[1980–87 Gib LR 409]

BOULBEN v. PARODY

SUPREME COURT (Davis, C.J.): October 26th, 1986

Police—assault on police—execution of duty by police—no assault on police officer contrary to Criminal Offences Ordinance (cap. 37), s.256, if officer not acting in execution of duty when assaulted—not acting in execution of duty if prevents suspect's escape by removing car keys prior to arrest—amounts to unlawful interference with property which suspect entitled to resist with reasonable force

Road Traffic—failure to stop and report accident—intention to report—under Traffic Ordinance (cap. 154), s.40, no offence of failing to stop and report accident if driver intended to report it but stopped by police officer with knowledge of accident prior to reporting

The appellant was charged in the magistrates' court with assaulting and resisting a police officer in the execution of his duty and failing to stop after an accident contrary to the Criminal Offences Ordinance (*cap*. 37).

The appellant, driving at night, collided with two stationary cars and drove away. Police officers were sent to the scene and on finding the appellant's car nearby, one informed the appellant that marks on the car linked it to the collision. While speaking to the appellant, the police officer formed the impression that he was under the influence of alcohol or other drugs and asked him to get out of the car. The appellant refused and attempted to engage gear. The officer again asked him to get out but the appellant again refused and the car began to move away slowly. To prevent the appellant from driving away, the officer leant through the car-window and took the car keys. The appellant struck the officer and was arrested. When charged in the magistrates' court, the appellant was convicted of assaulting and resisting a police officer in the execution of his duty contrary to s.256 of the Criminal Offences Ordinance and failing to stop after an accident or report it contrary to s.40 of the Traffic Ordinance (*cap*. 154).

On appeal, the appellant submitted that (a) he had not assaulted the officer in the execution of his duty as the officer had been acting outside the scope of his duty in removing the keys from the car; and (b) although he had driven away after the collision, he had intended to report it as soon as possible, but the police had never given him the opportunity to do so.

The respondent maintained that he had been acting in the execution of his duty when the appellant assaulted him, submitting that (a) he had

seized the appellant's keys in order to prevent him from driving as he suspected that he was under the influence of alcohol or other drugs; (b) as a police officer in uniform, he had the power, under s.40(1) of the Traffic Ordinance (*cap*. 154), to require the appellant to stop or remain stationary; and alternatively (c) as the appellant had twice failed to respond to his order to step out of the car, he had removed the appellant's keys from the ignition in order to arrest him.

Held, allowing the appeal:

(1) The appellant's conviction for assaulting and resisting a police officer in the execution of his duty contrary to s.256 of the Criminal Offences Ordinance (*cap*. 37) would be quashed, as the police officer had been acting outside the scope of his duty when he removed the appellant's keys from the car. His actions in doing so constituted an unjustifiable use of power and amounted to an unlawful interference with the appellant's property which the appellant had been entitled to resist, as he had done, with reasonable force. If the police officer had wanted to arrest the appellant, he should have ordered him to stop the car when it began to move away and if the appellant had failed to do so, he would have committed an offence contrary to s.40 of the Traffic Ordinance (*cap*. 154), for which he could then have been arrested (paras. 16–17).

(2) The appellant's conviction for failing to stop and report the accident under the Traffic Ordinance (cap. 154), s.40 would also be quashed, as he had been apprehended by the police before he had had the opportunity to report the accident. Therefore, as he had intended to report the accident but had been approached by the police officer who already had knowledge of the collision, he had committed no offence under the Traffic Ordinance (*cap*. 154) (paras. 32–33).

Cases cited:

(1) *Alderson* v. *Booth*, [1969] 2 Q.B. 216; [1969] 2 W.L.R. 1252; [1969] 2 All E.R. 271, considered.

(2) *Kenlin* v. *Gardiner*, [1967] 2 Q.B. 510; [1967] 2 W.L.R. 129; [1966] 3 All E.R. 931, considered.

(3) *R*. v. *Waterfield*, [1964] 1 Q.B. 164; [1963] 3 W.L.R. 946; [1963] 3 All E.R. 659, *dicta* of Ashworth, J. applied.

(4) *Rice* v. *Connolly*, [1966] 2 Q.B. 414; [1966] 3 W.L.R. 17; [1966] 2 All E.R. 649, considered.

