J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 7/77

BEFORE: THE HON. PRESIDENT
THE HON. MR. JUSTICE WATKINS, J.A.
THE HON. MR. JUSTICE ROBOTHAM, J.A. (AG.)

R. v. ROY DILLON

Mr. F.M.G. Phipps Q.C., for the appellant

Mr. R. Stewart for the Crown

March 4 and 5, 1977

WATKINS JA.

The appellant, a police constable, was on January 3, 1977, convicted before Mr. A.J. Lambert, a resident magistrate for the parish of Kingston, on two counts of an indictment which charged him at common law with negligently permitting the escape from custody of Paul Bryan and Robert Blackwood respectively. By a majority his appeal was dismissed on March 5, 1977. I had the misfortune to differ from the learned President and Robotham, J.A. and inasmuch as the appeal raises some important questions of law it seems appropriate that the grounds of my dissent should be stated.

Count one of the indictment charged that "Roy Dillon on the 25th day of April 1976 in the parish of Kingston, being a member of the Jamaica Constabulary Force and having Paul Bryan a person arrested for shooting with intent lawfully in his custody, negligently permitted the said Paul Bryan to escape out of his custody." Count two was in these terms:

"Roy Dillon on the 25th day of April, 1976 in the parish of Kingston, being a constable in the Jamaica Constabulary Force and having Robert Blackwood a person lawfully detained in his custody, negligently permitted the said Robert Blackwood to escape out of his custody."

These charges clearly raised the allegations:-

(i) that Bryan had been lawfully arrested and that Blackwood had been lawfully detained;

(ii) that they had been in the actual and lawful custody of the appellant; and

(iii) that through negligence on the part of the appellant they had been permitted to escape.

These allegations are necessary constituents of the crime of escape at common law (See Archbold's Criminal Pleading Evidence and Practice 37th ed. para. 342 and Halsbury's 3rd ed. Vol. 10 paras. 1210 and 1211). Did the prosecution adduce evidence in proof beyond reasonable doubt of them?

(II) and (iii) may be briefly disposed of. The learned resident magistrate found that both Bryan and Blackwood had at the material time been in the actual custody of the appellant and that through failure on his part to observe the security rules of the lock-up in which they had been in custody, a dereliction of duty amounting to negligence, the escape of the prisoners had been facilitated. No cogent arguments were advanced by counsel for the appellant why these findings of the trial judge were ill-founded and in my view the evidence before the court of trial were sufficient to ground the findings of actual custody and negligence on the part of the appellant.

It remains therefore only to consider whether the initial arrest of Bryan and the initial detention of Blackwood were lawful and were so

established by the evidence to be lawful, for unless both the arrest and detention were lawful, the subsequent actual taking into custody would be unlawful, and there could be no crime of escape, whatever the circumstances of negligence which might have facilitated it. "To render an officer guilty of an escape there must first have been an actual and lawful arrest. If the arrest was of such a nature that the prisoner would have been justified in escaping, the officer is equally justified in releasing him." (See Halsbury's 3rd. edition Vol 10 para. 1211). It is necessary therefore to turn to the evidence, which disclosed the following facts. The escapee Paul Bryan had been in incarceration since February 28, 1976, had escaped on March 2 and re-captured on March 24 and Police Constable Leslie Grant testified that "on 28th February 1976 I arrested Paul Bryan, charged for shooting with intent. I placed him in custody at Central Police Station lock-up." This was the sum total of the relevant evidence and with reference to it the learned resident magistrate made no finding whatever concerning the lawfulness of the arrest. The presence on the other hand of escapee Robert Blackwood in the Central Police Station Lock-up on the date charged was accounted for in evidence by Detective Assistant Superintendent of Police Albert Richards in these words. "On 16th April, 1976 I found Blackwood at remand section of General Penitentiary. I had Blackwood on 23rd April, 1976 transferred to lock-up at Central Police Station, Kingston. Blackwood was taken to Central with view of holding ID parade which was put on for 26th April, 1976. Parade was not held. I got information as a

consequence ID Parade was called off." The learned resident magistrate likewise made no express finding with reference to the legality of this detention.

Was such evidence sufficient to establish the lawfulness of the arrest of Bryan? The argument for the Crown which found favour with the majority was that the act of arrest by the Constable raised a presumption in favour of the prosecution of the legality of such arrest and that it was for the appellant to rebut the same, if he could, but did not in the circumstances; and Archbold's 37th edition para. 1156 was cited in support. The learned authors in the paragraph under reference state:-

> "It is also a maxim of law that omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium upon which ground it will be presumed, even in a case of murder, that a man who has acted in a public capacity or situation was duly appointed, and has properly discharged his official duties."

