RIGHT TO LIBERTY AND SECURITY OF THE PERSON

Assaulting a police officer in the execution of his duty – whether taking a person’s arm to gain their attention is within the course of duty – definition of what constitutes going outside the duty.

Mepstead v DPP [1996] Crim LR 111 DC

The Facts

Mepstead parked his van causing an obstruction and made a brisk visit to his bank. When he returned, Mepstead found three policemen attaching a fixed penalty notice to the van, for the obstruction. Mepstead opened the door of his van to get in, but one of the officers shut it. Mepstead pushed the officer whilst persisting in his efforts to get in the van and drive off. The officer asked him to calm down and then requested that he give his name and address. Mepstead replied: 'like fuck I will'. The officer then took Mepstead by his right upper arm and said: 'Don’t be silly, calm down, it’s only a ticket'.

Mepstead then kicked out and swung his left arm at the officer. His left hand, which contained keys, struck the officer on the chest and caused grazing. Mepstead was subsequently convicted in the Magistrates’ Court of assaulting an officer in the execution of his duty, contrary to section 51(1) of the Police Act 1964. The case turned on the issue of whether the officer was acting in the course of his duty. The Magistrate found that the officer had taken Mepstead’s arm in order to draw his attention to what was being said to him. Consequently, she held, the officer, by taking Mepstead’s arm, had not strayed outside the course of his duty. The Magistrate relied upon obiter dicta (see below) of Goff LJ, as he then was, in Collins v Wilcock [1984] 3 All ER 374 DC.

Mepstead appealed by way of case stated and the Divisional Court entertained the following question: ‘Could a police officer, who takes a man’s arm, not intending to detain or arrest him but in order to
draw his attention to the content of what is being said to him, be held to be acting within the execution of his duty?"

The Decision

The Court dismissed Mepstead's appeal. Balcombe LJ (presiding with Buxton J) regarded Collins v Wilcock, where Goff LJ gave considerable guidance as to when an officer, by using physical force, deviated from the execution of his duty.

In Collins Goff LJ concluded that the slightest touching of another person amounted to a battery. But such a wide principle must be subject to exceptions. One is where an officer may wish to engage another's attention. In doing so he may lay his hand on that person's sleeve or tap him on the shoulder. But if he restrains the person, for example by gripping their arm or shoulder, then his action will be unlawful.

Therefore, in order to answer their question, the Court in Mepstead had to decide which of the two classes of behaviour the officer's act (of 'taking hold of' a person's arm) came within. Balcombe LJ concluded that 'took him by the arm' was a 'neutral phrase'. And without any evidence to the contrary, it must be assumed that the officer's act did not last long enough to constitute a restraint (an act which would have brought the officer outside of his duty). Otherwise, his lordship judged, the Magistrate would not have found the taking of the arm was solely to gain Mepstead's attention.

Analysis

This is a difficult case for two reasons. First, the interpretation of the facts and the application of the law as stated. Second, the correctness of the stated law.

First, the narrowly framed question restricted the appellant's argument: he could not contest the case on the totality of the facts found, only on those facts stated in the question. That was unfortunate. On the totality of facts found by the Magistrate it was clear that Mepstead was indeed being restrained. He persistently made attempts to get into his van in order to leave the scene (something he had a right to do), but was barred by the officer from doing so. He
was questioned and finally taken by the upper arm. All of this was in the presence of two other policemen. If the single act of taking him by the arm did not amount to a battery, the collective behaviour of the police amounted to false imprisonment. Thus the officer struck by Mepshead was clearly acting outside of his duty.

On the facts found by the Magistrate it is difficult to understand how she concluded that the officer took Mepshead's arm 'in order to draw his attention to what was being said'. It was clear that Mepshead was aware that he was being given a ticket. Further it was implicit in his reply to the officer's request to give his name and address that Mepshead understood what was being said to him. It is difficult to conclude that he was taken by the arm for any other reason than to restrain him whilst the officers completed their inquiries and the issuing of the ticket.