Legislation construed:

Criminal Offences Ordinance (Laws of Gibraltar, *cap*. 37), s.256:

> "(1) A person who assaults, obstructs, or resists any police officer in the execution of his duty or aids or incites any other person to assault, obstruct or resist any police officer or any person aiding or assisting a police officer in the execution of his duty, is guilty of an offence and liable on summary conviction to imprisonment for six months and to a fine . . ."

Traffic Ordinance (Laws of Gibraltar, *cap.* 154), s.40: The relevant terms of this section are set out at para. 31.

R.B. Perez for the appellant;
R. Vasquez for the respondent.

1 **DAVIS, C.J.:** The appellant appeals against his conviction by the Stipendiary Magistrate on November 24th, 1983, of assaulting a police officer in the execution of his duty contrary to s.256 of the Criminal Offences Ordinance (*cap.* 37), for which he was sentenced to a fine of £40. He also appeals against his conviction of resisting a police officer in the execution of his duty, also contrary to s.256 of the Criminal Offences Ordinance, on the ground that the magistrate erred in law and on the facts in holding that the police officer referred to in the charge, namely Police Sgt. Harry Louis Parody, was acting in the execution of his duty. The facts of the case are fully set out in the learned magistrate's ruling on a defence submission of no case to answer, and I take them from there, supplemented, where necessary, from the record of evidence.

2 Between 3 and 4 a.m. on October 23rd, 1983, the appellant, who was driving a black Fiat, collided with two stationary cars in Flat Bastion Road. In his defence, he said that he did not stop because there was a car following him and there was nowhere for him to park to let it pass. He said that accordingly, he drove on to the entrance on Gardiners Road, to the staff quarters of the Rock Hotel, where he stopped to consider what he should do about reporting his accident (the learned magistrate accepted the defendant's evidence that he intended to report the accident). In the meantime, a report by witnesses of the accident had been made to the police. Sergeant Parody and P.C. Caruana went to the scene of the accident in a police car.

3 On receiving a report from P.C. Galea, who was already at the scene, Sgt. Parody and P.C. Caruana proceeded along Flat Bastion Road in search of the car which had failed to stop after the accident, the description and number of which they had been given. They came upon the appellant in the car described to them at the junction of Gardiners Road and the Rock Hotel drive. Their evidence was that the appellant was, at the time, manoeuvering his car with difficulty towards the Rock Hotel staff quarters. P.C. Caruana then returned to the police car to report back to the police station. When he got out of the police car, he noticed that Sgt. Parody was struggling with the appellant. He went to the sergeant's help and the appellant was handcuffed.

4 In the meantime, Sgt. Parody approached the appellant and told him of the damage to the two cars in Flat Bastion Road and that marks on his car appeared to tie up with that damage. While speaking to the appellant, who was in the driver's seat of the stationary car, Sgt. Parody formed the

impression, from the smell of the appellant's breath and the appearance of his eyes, that he was under the influence of drink or drugs. Accordingly, he asked the appellant whether he was in such a state as to be unfit to drive.

5 The appellant refused to alight, said he was going home and attempted to engage the car's gears. Sergeant Parody again asked him to alight and again the appellant refused. Sergeant Parody then heard the gears engage and the car started to move slowly up the hill. Sergeant Parody said that in order to prevent the appellant driving away, he leaned through the open driver's window and reached for the ignition key. The appellant then struck the sergeant on the forearm and, as the sergeant drew the keys from the ignition, the appellant headbutted him. Sergeant Parody then opened the door of the car and told the appellant he was arresting him. Sergeant Parody said that the appellant then struggled violently and with P.C. Caruana's assistance, had to be handcuffed.

6 The appellant, in evidence in his defence in the magistrates' court, said that when he was approached by the police officers, his car was stationary. It appears from Sgt. Parody's evidence, although he is not recorded as having specifically said so, that he arrested the appellant for assaulting him, and the learned Stipendiary Magistrate in his ruling so found.

7 Mr. Perez for the appellant, submits that Sgt. Parody was acting outside his powers when he leant into the appellant's car and took the car keys. He submits that he was not then acting in the execution of his duty and that the appellant's assault of Sgt. Parody was not, therefore, an assault of a police officer in the execution of his duty so that the appellant's conviction of that offence was therefore wrong.