Numerous cases are cited in support of this statement and the more important ones must now be examined to determine whether the statement of the rule is true, and if so, whether it applies to the instant circumstances.

R. v. Gordon et al (1 Leach 515 and 168 E.R. 359) was a case in which a constable in the course of executing a warrant upon the accused parties was fallen upon by them and shot to death. That the constable had been duly appointed as such was not proved by the prosecution. The witness merely stated in evidence that he was a constable and the question referred for the consideration of the judges was as to whether such proof was not

requisite to which they replied that they were all of the opinion that "these circumstances were sufficient evidence and notification of his being a constable although there was no proof of his appointment or of his having been sworn into his office." Reference also was made to Berryman v. Wise (4 Term Rep. 368) in which Buller J. said:-

> "In the case of all peace officers, justice of the peace, constables etc. it is sufficient to prove that they acted in those characters, without producing their appointments and that even in the case of murder."

In R. v. Rees et al (6 C.T.P. 606) one of the accused parties was charged with embezzling a letter containing a bill of exchange, he being at the time employed under the Post Office. To the question whether it was necessary for the Crown to prove that the prisoner had been actually appointed it was answered by the Court that it was sufficient only to show that the prisoner had acted as servant of the Post Office. R. v Verelit (3 Camp 431) raised the question whether it was sufficient proof that a person held the office of surrogate merely to show that he had acted therein. The question was answered in the affirmative, though in the circumstances of the particular case the presumptive evidence was successfully rebutted by other evidence. R. v. Murphy (8 C and P 297) re-affirms the omnia praesumuntur rule that proof that a person has acted as a public officer on one occasion, before the occasion in question, is evidence to go to the jury that he is such officer. In R. v. Catesby (2B and C 814), the respondents exhibited a certificate purporting to be signed by one church-warden and one overseer of the poor and certifying that certain persons were inhabitants legally settled in their parish.

An ancient statute of England required that such certificates should be signed by a majority of church-wardens and overseers. On the question whether such a certificate was valid it was held that it must be taken to have been a good certificate, because it may be intended in favour of such an instrument (now sixty years old) that by custom there was only one church-warden in the parish and that two overseers had been originally appointed but that one of them died, and that the certificate was granted before the vacancy in the office was filled up. R. v. Townsend (C. and Mar 178) re-asserts the principle that proof that a person has acted in a capacity is sufficient proof that he holds that situation. In R. v. Creswell ((1876) P.Q.B.D. 446) it was proved against the prisoner charged with bigamy that the first marriage was solemnised, not in the parish church of the parish, but in a chamber in a building a few yards from the church, while the church was under repair. It was further proved that divine service had several times been performed in the building in question. It was held by the Court for Crown Cases Reserved that the building must be presumed to have been licensed, and therefore the first marriage was valid, and that the prisoner was properly convicted of bigamy. In R. v. Manwaring (Dears and B. 132) in which the prisoner was charged with bigamy the question was whether the first marriage was solemnised in a duly registered place. Wightman J. said:-

> "The presence of the registrar at the marriage, the fact of the ceremony taking place, and the entry in the registrar's book, of which a copy was produced at the trial, seemed to me at the time to be circumstances which

> afforded, and I now think, aided as they are by the presumption omnia rita esse acta, they do afford prima facie evidence that the chapel was a duly registered place in which marraige might be legally celebrated."

None of these cases support the principle for which the learned authors or counsel for the Crown contend in this matter. They uniformly and consistently establish the scope of the omni praesumuntur rule to be no more than that where it is shown by evidence that a person, including a constable, has acted in a capacity there arises a rebuttable presumption that he holds the relevant situation. The cases do not support the existence of the further presumption that the person who is shown to have acted in a public capacity or situation in addition to being duly appointed thereto, "has properly, discharged his official duties." In Brown's Legal Maxims 10th edition p. 642 the statement is made that:-

> "Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. In these cases the ordinary rule is, omnia praesumuntur rite et solemnito esse acta donec probetur in contrarium, that is to say everything is presumed to be rightly and duly performed until the contrary is shown. The following may be mentioned as general presumptions of law illustrating this maxim:-
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> > "That a man, in fact acting in a public capacity, was properly appointed and is duly authorised so to act;

> that in the absence of proof to the contrary, credit should be given to public officers who have acted, prima facie, within the limits of their authority, (my emphasis) for having done so with honesty and discretion."

