BIRD V. JONES

(1845) JELR 86985 (QB)

Queen's Bench • 11 Jan 1845 • United Kingdom

CORAM

Coleridge J.

JUDGEMENT

Coleridge J. In this case, in which we have unfortunately been unable to agree in our judgment, I am now to pronounce the opinion which I have formed: and I shall be able to do so very briefly, because, having had the opportunity of reading a judgment prepared by my brother Patteson, and entirely agreeing with it, I may content myself with referring to the statement he has made in detail of those preliminary points in which we all, I believe, agree, and which bring the case up to that point upon which its decision must certainly turn, and with regard to which our difference exists.

This point is, whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are in effect as follows. A part of a public highway was inclosed, and appropriated for spectators of a boat race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant: but, after a struggle, during which no momentary detention of his person took place, he succeeded in climbing over the inclosure.

Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go: but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and, during that time, remained where he had thus placed himself.

These are the facts: and, setting aside those which do not properly bear on the question now at issue, there will remain these: that the plaintiff, being in a public highway and desirous of passing along it, in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction, at his free will and pleasure: and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much. I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment neither more nor less from their being wrongful or capable of justification. And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be moveable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own. In Com. Dig. Imprisonment (G), it is said: "Every restraint of the liberty of a free man will be an imprisonment." For this the authorities cited are 2 Inst. 482, Cro. Car. 210[3]. But, when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books, the object was to point out that a prison was not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting on the Statute of Westminster 2d[4], "in persona," and says, "Every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of any common prison."

The passage in Cro. Car.[5], is from a curious case of an information against Sir Miles Hobart and Mr. Stroud for escaping out of the Gate House prison, to which they had been committed by the King. The question was, whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in London, and through the favour of the keeper, these gentlemen had not, except on one occasion, ever been within the walls of the Gate House: the occasion is somewhat singularly

expressed in the decision of the Court, which was "that their voluntary retirement to the close stool" in the Gate House "made them to be prisoners." The resolution, however, in question is this: "That the prison of the King's Bench is not any local prison confined only to one place, and that every place where any person is restrained of his liberty is a prison; as if one take sanctuary and depart thence, he shall be said to break prison." On a case of this sort, which, if there be difficulty in it, is at least purely elementary, it is not easy nor necessary to enlarge: and I am unwilling to put any extreme case hypothetically: but I wish to meet one suggestion, which has been put as avoiding one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of the exercise of a right of way into an imprisonment, the answer is, that there must be something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but, if only one end were walled up, and an armed force stationed outside to prevent any sealing of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison; and yet, as obviously, none would be confined to it. Knowing that my Lord has entertained strongly an opinion directly contrary to this, I am under serious apprehension that I overlook some difficulty in forming my own: but, if it exists, I have not been able to discover it, and am therefore bound to state that, according to my view of the case, the rule should be absolute for a new trial.

Williams J.[6] I also have had the benefit of seeing, and beg leave to refer to, what my brother Patteson has written, explaining the manner in which the only question now before us in this case is raised, and shewing that it depends upon whether the following facts constitute an imprisonment in point of law. A part of Hammersmith Bridge, which is generally used as a public footway, was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage way by a temporary fence. The plaintiff insisted upon passing along the part so appropriated, and attempted to climb over the fence. The defendant (clerk of the Bridge Company) pulled him back; but the plaintiff succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forwards along the footway in the direction he wished to go. The plaintiff, however, was at the same time told that he might go back into the carriage way and proceed to the other side of the bridge, if he pleased. The plaintiff refused to do so, and remained where he was so obstructed, about half an hour. And,

if a partial restraint of the will be sufficient to constitute an imprisonment, such undoubtedly took place. He wished to go in a particular direction, and was prevented; but, at the same time, another course was open to him. About the meaning of the word imprisonment, and the definitions of it usually given, there is so little doubt that any difference of opinion is scarcely possible. Certainly, so far as I am aware, none such exists upon the present occasion. The difficulty, whatever it may be, arises when the general rule is applied to the facts of a particular case. "Every confinement of the person" (according to Blackstone (3 Bl. C. 127)), "is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public street," which, perhaps, may seem to imply the application of force more than is really necessary to make an imprisonment. Lord Coke, in his Second Institute (2 Inst. 589), speaks of "a prison in law" and "a prison in deed:" so that there may be a constructive, as well as an actual, imprisonment: and, therefore, it may be admitted that personal violence need not be used in order to amount to it. "If the bailiff" (as the case is put in Bull. N. P. 62) " who has a process against one, says to him," "' You are my prisoner, I have a writ against you,' upon which he submits, turns back or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process." So, if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is, constructively, an imprisonment, though no actual violence be used. In such cases, however, though little may be said, much is meant and perfectly understood.

