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Feb. 18, 19; *Mar.* 7.

Jordan C.J.
Stephen J.
Street J.

BALES *v.* PARMETER AND ANOTHER.

Arrest—Police officer—Person suspected of crime—Reasonable and probable cause—Question for judge—Arrest for purpose of questioning or investigation— Justification—Crimes Act, 1900 *No.* 40, *s.* 352 (2) (a).

The defendants, who were police officers, in the course of investigating an alleged crime visited a flat occupied by the plaintiff where, despite the plaintiff's objections they searched the flat, questioned the plaintiff and prevented her from leaving. Subsequently, the defendants took the plaintiff against her will to a police station where she was further questioned. No charge was laid against her and she was ultimately allowed to leave. The plaintiff sued the defendants for damages for trespass to her dwelling, unlawful arrest and false imprisonment. At the trial the presiding judge left certain questions to the jury the fifth of which was "assume plaintiff was arrested, did defendants with reasonable cause suspect her of having committed a crime. Ans. No." The trial judge in the course of his summing up directed the jury that they should answer this question according to the view they took of certain evidence. The jury returned a verdict for the plaintiff. Upon appeal it was contended, *inter alia*, that the question of reasonable cause was a question for the judge and not for the jury.

Held, that it was open to the trial judge to leave the question to the jury in view of his direction to them.

Held, further, that, on the evidence, the arrest of the plaintiff was for the purpose of questioning her or making investigations in order to see whether she should be charged and was not for the purpose of bringing her before a magistrate to be dealt with according to law, and was unauthorised and actionable.

NEW TRIAL MOTION.

The following statement of facts is taken from the judgment of the Chief Justice :—

"This is a motion to set aside a verdict for the plaintiff and to enter judgment for the defendants, or in the alternative grant a new trial, in an action in which the plaintiff recovered a verdict for £400. The action was one in which damages were claimed upon three counts : trespass to a dwelling house, unlawful arrest and false imprisonment.

According to the evidence given on behalf of the defendants, Mrs. Procter, with whom the plaintiff, who was her cousin,

had been living, told the defendants, who are police officers, that some linen and towels were missing from her home. She said that she missed them after the plaintiff had left, and that she suspected the plaintiff of having taken them. When asked by the defendants what ground she had for this suspicion, Mrs. Procter said that on a previous occasion she had seen in a portmanteau belonging to the plaintiff articles belonging to Mrs. Procter which were still missing; and that two old quilts had been put into the drawer from which the linen had been taken, so as to make it appear that nothing had been removed. The defendants replied that they could do nothing unless Mrs. Procter would charge the plaintiff with theft if the property were traced to her possession or it were found that she had stolen it. Upon her promising to do so, the defendants proceeded to a flat in Darlinghurst which they had been informed was let to a man named Sydenham, they supposing that they had his permission to enter and search it. The plaintiff, who was unmarried, was living there under the name of Mrs. Sydenham. They obtained a key from the caretaker, who gave it to them as soon as she was told that they had Sydenham's permission, and went in. The plaintiff was absent, but arrived shortly afterwards and before they had commenced to search. They explained their presence, and she gave them permission to search the flat. They did so, without discovering any of the missing articles, and then asked her whether she was willing to go to the Darlinghurst Police Station to see the sergeant. She said that she would do so willingly, and accompanied them thither. At the Police Station she was subjected to no restraint, but left after being told that no action would be taken against her. They say that there was no suggestion of any charge being made against the plaintiff.

On behalf of the plaintiff, the evidence was that it was she who was tenant of the flat, and that she was using the name "Mrs. Sydenham" because, at the time, she was engaged to be married to Sydenham. When she arrived on the scene, she found the defendants in the flat engaged in searching. She expostulated; but they accused her of having taken the missing articles; and insisted on going on with the search, refusing to give her permission to leave the flat. The defendants then said that she would have to go with them to the

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Police Station, and, upon her objecting, said that if she did not go they would take her. She was then weeping; she went with them to the Police Station against her will, and was there taken to a room upstairs where she was again accused of taking the missing articles, and was questioned about them. No charge was laid against her, and ultimately she was allowed to leave.

The substantial defences were, "not guilty," and "not guilty by statute," the latter plea raising the issue of justification by virtue of s. 352 (2) (a) of the Crimes Act, 1900.

Eight questions were left to the jury by the trial judge and these questions, and the answers thereto given by the jury, are as follows:—

1. Was plaintiff the tenant of subject flat? A. Yes.

2. Did plaintiff give leave to defendants to search. A. No.

3. (a) If the plaintiff was tenant, what damages would be awarded for original entry into flat? A. £125.

(b) If plaintiff was tenant and did not give leave to search, what damages for search? A. £75.

