

22/82

## HOUSE OF LORDS

**ALBERT v LAVIN**

Lord Diplock, Lord Simon, Lord Keith, Lord Scarman and Lord Roskill

18 November, 3 December 1981

[1982] AC 546; [1981] 3 All ER 878; (1981) 74 Cr App R 150; [1981] 3 WLR 955; (1981) 146 JP 78.

**CRIMINAL LAW – BREACH OF THE PEACE – ARREST – ACCUSED COMMITTING DISTURBANCE IN BUS QUEUE – ACCUSED RESTRAINED BY OFF-DUTY POLICE OFFICER IN PLAIN CLOTHES – ACCUSED HONESTLY BUT UNREASONABLY BELIEVING POLICE OFFICER TO BE A PRIVATE CITIZEN – ACCUSED ASSAULTING OFFICER IN WHAT HE BELIEVED TO BE SELF-DEFENCE – ACCUSED CONVICTED OF ASSAULTING POLICE OFFICER IN THE EXECUTION OF HIS DUTY – WHETHER BELIEF THAT POLICE OFFICER WAS A PRIVATE CITIZEN A GOOD DEFENCE.**

The appellant caused a disturbance in a bus queue while attempting to board a bus. He was restrained by an off-duty police officer who was in plain clothes. A struggle ensued between the appellant and the officer, in the course of which the officer told the appellant that he was a police officer, a statement which the appellant in his excited state honestly but unreasonably disbelieved. The appellant continued to hit the officer and was arrested and charged with assaulting a police officer in the execution of his duty. The appellant was convicted by magistrates on that charge. He appealed, contending, *inter alia*, that his belief that he was being subjected to an unjustified assault because of his genuine, albeit mistaken, belief that the officer was not a policeman was a good defence to the charge. The Divisional Court (1981) 1 All ER 628 dismissed his appeal, holding that it was not a defence to a charge of assault that the accused honestly but mistakenly believed that his action was justified as being reasonable self-defence if there were no reasonable grounds for his belief. The appellant appealed to the House of Lords.

**HELD:** The well-established principle that to detain a man against his will without arresting him was an unlawful act and a serious interference with a citizen's liberty was subject to an equally well-established exception (which was not confined to detention effected by a police constable in the execution of his duty) that it was the right and duty at common law of every citizen in whose presence an actual, or reasonably apprehended breach of peace was being or about to be committed to make the person who was breaking or threatening to break the peace refrain from so doing and, in appropriate cases, to detain him against his will. It followed therefore that, even if the appellant's belief that the officer was a private citizen and not a constable had been correct, it would not have made his resistance to the officer's restraint of him lawful. The appeal would accordingly be dismissed.

[Decision of the Divisional Court of the Queen's Bench Division (1981) 1 All ER 628; (1981) 2 WLR 1070 affirmed on other grounds. Notes: For powers of arrest at common law and arrest for breach of the peace, see 11 *Halsbury's Laws* (4th Edn) paras 107-108, and for cases on the subject, see 14 (1) *Digest* (Reissue) 199-202, 1434-1468.]

**LORD DIPLOCK:** My Lords, this is a very much simpler case than it was made to appear to the magistrates who tried it and to the Divisional Court to which an appeal by way of case stated was brought by the appellant (Albert) against his conviction by the Brentford Magistrates' Court of an offence under s51 of the *Police Act* 1964 of assaulting a constable (the respondent, Lavin) in the execution of his duty (see (1981) 1 All ER 628; (1981) 2 WLR 1070).

