

30th. June, 1949

Judge :

The Hon. Mr. Justice W. Harding, B.Litt., LL.D.

The Police *versus* Leslie Hewitt

**Evidence of a Co-Defendant — Assault and Resistance
to Public Officers by Violence — Art. 95 (a)
of the Criminal Code.**

When two persons are tried jointly, one of them is not a competent witness for the other, so long as the proceedings against him are not terminated.

It is quite in order for a policeman to ask a person, who refuses to give his particulars, to accompany him to the police station, and, if he does not comply, to try to take him by force. If in trying to secure that person the policeman is attacked by that person, he may certainly defend himself within proper limits. These limits must be judged in the light of all the circumstances of the case.

It is true, generally speaking, that if an officer in the execution of his office proceeds irregularly, and exceeds the limits of his authority, the law gives him no protection in that excess; but it is also true that every man is bound to submit himself to the regular course of justice. If the person concerned wishes to dispute the policeman's orders, he should either give his particulars, or accompany the policeman to the police station, in order that the matter may be investigated. He is not entitled to dispute the intrinsic correctness of the order before complying with it — that would be a matter for redress later on. If he chooses not to submit, but to resist and use force against that policeman, then he is guilty of assault and resistance with violence against a public officer whilst in the execution of his lawful duties.

This is an appeal entered by the defendant Leslie Hewitt against a judgment given by the Criminal Court of Magistrates for the Island of Malta on the 16th. day of May, 1949, whereby he was found guilty of an offence under section 95 (a) of the Criminal Code, that is of having assaulted and resisted by violence members of the Police Force whilst in the execution of their lawful duty, causing bodily harm to certain police officers, and was sentenced to the punishment of imprisonment for the term of four months;

This Court, upon reading the depositions of the witnesses....., considers as follows;

It appears from the evidence that on New Year's Day a certain taxi-driver, by name Francis Zammit, had driven the appellant and his companion, Leading Seaman Owen, from Valletta to Manoel Island. There was an argument about the fare, which should have been ten shillings, but of which only five shillings were paid to Zammit. Zammit states that he then called Police Constable Kitcher, who told the appellant to pay to Zammit his share of the fare. The appellant refused, and P.C. Kitcher ordered the appellant to give him his particulars. The appellant again refused, and struck P.C. Kitcher. A number of other sailors then came on the scene and, later on, other police officers, and there appears to have been some sort of a general disturbance;

P.C. Kitcher in his evidence states.....;

Police Constable Attard..... saw Kitcher surrounded by a group of sailors.....;

Police Sergeant Mangion..... states that as soon as he arrived on the spot he was held by two sailors and struck by them.....;

Police Constable Gauci arrived on the spot with the preceding witness. He too saw.....;

Inspector Bencini..... states that he saw the road blocked..... A general mêlée, the Inspector continues, was on at the time;

As has been stated, the appellant went in the witness box, and stated that on the night in question..... He was taken back to his ship in an ambulance..... However, witness Dunn..... states that the appellant had a cut on his head.....;

Witness Daly saw the appellant being taken to the police station.....;

Leading Seaman Owen states.....;

In the proceedings before the First Court there were two other co-defendants, Neill and Clark, who also gave their evidence. During the hearing before this Court, counsel for the appellant made some reference to Neill's statement on oath. It is obvious, however, that, at the time Neill made that statement, he was not a competent witness in defence of Hewitt, as it is well settled that, when two persons are jointly tried, one of them is not a competent witness for the other. This Court pointed out to counsel for the appellant that he could, if he wished, call Neill as witness now that proceedings against him were terminated; but it appears that Neill is absent from the Island; and, in any case, no request was made by counsel;