Even on the narrow question presented to the Divisional Court, it is hard to understand the application of the law. The dichotomy expressed (above) by Goff LJ in Collins is usually illustrated by two cases, each falling very close to the dividing line. In the first, Donnelly v Jackman [1970] 1 WLR 562, a policeman tapped the defendant on the shoulder a second time, after being rebuffed following the first. The defendant struck the policeman in the face and was convicted of assaulting an officer in the course of his duty: the officer, it was held, had acted within the course of his duty. In the second case, Bentley v Brudzinski (1982) 75 Cr App Rep 217, a constable questioned the defendant about a stolen car. The defendant answered the questions satisfactorily and then moved off. A second constable, who had just arrived on the scene, said 'just a minute' and placed his hand on the defendant's shoulder. The defendant punched the officer in the face but was acquitted of assaulting him in the course of his duty: it was held that the constable had acted to detain the defendant and so strayed outside the course of his duty.¹

Balcombe LJ stated that the Magistrate's finding that the officer 'took him by the arm' was a 'neutral phrase'.² Presumably this means half way between a 'tap on the shoulder' and a 'gripping of the arm', or in light of Bentley the placing of a hand on the shoulder. 'Taking

¹ See also Ludlow v Burgess (1971) 75 Crim App R 327, at 228
² In fact it was found that he was taken by the upper right arm
somebody by the arm in order to draw their attention to what is being said' is surely closer to Bentley than it is to Donnelly v Jackman. On that basis it was possible to acquit Mepstead on the narrow question put before his Lordship.

The second difficulty is that Mepstead has highlighted a problem which has afflicted most cases on this issue: the courts ask the wrong question. Take Collins for example. After being referred to a string of cases on the point Goff LJ commented: 'the crucial question in each case being whether the police officer, by using physical force on the accused in response to which the accused assaulted the police officer, was acting unlawfully and so not acting in the execution of his duty.'

He concluded the law as follows: '...physical contact by a police officer with another person may be unlawful as a battery, just as it might be if he was an ordinary member of the public. But a police officer has his rights as a citizen, as well as his duties as a policeman.'

His Lordship then went on to explain that, like any citizen, a constable will not commit a battery by merely touching a person to gain their attention. In other words the courts ask: 'Did the constable commit an assault or battery?' Or perhaps 'Did the officer act unlawfully?' Yet section 51(1) of the Police Act contains no element that the officer must have been acting lawfully. The proper question to ask is: 'Was the constable acting within the course of his duty?' The starting point for this question is the definition of a police officer's duties. Few cases have offered that. Instead they make a leap of logic and ask if the officer committed a trespass, or acted otherwise unlawfully. Implicit in this is the notion that a police officer's duties include anything so long as it is not unlawful. Surely that is too sweeping.

These cases may be compared with the leading case on the similar offence of obstruction of a police officer in the course of his duty. In Rice v Connolly [1966] 2 QB 414 Lord Parker CJ stated that an officer's duty included taking all steps necessary to keep the peace, prevent...
and detect crime, protect property from criminal damage and bring offenders to justice. This, admittedly, is a loosely worded definition and may, in many circumstances, amount to 'anything which is not unlawful'. But not in all circumstances. For example a constable may depart from his beat and visit his paramour. That may be deviating from his course of duty, yet it would not be unlawful. If the mistress assaulted him a charge under section 51(1) could not succeed. This would not be because the officer acted unlawfully (he had not), but simply because he was acting outside the course of his duty.

The different approaches to assault and obstruction may be explained by the nature of the respective offences. In cases of obstruction the courts necessarily have to define a constable's duty. This is because for all practical purposes the offence demands that it is the exercise of the duty which has been obstructed. Whereas under the assault charge, it is the officer who is assaulted and the issue of duty is a separate one.

Whatever the reason for the anomaly, it ought to be rectified at the earliest opportunity. It probably would make no difference to the outcome of many of the cases. However there are bound to be cases where the distinction is vital. For example, if the Magistrate in Mepstead had asked herself the broader question 'was the officer acting within his duty?' she may have appreciated the totality of the facts and found that the appellant was being restrained. And even if she had not acquitted him, the question for the Divisional Court would have been framed more broadly, allowing more discretion to acquit.

Perhaps more importantly, if the citizen and the constable had a clearer idea of what the constable's duties were, many of the cases would not have arisen. Take Mr Mepstead for instance. He may have said to the officer: 'Please let me go. I am in a hurry. You have no right to detain me'. If the officer knew that in preventing Mr Mepstead from driving off he would stray beyond his duty, then in all likelihood he would have let him go. Mr Mepstead would have got his parking ticket and the inflamed incident would have been avoided. Incorrect or vague statements as to what constitutes a constable's duties do nothing to clarify the status of the citizen vis-à-vis...
vis the police officer.

An alternative solution was suggested by Donaldson LJ, as he then was, in _Bentley v Brudzinski_. He advised the prosecution to lay an alternative charge of common assault. Thus easing the burden on the prosecution of proving that the officer was acting in the execution of his duty. The accused would be left with the defence of self-defence. The problem with that approach is that it would, in substance, render section 51(1) redundant. That surely is task for Parliament.

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8 That view was endorsed by Butler-Sloss in _Kerr v DPP_ (1994) 138 JP 1048 The Times 5th August 1994