8 Mr. Vasquez, for Sgt. Parody, submits that it was clear from the evidence that Sgt. Parody was concerned to stop the car to prevent the appellant from driving because he suspected that the appellant was under the influence of drink or drugs and incapable of having proper control of the car. The appellant, by driving, would have been committing an offence under s.34 of the Traffic Ordinance and Sgt. Parody, in seizing the car keys, was acting to prevent this suspected offence. He was accordingly acting in the execution of his duty as a police officer and the assault committed by the appellant was an assault on a police officer in the execution of his duty, the appellant was therefore rightly convicted of that offence.

9 Alternatively, Mr. Vasquez submits that, under s.40(1) of the Traffic Ordinance, a police officer in uniform has the power to require the driver of a car to stop, and therefore Sgt. Parody had the power to require the driver of a stationary vehicle to remain stationary. He submits that in investigating a suspected offence under the Traffic Ordinance, Sgt. Parody was acting within the scope of his statutory duty to require the appellant

not to drive away and that he was acting in the exercise of his duty by preventing the car being driven away through the removal of its ignition key.

10 As a final alternative, Mr. Vasquez submits, following the tentative finding at the conclusion of the learned magistrate's ruling, that in the circumstances Sgt. Parody had no time before the appellant started to drive away to arrest the appellant on suspicion of an offence under the Traffic Ordinance, and that accordingly he was acting in the execution of his duty in removing the keys from the ignition to stop the appellant in order to arrest him.

11 I was referred to the case of *Rice* v. *Connolly* (4), which was a case relating to the offence of obstructing a police officer in the execution of his duty contrary to s.51(3) of the Police Act, 1964. Lord Parker, C.J. in the course of his judgment said ([1966] 2 Q.B. at 419):

> ". . . It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice."

12 As I see it, in the present case, Sgt. Parody and P.C. Caruana were acting pursuant to their duty to detect an offence, namely, failing to stop after or report an accident, and to bring the offender to justice. Sergeant Parody would also appear to have been acting pursuant to his duty to prevent an offence, namely driving when drunk or drugged contrary to s.34 of the Traffic Ordinance.

13 Further on in his judgment in *Rice* v. *Connolly* (4), Lord Parker, C.J. said (*ibid*., at 419):

> ". . . It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and a refusal to accompany those in authority to any particular place; short, of course, of arrest."

14 In my view, the appellant was perfectly within his rights to refuse to alight from his car when asked to do so by Sgt. Parody and, in fact, to drive away. The question is: had Sgt. Parody any right to remove the ignition key from the appellant's car to prevent the appellant driving away?

15 In *R*. v. *Waterfield* (3), Ashworth, J. said ([1964] 1 Q.B. at 170–171):

"In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was *prima facie* an unlawful interference with a person's liberty of property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution for these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited."

16 It appears to me that the removal by Sgt. Parody of the keys of the appellant's car was *prima facie* an unlawful interference with the appellant's property. Going on, therefore, to consider whether (a) Sgt. Parody's conduct fell within the general scope of any duty imposed on him by statute or common law, I find that it did so; I find that Sgt. Parody was trying to detect an offence and to bring the offender to justice, and, more particularly, as it appears from his evidence, he was trying to prevent the commission of the suspected offence of driving when drunk or drugged. Going on from there to consider (b) whether Sgt. Parody's conduct, albeit within the general scope of such duty, involved an unjustifiable use of powers associated with that duty, I find that it did so. In my view, Sgt. Parody had no right in the circumstances to remove the keys of the appellant's car. I consider that this was an unlawful interference with the appellant's property which could therefore be resisted with reasonable force.

17 To stop the car, Sgt. Parody's proper course, in my view, was to order the appellant to stop. If he failed to stop, the appellant would commit an offence contrary to s.40(1) of the Traffic Ordinance (*cap.* 154), for which he could have been arrested—mere words being sufficient to constitute an arrest. See Archbold, *Criminal Pleading, Evidence & Practice*, 41st. ed., para. 20–251, at 1500 (1982) and the case of *Alderson* v. *Booth* (1) there cited. It would then have been open to Sgt. Parody to inform the appellant that he was arresting him for failing to stop and to take such action as was necessary or possible to prevent him driving away, such as removing the ignition key of the car. In my view, however, Sgt Parody was not justified in removing the ignition key without first having arrested the appellant.