For this latter statement of the rule Derby v. Bury Imp. Commrs. L.R. 4 Ex. 222 is cited. In that case the defendants had statutory power, whenever any drain or watercourse became a nuisance and could not be rendered innocuous without the laying down of a sewer or some other structure along the same, or part thereof or instead thereof, to lay down such sewer or other structure and to keep the same in good serviceable repair. A drain on the plaintiff's land had become a nuisance whereupon upon proper notice served in accordance with the statute, the defendants constructed a new sewer, partly along the line of the old drain, but cutting diagonally across the plaintiff's land. The question was whether the defendants were justified in making the new sewer through the plaintiff's land. At trial it was held that they were not, despite the fact that it was established that the respondents had constructed the new sewer in the most inexpensive and convenient course and it was not alleged that any alternative method was either feasible or advisable. On appeal the decision was reversed by the Court of Exchequer Chamber, Wills J. stating:-

> "There is no suggestion of excess or abuse in the statement of facts upon which our judgment ought to be founded. In the absence of any proof to the contrary credit ought to be given to public officers who have acted prima facie within the limits of their authority, for having done so with honesty and discretion."

Neither this case nor any of the preceding ones support the proposition that evidence simpliciter of an arrest or detention made by a constable gives rise to a rebuttable presumption that the arrest or detention was lawful. I am therefore constrained to reject it. Furthermore it is to fall into error to think that for a constable to effect an arrest or detention is to discharge an "official" duty. To arrest or to detain is a power that flows either from the common or the statute law and although there are some few statutes which in particular circumstances oblige a constable to arrest and it therefore becomes a statutory not an official duty on him so to do, in neither of the instant cases is there such a statutory duty.

I come now to the second and final question, namely: How does the Crown prove a valid arrest or detention or alternatively what are the requisites of a valid arrest or detention? Dealing with detention first, it is trite law that save in circumstances of a state of public emergency whereunder statute is enacted or regulations are promulgated giving the State power to detain without accusation of the Commission of a criminal offence, there is no power either at common law or under any statute simply to detain or imprison anyone against whom no criminal charge is pressed relating to that detention or imprisonment. The locus classicus is Kenlin and Another v. Gardiner and Another (1966) 3 ALL E.R. p. 931. There two policemen in plain clothes saw two schoolboys going from house to house in a street. Becoming suspicious of their movements, which were in fact quite innocent, the policemen showed them their warrant cards and sought to take hold of them with a view to questioning them at the police station. The boys violently resisted, but were subdued. Later charges of assaulting the constables in the execution of their duty were laid against the boys and they were convicted. In allowing their appeals Winn L.J. in the Queen Bench Division said:-

> "Assuming that the policemen had a power of arrest it is to my mind perfectly plain that neither of the respondents purported to arrest either of the appellants. What was done was not done as an integral step in the process of arresting, (my emphasis) but was done in order to secure an opportunity, by detaining the appellants from escape, to put to them or to either of them the question which was regarded as the test question to satisfy the respondents whether or not it would be right in the circumstances, and having regard to the answer obtained from that question, if any, to arrest them. I regret to say that I think that there was a technical assault by each of the respondents" (at 934).

In R. v. Abdul Alif Lemsatif Times 3/7/76 Lord Justice Lawton, sitting with Mr. Justice Cusack and Mr. Justice Slym said:-

> "Helping with inquiries" is a phrase that came into use because of the need for the press to be careful how they describe events when somebody has been arrested but not charged. If the idea has got around among either customs or police officers that they can arrest or detain for this purpose the sooner they disabuse themselves of that idea the better."

The evidence tendered by the Crown against Blackwood indicates no more than that he was found at the remand section of the General Penitentiary when he was taken to the Central Police Station for purposes of an identification parade in relation to a capital offence of the commission of which he was apparently suspected. The circumstances of the detention were not proved.

Whether for instance, Blackwood had been arrested and charged with any offence whatever concerning which he had been brought before a court whence he was remanded into custody to be brought at a later stage before the Court was not established. It is clear therefore that the Crown has failed to establish the validity of the initial restriction placed upon the liberty of Blackwood. It may well have been that Blackwood had been quite legally arrested and that pursuant to an order of a competent court had been duly and properly remanded into custody awaiting re-appearance before the court. Whether this is so or not is not known. The Crown has failed to adduce this evidence which constitutes an essential ingredient of the charge of escape. A legal detention was not proved.