The party addressed in the manner above supposed feels that he has no option, no more power of going in any but the one direction prescribed to him than if the constable or bailiff had actually hold of him: no return or deviation from the course prescribed is open to him. And it is that entire restraint upon the will which, I apprehend, constitutes the imprisonment.

In the passage cited from Buller's Nisi Prius it is remarked that, if the party addressed by the bailiff, instead of complying, had run away, it could be no arrest, unless the bailiff actually laid hold of him, and for obvious reasons. Suppose (and the supposition is perhaps objectionable, as only putting the case before us over again) any person to erect an obstruction across a public passage in a town, and another, who had a right of passage, to be refused permission by the party obstructing, and, after some delay, to be compelled to return and take another and circuitous route to his place of destination: I do not think that, during such detention, such person was under imprisonment, or could maintain an action for false imprisonment, whatever

other remedy might be open to him. I am desirous only to illustrate my meaning and explain the reason why I consider the imprisonment in this case not to be complete. The reason shortly is, that I am aware of no case, nor of any definition, which warrants the supposition of a man being imprisoned during the time that an escape is open to him if he chooses to avail himself of it. Patteson J.

This was an action of trespass for an assault and false imprisonment. The pleas were: as to the assault, son assault demesne; as to the imprisonment, that the plaintiff, before the imprisonment, assaulted the defendant, wherefore the defendant gave him into custody. The replication was de injuria to each plea. This puts in issue, as to the first plea, who committed the first assault; and, as to the second, whether the imprisonment was before or after the assault, if any, committed by the plaintiff. Supposing the defendant to have made the first assault, and the plaintiff to have followed, and much continuous assaulting to have taken place, the plaintiff must succeed on the issue as to the first plea. Supposing a continuous imprisonment to be established, and an assault by the plaintiff, but which took place in trying to escape from that imprisonment, and not before the imprisonment, the plaintiff must succeed on the issue as to the second plea. If, on the other hand, the plaintiff did assault the defendant before the imprisonment, then he must fail upon the issue as to the second plea, even if his assault was justifiable, because in that case he should have replied such justification, as, for instance, defence of his close, or that he was in the exercise of a right of way which the defendant obstructed, or other matter of justification[7]. Now the facts of this case appear to be as follows.

A part of Hammersmith Bridge which is ordinarily used as a public footway was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage way by a temporary fence. The plaintiff insisted on passing along the part so appropriated, and attempted to climb over the fence. The defendant, being clerk of the Bridge Company, seized his coat, and tried to pull him back: the plaintiff, however, succeeded in climbing over the fence. The defendant then stationed two policemen to prevent and, they did prevent, the plaintiff from proceeding forwards along the footway; but he was told that he might go back into the carriage way, and proceed to the other side of the bridge, if he pleased.

The plaintiff would not do so, but remained where he was above half an hour: and then, on the defendant still refusing to suffer him to go forwards along the footway, he endeavoured to force his way, and, in so doing, assaulted the defendant: whereupon he was taken into custody. It is plain from these facts that the first assault was committed by the defendant when he tried to pull the plaintiff back as he was

climbing over the fence: and, as the jury have found the whole transaction to have been continuous, the plaintiff would be entitled to retain the verdict which he has obtained on the issue as to the first plea. Again, if what passed before the plaintiff assaulted the defendant was in law an imprisonment of the plaintiff, that imprisonment was undoubtedly continuous, and the assault by the plaintiff would not have been before the imprisonment as alleged in the second plea, but during it, and in attempting to escape from it: and the plaintiff would, in that case, be entitled to retain the verdict which he has obtained on the issue as to the second plea. But, if what so passed was not in law an imprisonment, then the plaintiff ought to have replied the right of footway and the obstruction by the defendant, and that he necessarily assaulted him in the exercise of the right, and, not having so replied, is not entitled to the verdict. So that the case is reduced to the question, whether what passed before the assault by the plaintiff was or was not an imprisonment of the plaintiff in point of law[8].

I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room: and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree, also, that the compelling a man to go in a given direction against his will may amount to imprisonment. But I cannot bring my mind to the conclusion that, if one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he can be said thereby to imprison him.