4. Was plaintiff arrested? A. Yes.

5. Assume plaintiff was arrested, did defendants with reasonable cause suspect her of having committed a crime? A. No.

6. If plaintiff was arrested and defendants did not have reasonable cause, what damages? A. £100.

7. Was plaintiff imprisoned? A. Yes.

8. If plaintiff was imprisoned, what damages? A. £100.

Total, £400.

The form of the questions was agreed to, but counsel for the defendants objected to question 5 being left to the jury, he contending that this was a matter to be decided by the judge.

The grounds of appeal argued before us were (a) that the verdict was on all points against the evidence and the weight of evidence, (b) that the fifth question should have been decided by his Honour and not left to the jury, and (c) that the damages were excessive."

Watt, K.C. and *Badham*, for the appellants. The jury's verdict was unreasonable and was against the evidence.

It was almost perverse and the appellate court can set it aside : *Ailcock* v. *Hall* ([1891] 1 Q.B. 444). If the jury disbelieved the detectives on how they came to question the respondent, their verdict was unreasonable. If the jury disregarded the implied direction of the trial judge, their verdict was even more unreasonable. In any event, the question of reasonable and probable cause was for the judge, and the fifth question should not have been left to the jury : *Bradshaw* v. *Waterlow & Sons Ltd.* ([1915] 3 K.B. 527); *Davis* v. *Hardy* (6 B. & C. 225).

[JORDAN, C.J. referred to *McArdle* v. *Egan* (150 L.T. 412)].

The trial judge was misled, when he left the question to the jury by *Hammer* v. *Hoffnung & Co. Ltd.* (28 S.R. 280).

[STEPHEN, J. referred to *Douglas* v. *Tiernan* (32 S.R. 149).] Secondly, the jury in finding two separate verdicts of £100 each for the arrest and for the imprisonment have overlooked the fact that, if the two were distinct, the difference was technical. They imported into each the aggravation appropriate to one or the other. The judge should have put these matters to the jury as one.

[STEPHEN, J. · The parties agreed on the form of questions].

The damages were excessive. The trespass was technical yet the jury awarded £125, while for the search only £75 was awarded. This indicates that some wrong principle was applied.

Evatt, for the plaintiff, the respondent. The question now objected to was drafted by the judge and agreed to by the parties.

[JORDAN, C.J. The form of question was agreed, not whether it should be left to the jury.]

He referred to *McArdle* v. *Egan* (150 L.T. 412); *Clarke* v. *Bailey* (33 S.R. 303). The jury has found there was an arrest. No charge was ever laid against the respondent. Arrest can only be justified when it is for the purpose of charging a person. He referred to s. 153 of the Justices Act, 1902, and s. 352 of the Crimes Act, 1900. The jury were not bound to accept the appellant's evidence and the verdict was reasonable. The further matters occurring at the police station could not be justified and, if part of the appellant's action was unlawful, the whole arrest is bad : *Edwards* v. *Ferris* (7 C. & P. 542) ; *Meering* v. *Graham White Aviation Co.* (122 L.T. 44). When all the circumstances are considered the damages are not excessive. The invasion of

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a person's home is serious. He referred to *Bracegirdle* v. *Orford* (2 M. & S. 77 at p. 79).

Watt, K.C., in reply.

Cur. adv. vult.

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JORDAN, C.J. [after stating the above facts, continued :] As to the first question which was left to the jury, I could very readily have understood the jury coming to an opposite conclusion to that at which they arrived ; but I am of opinion that their answer cannot be upset on the ground that it was against the weight of evidence. We have not had the advantage of seeing the witnesses, and as there was evidence both ways, it would be necessary, in order to justify us in setting aside their verdict, to come to the conclusion not only that the weight of evidence was the other way, but that it so strongly preponderated in favour of the defendants as to lead us to the conclusion that the jury, in finding as they did, either wilfully disregarded it, or failed, to understand and appreciate it. I am unable to come to this conclusion.

As to the second, fourth, and seventh questions, the jury's answers depended entirely upon whose evidence they accepted. They evidently accepted that of the plaintiff ; and I am unable to say that they were not justified in so doing.

The fifth question is the matter to which the greater part of the argument has been directed. There is no doubt that in an action for wrongful arrest and false imprisonment by a police officer it is a good defence if the defendant proves that he had reasonable and probable cause for his actions. Such reasonable and probable cause may be established by proving that he, with reasonable cause, suspected the person whom he arrested of having committed a crime or offence. The question whether the officer had reasonable cause for entertaining the suspicion is a question to be determined by the Judge : *McArdie* v. *Egan* (150 L.T. 412). If any question of fact arises as to whether the officer in fact suspected the accused, or in fact had the information upon which he says that he formed the suspicion, or believed that information to be true, or had reasonable ground for believing it to be true, these questions should

be put to the jury, in order to provide the Judge with material to determine the question which is for him alone, namely, whether the data afforded reasonable ground for entertaining the suspicion. But if the evidence relating to this issue is all one way and is either unchallenged, or is such that reasonable men could come to only one conclusion about it, the Judge need put no question to the jury on this point, but may proceed to determine the question for himself: *ibid.* If he thinks that a question should be put to the jury, it is for him to exercise his discretion as to what is the best way to put it to them in order that the respective duties of himself and them may be properly carried out. He may put specific questions to them and then resolve the matter upon their answers; or he may put to them the very question which he has to decide, so long as he makes it clear to them that they have no alternative but to answer it one way or the other according as they take one view or another upon the incidental questions of fact which are involved.