18 It would appear that Sgt. Parody's seizure of the ignition key was done in order (as he said himself) "to impede him [the appellant] from driving" so that he might carry on his investigation as to whether, as he suspected, the appellant was under the influence of drink or drugs and was incapable of having proper control of his car and also whether he was the person involved in the collision with the cars in Flat Bastion Road. It does not appear from Sgt. Parody's evidence that his removal of the ignition key was done in the process of arresting the appellant and accordingly it was not done in the execution of his duty.

19 In my view, Sgt. Parody's action of stopping the appellant's car (and therefore the appellant) corresponded with the action of P.C. Gardiner in the case of *Kenlin* v. *Gardiner* (2). In that case, two police officers whose suspicions had been aroused by the visits two boys were paying to houses in a street, approached the two boys and started to question them. One of the boys made as if to run away. P.C. Gardiner caught him by the arm and said ([1967] 2 Q.B. at 510): "Now look, son, we are police officers. What have you been up to?" and cautioned him. The boy, not believing that P.C. Gardiner was really a police officer, started to struggle, then punched and kicked the officer. The other boy then started to run away. He was caught by the other officer, P.C. Peters, whom the boy then struck. Both boys were convicted of assaulting a police officer in the execution of his duty contrary to s.51(1) of the Police Act 1964. It was held on appeal that the prior assault by the police officers, in taking hold of an arm of each of the boys was not justified; it was done not as an integral step in the process of arresting the boys but in order to secure an opportunity, by detaining them, to question them so as to satisfy the officers whether or not it would be right, in the circumstances, to arrest them. As there had been a technical unjustified assault by the police officers, the plea of self-defence was available to the boys, and their conviction was quashed.

20 Sergeant Parody's evidence is clear that on approaching the appellant, he first told him that he was alleged to be the driver of a car which had collided with two others in Flat Bastion Road. He said the appellant denied that it was he. Sergeant Parody went on to say that it was while he was speaking to the appellant that he noticed that his breath smelt of drink, that his eyes were glassy and he suspected him of being under the influence of drink or drugs. He said that he asked the appellant to alight in order to ascertain whether he was unfit to drive, but on the appellant's twice refusing to do so, saying he was going home and then starting to drive off, he leant into the car and took the keys.

21 It is clear that when Sgt. Parody twice asked the appellant to alight, he was no longer trying to establish whether the appellant was the person who had had the accident in Flat Bastion Road and had failed to stop or report it. He was then investigating a further, albeit connected, suspected offence of driving a car when unfit through drink or drugs.

22 If, as occurred, the appellant refused to alight when asked to do so by Sgt. Parody, it was open to Sgt. Parody to arrest him on suspicion of an offence—either (a) failing to stop after, or to report, an accident, or (b) driving when drunk or drugged. Sgt. Parody was not entitled, however, when the appellant refused on the second occasion to alight and started to drive away, to remove the ignition key from the car.

23 At the conclusion of his ruling on no case to answer at the appellant's trial, the learned magistrate said:

> "On the common law aspect of the matter, I would venture to think that, notwithstanding counsel's point as to time, the sergeant really had no sufficient time to effect an arrest and so his taking away the key from the ignition was lawful and in the course of due execution of his duty."

24 There is nothing, however, in Sgt. Parody's evidence to suggest that he withdrew the ignition key in order to stop the appellant to arrest him. Sergeant Parody said he took the keys "to impede him [the appellant] from driving," not, it would seem, in order to arrest the appellant but to pursue his investigations into the appellant's suspected drunkenness and involvement in the collision in Flat Bastion Road. As I have said in my judgment, Sgt. Parody had no right to interfere with the appellant's car unless he did so in the process of arresting him, and there is nothing in the evidence to show that he did so. Had Sgt. Parody, as he leant into the car to take the keys from the ignition, said to the appellant that he was arresting him because he suspected he was unfit to drive through drink or drugs, he would, in my view, have been acting quite properly and in the execution of his duty. Unfortunately he did not do that.

25 Nor, in my judgment, did Sgt. Parody have the power to keep the appellant and his vehicle stationary (as suggested by Mr. Vasquez), once the appellant decided to start driving away, except by arresting him. Accordingly, when Sgt. Parody leant into the appellant's car and removed the ignition key, he was not in my view acting in the execution of his duty, and the appellant's assault of the sergeant was not therefore an assault of a police officer in the execution of his duty. His conviction for that offence must therefore be quashed.