He does him wrong, undoubtedly, if there was a right to pass in that direction, and would be liable to an action on the case for obstructing the passage, or of assault, if, on the party persisting in going in that direction, he touched his person, or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him. The quality of the act cannot, however, depend on the right of the opposite party. If it be an imprisonment to prevent a man passing along the public highway, it must be equally so to prevent him passing further along a field into which he has broken by a clear act of trespass. A case was said to have been tried before Lord Chief Justice Tindal involving this question[9]: but it appears that the plaintiff in that case was compelled to stay and hear a letter read to him against his will, which was doubtless a total restraint of his liberty whilst the letter was read. I agree to the definition in Selwyn's Nisi Prius, title Imprisonment (vol. ii. p. 915, 11th ed.): "False imprisonment is a restraint

on the liberty of the person without lawful cause; either by confinement in prison, stocks, house, etc., or even by forcibly detaining the party in the streets, against his will." He cites 22 Ass. fol. 104, B, pi. 85, per Thorpe C.J. The word there used is "arrest," which appears to me to include a "detaining," as Mr. Selwyn expresses it, and not to mean merely the preventing a person from passing. Upon the whole, I am of opinion that the only imprisonment proved in this case was that which occurred when the plaintiff was taken into custody after he had assaulted the defendant, and that the second plea was made out; I therefore think that the rule for a new trial ought to be made absolute. Lord Denman C.J. I have not drawn up a formal judgment in this case, because I hoped to the last that the arguments which my learned brothers would produce in support of their opinion might alter mine. We have freely discussed the matter both orally and in written communications; but, after hearing what they have advanced, I am compelled to say that my first impression remains. If, as I must believe, it is a wrong one, it may be in some measure accounted for by the circumstances attending the case. A company unlawfully obstructed a public way for their own profit, extorting money from passengers, and hiring policemen to effect this purpose.

The plaintiff, wishing to exercise his right of way, is stopped by force, and ordered to move in a direction which he wished not to take. He is told at the same time that a force is at hand ready to compel his submission. That proceeding appears to me equivalent to being pulled by the collar out of the one line and into the other. There is some difficulty perhaps in defining imprisonment in the abstract without reference to its illegality; nor is it necessary for me to do so, because I consider these acts as amounting to imprisonment. That word I understand to mean any restraint of the person by force. In Buller's Nisi Prius (p. 22) it is said: "Every restraint of a man's liberty under the custody of another, either in a gaol, house, stocks or in the street, is in law an imprisonment; and whenever it is done without a proper authority, is false imprisonment, for which the law gives an action; and this is commonly joined to assault and battery; for every imprisonment includes a battery, and every battery an assault." It appears, therefore, that the technical language has received a very large construction, and that there need not be any touching of the person: a locking up would constitute an imprisonment, without-touching. From the language of Thorpe C.J., which Mr. Selwyn (vol. ii. p. 915, 11th ed., tit. Imprisonment), cites from the Book of Assizes (22 Ass. fol. 104, B, pl. 85), it appears that, even in very early times, restraint of liberty by force was understood to be the reasonable definition of imprisonment. I had no idea that any person in these times supposed any particular boundary to be necessary to constitute imprisonment, or that the restraint of a man's person from doing what he desires ceases to be an imprisonment because he may

find some means of escape. It is said that the party here was at liberty to go in another direction. I am not sure that in fact he was, because the same unlawful power which prevented him from taking one course might, in case of acquiescence, have refused him any other. But this liberty to do something else does not appear to me to affect the question of imprisonment. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else? How does the imposition of an unlawful condition shew that I am not restrained? If I am locked in a room, am I not imprisoned because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water or by taking a route so circuitous that my necessary affairs would suffer by delay? It appears to me that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty: and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person.

The case cited as occurring before Lord Chief Justice Tindal, as I understand it, is much in point. He held it an imprisonment where the defendant stopped the plaintiff on his road till he had read a libel to him. Yet he did not prevent his escaping in another direction. It is said that, if any damage arises from such obstruction, a special action on the case may be brought. Must I then sue out a new writ stating that the defendant employed direct force to prevent my going where my business called me, whereby I sustained loss? And, if I do, is it certain that I shall not be told that I have misconceived my remedy, for all flows from the false imprisonment, and that should have been the subject of an action of trespass and assault? For the jury properly found that the whole of the defendant's conduct was continuous: it commenced in illegality; and the plaintiff did right to resist it as an outrageous violation of the liberty of the subject from the very first. Rule absolute.