In the present case, in the course of his summing up, his Honour, undoubtedly did in the first instance purport to leave it to the jury to determine whether the defendants had reasonable cause for suspecting the plaintiff, in terms which would have left it to them to determine the whole matter; but when he continued his summing up on the following morning he directed them quite definitely that if they believed that Mrs. Procter told the defendants what both she and they said she did tell them, that would be reasonable cause. I am of opinion that it was open to his Honour the leave the matter to the jury in this way; and that no exception can be taken to his having put to the jury the question which he had to decide, in view of the specific direction contained in the summing-up. In the present case, however, this matter is, in my opinion, of no real importance, because there is undisputed evidence upon which I think that it would have been impossible to hold that the arrest and imprisonment which the jury found as a fact to have occurred were with reasonable and probable cause.

It is, no doubt, very important, as was pointed out by Lord *Wright* in *McArdle* v. *Egan* (150 L.T. 412 at p. 413), that police officers should be protected in the reasonable and proper

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execution of their duty; they should not be hampered or terrified by being unfairly criticised if they act on reasonable suspicion. "It is to be remembered that police officers, in determining whether or not to arrest, are not finally to decide the guilt or innocence of the man. Their functions are not judicial, but ministerial, and it may well be that if they hesitate too long when they have proper and sufficient ground of suspicion against an individual, they may lose an opportunity of arresting him, because in many cases steps have to be taken at once in order to preserve evidence. I am not saying that as in any way justifying hasty or ill-advised conduct. Far from that, but once there is what appears to be a reasonable suspicion against a particular individual, the police officer is not bound, as I understand the law, to hold his hand in order to make further inquiries if all that is involved is to make assurance doubly sure." But suspicion that a person has committed a crime cannot justify an arrest except for a purpose which that suspicion justifies; and arrest and imprisonment cannot be justified merely for the purpose of asking questions. When a police officer suspects that a crime has been committed, there is no reason why he should not, and every reason why he should, ask questions of any person who seems likely to be able to give any information on the subject, whether he suspects him of having committed it or not, for the purpose of discovering whether his suspicions are well founded, and if so, who is the perpetrator, but he has no authority to arrest or confine any person merely for the purpose of asking him questions. No person is entitled to impose any physical restraint upon another except as authorised by law. This rule applies as much to police officers as to any one else, although the law allows them somewhat greater powers in this respect than it allows to other citizens. Where the imposition of physical restraint is authorised by law it may be imposed only for the purpose for which it is authorised. Thus, such restraint may be lawful to prevent a breach of the peace, so long as it ceases as soon as its necessity ceases: *Williams* v. *Glenister* (2 B. & C. 699). It may be imposed in the course of arresting and bringing before a magistrate a person for whose arrest a warrant has issued; and it may be imposed by a police officer in the course of arresting and bringing before a magistrate a person for whose arrest no warrant

has issued, but whom the officer, with reasonable cause, suspects of having committed a crime or an offence punishable whether by indictment or summarily under any Act. This authority existed with respect to felonies at common law. It was extended to other offences by statute—now s. 352 (2) (a) of the Crimes Act 1900. But the statute, like the common law, authorises him only to take the person so arrested before a justice to be dealt with according to law, and to do so without unreasonable delay and by the most reasonably direct route: *Clarke* v. *Bailey* (33 S.R. 303). Any detention which is reasonably necessary until a magistrate can be obtained is, of course, lawful, but detention which extends beyond this cannot be justified under the common law or statutory power. T us, it has been held that if in the course of an arrest which is otherwise for a lawful purpose, the arresting constable takes the arrested person to some place to which it would not be reasonable and proper to take him in the course of bringing him before a magistrate, for the purpose of searching him there, the detention in that place and the search are unauthorised and therefore actionable: *ibid.*

The whole case of the defendants was that they did not arrest the plaintiff at all, and that at no time did they impose any measure of constraint upon her. At the flat they did not check her movements; she went to the police station of her own free will, without any coercion, physical or moral; and she remained at the police station voluntarily until she ultimately chose to leave. All this is quite inconsistent with their having arrested her and taken her to the police station for the purpose of keeping her there until a magistrate could be obtained before whom she could be charged, or until the sergeant-in-charge had granted bail under s. 153 of the Justices Act, 1902, if he was willing to do so.

