrong submitted that the purpose of the police officer was simply to carry out the cautioning procedure and that, having regard to her purpose, her action could not be regarded as unlawful. Again, we cannot accept that submission. If the physical contact went beyond what is allowed by law, the mere fact that the police officer had the laudable intention of carrying out the cautioning procedure in accordance with established practice cannot, we think, have the effect of rendering her action lawful. Finally, Mr. Armstrong submitted that the question whether the police officer was or was not acting in the execution of her duty was a question of fact for the magistrate to decide; and that he was entitled, on the facts found by him to conclude that the prosecutrix had been acting lawfully. We cannot agree. The fact is that the prosecutrix took hold of the defendant by the left arm to restrain her. In so acting, she was not proceeding to arrest the defendant; and since her action went beyond the generally acceptable conduct of touching a person to engage his or her attention, it must follow, in our judgment, that her action constituted a battery on the defendant, and was therefore unlawful. It follows that the defendant's appeal must be allowed, and her conviction quashed,

We turn finally to the question posed by the magistrate for our consideration. As we have already observed, this question is in wide general terms. Furthermore, the word “detaining” can be used in more than one sense. For example, it is a commonplace of ordinary life that one person may request another to stop and speak to him; if the latter complies with the request, he may be said to do so willingly or unwillingly, and in either event the first person may be said to be “stopping and detaining” the latter. There is nothing unlawful in such an act. If a police officer so “stops and detains” another person, he in our opinion commits no unlawful act, despite the fact that his uniform may give his request a certain authority and so render it more likely to be complied with. But if a police officer, not exercising his power of arrest, nevertheless reinforces his request with the actual use of force, or with the threat, actual or implicit, to use force if the other person does not comply, then his act in thereby detaining the other person will be unlawful. In the former event, his action will constitute a battery; in the latter event, detention of the other person will amount to false imprisonment. Whether the action of a police officer in any particular case is to be regarded as lawful or unlawful must be a question to be decided on the facts of the case.

Having regard to the facts of the present case, we have no doubt that the magistrate framed his question having in mind the act of the woman police officer in taking hold of the defendant's arm to restrain her, ***\*1181*** which we have held to be a battery and so unlawful. But, having regard to the distinctions we have drawn, we consider the question itself to be so widely drafted as not to be susceptible of a simple answer. We therefore prefer not to answer it; and we shall exercise our power to amend the case by adding the following further question which arises on the facts of the case, viz. whether, on the facts found by the magistrate, the prosecutrix was acting in the course of her duty when she detained the defendant. That question we shall, for the reasons we have already given, answer in the negative.

[Reported by ROBERT RAJARATNAM, Esq., Barrister-at-Law]

**Representation**

Solicitors; Sears Blok; Solicitor, Metropolitan Police .

*Appeal allowed. Defendant's and prosecutrix's costs out of central funds.*

[1](#srcfnI89BA33F0E42711DA8FC2A0F0355337E91). Street Offences Act 1959, s. 1(1), (3) : see post p. 1175C . S. 2. “(1) Where a woman is cautioned by a constable, in respect of her conduct in a street or public place, that if she persists in such conduct it may result in her being charged with an offence under section 1 of this Act, she may not later than 14 clear days afterwards apply to a magistrates' court for an order directing that there is to be no entry made in respect of that caution in any record maintained by the police of those so cautioned …”