In assessing the evidence it would appear that, in similar cases, the proper method of approach is to fit in the facts in their proper background consistently with the turn which events are normally expected to take. In the present instance, it is a fact that there was an argument between the appellant and the taxi-driver over the fare. It is also a fact that the appellant and Owen moved away without paying the full legal fare. Normally, one would expect the taxi-driver to insist on being paid, and to call a policeman to his aid; and, in point of fact, Zam-

mit did so. Kitcher, the police constable who was called in, had no particular reason or interest at the time for using force, and his first act was to prevent appellant from getting away without paying the full fare and to order him to pay. If the appellant refused, the next step would be to have his particulars. If these were refused, it was quite in order for the policeman to ask the appellant to accompany him to the station; and it was also in the appellant's interests to do so, if he thought he had any good explanation to give. If the appellant disobeyed this injunction, the police constable had no other alternative beyond that of trying to take him by force;

This Court, on reviewing the evidence, feels that the evidence produced by the Prosecution is more convincing. The Magistrate also accepted that evidence, and his conclusion, having regard to the whole of the evidence, appears to this Court to be reasonable. Undoubtedly, the appellant was struck, but this was after he had resisted, apparently with good effect, the efforts of the police officers to take him to the police station. Had the appellant paid the full fare, or, if he wished to dispute it, had he at least given his particulars, or accompanied Kitcher peacefully to the police station, nothing would have happened. As it is, his attitude compelled Kitcher to try to take him to the station by force. The appellant resisted and struck Kitcher; other naval ratings bent on helping the appellant approached threateningly; naturally, other police officers came to the scene, and there arose a scuffle, in which the police officers, outnumbered by the hostile naval ratings, could not but defend themselves; meanwhile the appellant continued his resistance and struck other police officers;

Counsel for the appellant submitted that Kitcher behaved arbitrarily, and therefore forfeited the special protection to which he would otherwise have been entitled. Consequently, the actions of the appellant, whether against Kitcher or against the other officers, cannot fall under the particular section quoted in the judgment of the Court below, because there was an initial excess of power by Kitcher which vitiated the whole position of the police officers in so far as that section is relied on by the Prosecution;

Now, whilst it is true, generally speaking, that if an officer, in executing his office, proceeds irregularly, and exceeds the limit of his authority, the law gives him no protection in that excess, it is also true that an over-riding principle in this matter is that enunciated by Russell (*Crimes and Misdemeanours*, Vol. I, p. 519), to the effect that "every man is bound to submit himself to the regular course of justice";

In the present case, whatever the circumstance of the fare may have been, that is, whether the five shillings paid by the appellant were given to him by Owen as his share and then the appellant failed to add his own share and paid to Zammit Owen's share only, or whether the five shillings were the appellant's money, it is a fact that the fare was ten shillings and that only five shillings were paid to Zammit. Undoubtedly, therefore, Zammit had a legitimate grievance. As a member of the police force, Kitcher was well within his right to overtake the appellant, as one of the hirers of the taxi, and to ask him to pay before he went away. If the appellant thought he was not bound to pay anything more, either because he disputed the amount of the fare, or because he considered that Owen (and not he) should pay the balance, then he could have peaceably given his particulars to Kitcher, or accompanied him to the station to have the matter threshed out; and Kitcher was quite in order to order the appellant to give him his particulars, and afterwards, on the appellant refusing to do so, to accompany him to the station. When the appellant persisted in refusing to comply with Kitcher's orders, then Kitcher was entitled to use such degree of force as was necessary to secure the appellant—"provided", says Kenny in his text-book *Outlines of Criminal Law*, no more force is used than is proportionate to the immediate need". But he was entitled to use force "in the furtherance of public authority". Of course, this "quantum" of force is not capable of being measured to a millimetre, or weighed to an ounce; and a police officer, if he is resisted and attacked, has the undoubted right to defend himself;

"It is a principle of plain common sense that a man, when attacked, should be permitted to defend himself". This principle, so enunciated by Ball (*Leading Cases of the Law of*