In N.S.W. the same strictness has not been observed with respect to the interrogation by a police officer of persons who have been arrested, or whom the officer has decided to arrest, upon a criminal charge, as now obtains in England: Contrast *Hough* v. *Ah Sam* (15 C.L.R. 452) with Phipson on Evidence, 7th Ed. 258, and appendix vii. The proper caution should however, be given as soon as the officer has decided to arrest, and, *a fortiori*, as soon as the arrest has been made; and any-

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thing in the nature of cross-examination of a prisoner who obviously is unwilling to answer questions is to be avoided. In the present case, there is no suggestion that there was any cautioning of the plaintiff either at the flat or at the police station, such as one would have expected if an arrest had been made for the purposes of a criminal charge.

The jury found that there was an arrest at the flat and an imprisonment at the police station. Accepting those findings, it is impossible, on the defendants' own evidence, to escape the conclusion that any such restraint of the plaintiff's liberty was, not for the only purpose for which in the circumstances it could have been justified—that of taking her before a magistrate to be charged and dealt with according to law—but for the purpose of asking her questions or making investigations in order to see whether it would be proper or prudent to charge her with the crime. If a person has been arrested, and is in process of being brought before a magistrate questioning within limits is regarded as proper in New South Wales—indeed, within very narrow limits, it is regarded as proper in England ; but a police officer has no more authority to restrain the liberty of a suspected person for the purpose, not of taking him before a magistrate, but of interrogating him, than he has of restraining the liberty of a person who may be supposed to be capable of supplying information as a witness.

For these reasons, I am of opinion that the motion fails upon all points, and should be dismissed, with costs. I may add that I have read, and agree with, the judgment of his Honour Mr. Justice *Milner Stephen*.

In these circumstances, I am of opinion that the fifth question really did not arise, in view of the jury's answers to the fourth and seventh questions, when taken with the defendants' own evidence.

With regard to the question of the quantum of damage, no exception is, or could be, taken to His Honour's summing-up in this respect ; but it is contended that the awards are excessive. It may very well be that the splitting up involved in questions three, six and eight went to increase the total amount awarded ; but since this division was agreed to we can give little weight to this consideration. The damages were undoubtedly liberal, more liberal than I would myself award

upon the evidence, which, however, I can judge only as so much cold print. Assuming, however, as I think I must, that the jury entirely accepted the plaintiff's version, I am unable to say that the amount is so great that reasonable men could not have given it, or is such as to show that they must have applied a wrong measure by taking into consideration something which they ought not to have considered, or failing to take into consideration something which they ought to have considered.

STEPHEN, J. I agree. In my opinion if it were necessary to found the verdict for wrongful arrest upon the jury's answer to the 5th question, there is sufficient evidence to support it. We were asked by the defendant's counsel to say that the evidence of the defendants and Mrs. Procter, being uncontradicted, should have been accepted by the jury on the principle stated in *Davis* v. *Hardy* (6 B. & C. 225) and accepted, though not applied, in *Hammer* v. *S. Hoffnung & Co. Ltd.* (28 S.R. 280) and *Douglas* v. *Tiernan* (32 S.R. 149). In the former of these cases it was held that, where the onus is on the defendant, the jury are not bound to accept the uncontradicted evidence of the defendant, unless the case falls within the exceptional class represented by *Davis* v. *Hardy* (*supra*), where the evidence has been given by a person of undoubted reliability, whose credit has not been shaken in any way. Even then it would appear from a perusal of *Douglas* v. *Tiernan* (*supra*) and *Gozzard* v. *McKell* (32 S.R. 39) that the safer course is for the trial Judge to leave the question of fact to the jury. Here it cannot be said upon the whole case that the defendants' evidence was in no way discredited. The jury obviously accepted the plaintiff's version against the defendants' in matters where there was direct conflict, and to that extent at any rate the defendants must be taken to have been discredited in the jury's eyes ; although on the evidence, as it comes before us, we might take quite a different view.

No doubt it is wholly improbable that the defendants would visit the plaintiff's flat unless they had first received some information from Mrs. Procter. But the onus lay on the defendants to show that they had received from her that information which they placed before the jury as justifying suspicion on

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their part ; and if the jury thought that their evidence on other vital parts of the case was not to be believed, they were not bound to accept that version, and the defence fails of proof. On this part of the case, then, I come to the conclusion that the finding must stand that the defendants had not reasonable cause for suspicion.

Further, I agree with what the Chief Justice has said as to the other ground upon which the verdict for wrongful arrest may be sustained.

STREET, J. I agree.

Solicitors : *J. E. Clark* (Crown Solicitor) ; *C. Jollie Smith & Co.*