Turning now to the case of Bryan one must consider what are the ingredients of a valid arrest? The answer is succinctly given in the 1954 Criminal Law Review pp. 6 - 7 where the stated ingredients are:-

(a) the existence of legal power to arrest which may derive either from statute or common law;

(b) the deprivation of the liberty of the person arrested, that is to say, he must be imprisoned;

(c) the imprisonment must be intended as a step in a criminal process, and the intention must be made known by the officer to the person arrested; and

(d) the reason for the arrest must, subject to certain qualifications, be communicated to the person arrested.

Now with reference to (a) the first ingredient, it needs no citation of

decided cases to state that where a power to arrest is given whether by statute or by common law, the validity of the exercise of the power depends upon strict compliance with the terms and qualifications of the power. Thus by section 80 of the Offences against the Person Act power is given to a constable without warrant, to arrest any person whom he shall have good cause to suspect of having committed or being about to commit any felony in this Act mentioned (e.g. section 20 - shooting with intent at any person) and shall take such person, as soon as reasonably may be, before a Justice, to be dealt with according to law. Again by section 15 of the Constabulary Force Act power is given to a constable, without warrant to apprehend any person found committing any offence punishable upon indictment (e.g. shooting with intent at any person) and to take him forthwith before a Justice who shall enquire into the circumstances of the alleged offence and is empowered either to commit the offender to jail, or to take bail with or without surety, conditioned on his appearance before a competent court to be dealt with according to law. As in the case of the statutes abovementioned so at common law where a person arrests another without warrant he is required to take that person before a Justice of the Peace, not necessarily forthwith, but as soon as reasonably possible. To fail to do so renders the arrest invalid and the consequential imprisonment false - see John Lewis and Co. v. Tims (1952) 1 All E.R. p. 1203. Now no evidence whatever was adduced by the Crown calculated to establish that Bryan had been taken at any time after arrest before a Justice of the Peace. Indeed no evidence was adduced to show that he was ever taken before a court throughout the period of his

detention which was punctuated by attempts to escape. Whether bail was sought but refused by any competent authority does not appear. Finally the evidence discloses that Bryan was informed merely that he was charged with shooting with intent. The arrestor, so far as the evidence is concerned, made no attempt to advise him as to the identity of his victim or intended victim. Both at common law and under our Constitution a person arrested has a right to be informed not only that he is being arrested but also of the reason for the arrest, the reason being that "it is desirable that the arrested person be given notice as soon as possible of the charge against him, in order that he may clear himself, if he can." Christie v. Leachinsky (1947) A.C. 573 at p. 588 per Viscount Simon L.C.). Without being told whom he had shot at, Bryan would have been deprived of any opportunity of clearing himself. If this rule in Christie v. Leachinsky is not complied with the whole arrest is unlawful. Here again it may well have been that Bryan had been told all that the common law or the Constitution required him to be told. Be that as it may, it does not so appear from the evidence and yet another cardinal requirement of a valid arrest was not established. In both cases therefore I hold that the prosecution failed to establish either a valid arrest of Bryan or a valid detention of Blackwood. Failure to prove a valid arrest is fatal to a charge of escaping or of permitting escape. In Punshon v. Leslie 14 English and Empire Digest p. 194, a constable having been informed by his wife that P had indecently exposed himself to her and another woman, went in search of P and then without warrant arrested P who resisted, but

without unnecessary violence. P was charged with and convicted of assaulting L in the discharge of his duty. On appeal the conviction was reversed, for the arrest by the constable being illegal, the prisoner was justified in freeing himself. Lastly, section 16(2) of the Prison Act was prayed in aid by the Crown. That subsection reads:-

> "Every person whenever he is confined in any lock-up in which he may lawfully be confined, or whenever he is being taken to or from or is working in the custody or under the control of any person in charge of any lock-up beyond the limit of such lock-up shall be deemed to be in the legal custody of the person in charge of such lock-up,"

and the argument was to the effect that having been confined in the Central Police Station which is a lock-up in which they could lawfully be confined, both Bryan and Blackwood were deemed to be in lawful custody. That argument seeks to construe the subsection to mean that irrespective of the illegality of an initial arrest or detention, once the arrested or detained person has been placed in a lock up in which he may lawfully be confined, the illegal arrest and imprisonment are covered with the mantle of legality. Such a construction could be entertained only upon the most express assertion of it by the Legislature and in the absence of such a declaration, a court is bound to lean in favour of a construction which is consistent with liberty.

For the reasons above stated I hold that essential ingredients of the charges against the appellant were not proved and that accordingly the convictions were wrong in law. I would therefore allow the appeals and set aside the convictions and sentences.