26 Turning then to the appellant's conviction for resisting a police officer in the execution of his duty. It appears, and the learned magistrate so found in his ruling on the submission of no case to answer, that Sgt. Parody arrested the appellant for assault. It is not clear from Sgt. Parody's evidence whether he arrested the appellant for common assault and battery contrary to s.46 of the Criminal Offences Ordinance (*cap.* 37), or for assaulting a police officer in the execution of his duty, contrary to s.256. If it were the latter, I have found that Sgt. Parody was not acting in the execution of his duty in removing the ignition key. Consequently, no

assault contrary to s.256 was committed, and the appellant's arrest for that offence was wrongful. If, on the other hand, Sgt. Parody arrested the appellant for common assault and battery contrary to s.46, then again this arrest would appear to have been wrongful in the absence of any evidence that the appellant's assault of Sgt. Parody was anything other that reasonable resistance to the sergeant's unlawful interference with his car. As the charge against the appellant of resisting a police officer in the execution of his duty, and his conviction for that offence, arose from his wrongful arrest, I find that Sgt. Parody was, in the circumstances, not acting in the execution of his duty in arresting the appellant, and that consequently, the appellant's conviction for resisting a police officer in the execution of his duty cannot stand.

27 Accordingly, this appeal is allowed. The appellant's conviction of assaulting a police officer in the execution of his duty and of resisting a police officer in the execution of his duty are quashed, and I order that the fine of £40, if paid, be refunded to the appellant.

28 Although this was not raised on appeal, there is one further matter which I consider I should deal with in this case under the powers conferred on this court by s.25 of the Supreme Court Ordinance (*cap.* 148) and by s.154 of the Criminal Justice Administration Ordinance (*cap.* 36).

29 As well as being charged in the magistrates' court with the offences of assaulting and resisting a police office in the execution of his duty, the appellant was charged with not stopping after an accident, contrary to s.40(1) of the Traffic Ordinance. The particulars of the charge read as follows:

> "Abdeslam Mofaddel Boulben, on October 23rd, 1983, in Gibraltar, then being the driver of Motor Car G32609, owing to the presence of which an accident occurred whereby damage was caused to Motor Car G41215 (the property of Gib Coin Amusements Ltd.), and Motor Car G35020 (the property of Albert Reyes) did fail to stop at Flat Bastion Road."

30 The appellant pleaded not guilty to the charge. It appears from the record that in evidence in his defence, he said, the "police never gave me the chance to report the accident, but I did intend to report it." The learned magistrate accepted that the appellant intended to report the accident. Despite this, he found the appellant guilty as charged and recorded a conviction against the appellant accordingly.

31 Section 40 of the Traffic Ordinance, insofar as relevant to this case, provides as follows:

> "(1) If in any case owing to the presence of a motor vehicle on a road an accident occurs whereby damage or injury is caused to any person, vehicle, property or animal, the driver of the vehicle shall

stop and if required so to do by any person having reasonable grounds for so requiring shall give his name and address and also the name and address of the owner of the vehicle.

(2) If in the case of any such accident the driver of the motor vehicle for any reason does not give his name and address to any such person as aforesaid he shall report the accident at the Central Police Station or to a police officer as soon as reasonably practicable and in any case within twenty-four hours of the occurrence thereof.

. . .

(4) Any person who fails to comply with the provision of this section shall be guilty of an offence."

32 In my view sub-ss. (1) and (2) of this section provide the driver of the car with two alternative courses of action, to either (1) stop and give his name and address, *etc*. if required to do so, or (2) report the accident at the Central Police Station or to a police officer as soon as reasonably practicable and in any case within 24 hours of the accident. The learned magistrate accepted that the appellant intended to report the accident, that is to say, as I understand it, he accepted that the appellant was not in breach of s.40(2). It is not disputed that the appellant did not stop in Flat Bastion Road immediately after his accident, and he explained in evidence why he did not do so. If, however, as the learned magistrate found, he intended to report the accident to the police at the time when Sgt. Parody and P.C. Caruana approached him and the matter was then taken out of his hands, in my view, he committed no offence under s.40 of the Traffic Ordinance.

33 Accordingly, in exercise of the powers of review conferred on me by s.25 of the Supreme Court Ordinance (*cap*. 148) and in exercise of the powers conferred by s.154 of the Criminal Justice Administration Ordinance (*cap*. 36), I quash the appellant's conviction of failing to stop after an accident contrary to sub-ss. 40(1) and (4) of the Traffic Ordinance and acquit the appellant of that offence.

Appeal allowed.