Torts, p. 421), is obviously also applicable to policemen who are attacked in the execution of their duty. A policeman, it should be appreciated, is in a much worse position than a private party. A private party, on being threatened with aggression, can, indeed, he has a duty, to retreat. But a policeman, obviously, cannot retreat, and his duty is to prevent or stop a breach of the peace. If in doing so, he is struck, or about to be struck, he may certainly defend himself within proper limits; but these limits must be judged in the light of all circumstances, because, as the late Sir Charles Houghton-Rafter, K.B.E., Chief Constable of the Birmingham City Police Force, said, in a foreword to the first edition of *Police Law* (published 1948), the policeman, on encountering an emergency, has no time to consult musty reference books. Matters are made worse when others, evidently hostile to the Police, attempt to obstruct their action, with a view to rescuing the man about to be apprehended, particularly if the police are outnumbered. In this case, when the original incident between the appellant and Kitcher developed in an affray—which is a public offence to the terror of the King's subjects—it is not to be wondered at if the police, after being attacked or heavily outnumbered by the naval ratings, had recourse to their truncheons and struck their assailants, in order to carry out their duty of quelling the affray;

Counsel for the appellant has also pressed on the Court the point that, in order to bring the appellant's action under section 95 afore quoted, the specific intent, which is requisite, must be proved. Now, all the circumstances disclose that intent. Kitcher was in uniform, and was therefore, as old text-writers term it, "cognitus". The appellant had, therefore, ample and obvious notification of the character in which Kitcher was interposing himself in the argument between the appellant and the taxi-driver. Moreover, to use again a technical phrase, "peace was commanded" by Kitcher, in the sense that he declared with what intent he was intervening by ordering the appellant to pay the fare. The appellant could not but know that the process was legal. What is meant by "legal" in this context is that the person giving the order was, as a matter of form, entitled to give it in the ordinary course of his

duties. If the appellant meant to contest the amount of the fare, or if he thought that it was Owen's turn to pay his share, then he could have given his particulars or accompanied Kitcher to the station to have the matter investigated. What the law requires should not be in excess is the extrinsic nature of the act of the police officer. Indeed, it would be tantamount to neutralising the actions of the Police if it were to be held that every citizen is entitled to dispute the intrinsic correctness of a police order before complying with it; that would be a matter for redress later on;

This point was laid down with authority by the late Chief Justice Sir Joseph Carbone, sitting in this Court in the case *Crim. App. "Inspector Mamo vs. Formosa et."*, on the 30th. October 1908. It is also similarly expounded by Russell in his afore quoted text-book, at page 511, where, referring to the case of a police officer killed whilst endeavouring to execute process, the learned author says that "the crime will not amount to murder unless the process is legal, but by this is to be understood only that the process, whether by writ or warrant, must not be defective in the frame of it, and must issue in the ordinary course of justice from a Court or Magistrate having jurisdiction in the case..... in all kinds of processes the falsity of the charge contained in such process will afford no matter of alleviation.....";

A comment made by Warburton and Grundy on a judgment which they include in their text-book "Leading Cases in the Criminal Law" (page 482) similarly brings out the point afore stressed. "The liberty of the subject", they say, "is so jealously guarded by our laws, that all prescribed formalities must be complied with before an arrest can be recognised as legal";

The appellant, therefore, was clearly not entitled to fight the matter out with the Police by the use of force, but should have given his explanations, and, if required, his particulars, in order to have the incident gone into peaceably in the ordinary course of things and consistently with the requirements of public order. The appellant may have been credited with a good intention excluding the "mens rea" had he limited himself to refusing to pay on the ground that the fare was exces-

sive, or that the balance was due by Owen, and had he given his particulars when requested to do so; but any justification ceased as soon as he refused to give his particulars or to accompany Kitcher to the police station, and as soon as he showed by his behaviour that he meant to fight the matter out with the Police. Kenny, in his afore quoted text-books (page 529), dealing with the powers of arrest appertaining to a police constable, states as follows:— "A police constable, even when acting without a warrant, has powers still more extensive than a private person. Moreover, as his official position renders it in all these cases a duty for him to make the arrest, it will, in any of them, be a duty, even for an innocent person, to submit to him, and not to resist arrest". The appellant chose not to submit, to resist Kitcher and strike him;

With regard to the punishment, the Magistrate awarded the minimum, and therefore the question of mitigation, even if there had been room for it, does not arise;

This Court, therefore, dismisses the appeal, and affirms the judgment of the Court below.