The relevant facts can be stated in three sentences. As a result of incidents that occurred when Albert tried to 'jump the queue' at a bus stop, Lavin, a police constable who, at the time, was at the head of the queue, off duty and in plain clothes, had, as the magistrates found, reasonable grounds for believing a breach of the peace to be imminent unless he obstructed Albert from boarding the bus out of turn. Albert's conduct thereafter, while he was being restrained by Lavin, during the course of which Lavin had said that he was a constable, was found by the magistrates to amount to a continuing breach of the peace. After being told that Lavin was a constable, a statement which the magistrates found that Albert in his excited state honestly but unreasonably disbelieved, Albert struck him five or six blows in the stomach. This constituted the assault on a

constable in the execution of his duty for which Lavin arrested him and of which he was convicted by the magistrates.

On those facts the findings the magistrates' court stated a case that raised the two following questions of law for the opinion of the High Court.

'The questions for the opinion of the High Court are whether:

(i) a constable who reasonably believes that a breach of the peace is about to take place is entitled to detain any person without arrest to prevent that breach of the peace in circumstances which appear to him to be proper

(ii) a person being detained in the circumstances set out above but who does not accept that the person detaining him is a constable may be convicted of assault on a constable in the execution of his duty if he uses no more force than is reasonably necessary to protect himself for what he mistakenly and without reasonable grounds believes to be an unjustified assault and false imprisonment.'

My Lords, if in the first question the adverb 'reasonably' be treated as inserted before the verb 'appear' (and it is apparent from the body of the stated case that this was the magistrates' intention) the answer to each of these questions is Yes. Unfortunately in the Divisional Court the appeal proceeded on the basis, apparently undisputed by either party, that there was only one exception to what Hodgson J, who gave the main judgment, called 'the well established principle that to detain a man against his will without arresting him is an unlawful act and a serious interference with a citizen's liberty', and that the sole exception was where the detention was effected by a constable in the execution of his duty. This led the learned judge into a lengthy and erudite consideration of what must be the state of mind of a person charged with assault in order to enable him to rely on the defence of a mistaken belief that facts existed that justified the assault as the exercise of a lawful right of self-defence of which he would have been entitled to avail himself if the belief had been correct. Consideration of this question involved reference in the judgment to more than a score of reported cases on *mens rea*, 'subjective' and 'objective' tests and related topics, which led Hodgson J to the conclusion that there must be reasonable grounds for the mistaken belief, if it is to be relied on, as a defence.

With the correctness or otherwise of this part of the judgment of Hodgson J your Lordships are not concerned in this appeal. The question to which it was directed simply does not arise. What had been overlooked in the argument in the Divisional Court and in the written cases of both parties that were lodged in this House is that to the well-established principle referred to by the learned judge there is an equally well-established exception, not confined to constables, that is applicable to the instant case. It is that every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although, except in the case of a citizen who is a constable, it is a duty of imperfect obligation.

One of the findings of the magistrates in the stated case this well-established exception was plainly applicable to the instant case. It was drawn to the attention of counsel at the opening of the hearing before your Lordships, when it was pointed out that this House could not deal with the appeal on the basis of an erroneous assumption as to the applicable law even though in the court below the case had been argued and decided on the basis that the erroneous assumption was correct.

After an adjournment to enable counsel to verify the accuracy of the proposition as to the citizen's rights and duties at common law when confronted with breaches or threatened breaches of the peace, which I have stated above, counsel for the appellant conceded that on the correct view of the applicable law he could no longer pursue the appeal. Even if Albert's belief that Lavin was a private citizen and not a constable had been correct, it would not have made his resistance to Lavin's restraint of him lawful. The Divisional Court certified that the following question of law of general public importance was involved in its decision:

'Whether a person charged with an offence of assault may properly be convicted if the court finds that he acted in the belief that facts existed which if true would justify his conduct on the basis of

self-defence but that there were in fact no reasonable grounds for so believing.'

My Lords, for the reasons I have given, the Divisional Court was mistaken in thinking that that question of law was involved in the appeal that it was hearing. It is a hypothetical question on which it has not been necessary, nor would it have been proper, for your Lordships to hear argument; and your Lordships should decline to answer it I would dismiss this appeal.

*[The other members of the Bench agreed with Lord Diplock.]*

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