[2003–04 Gib LR 447]

PEARSON and WICHMANN v. ATTORNEY-GENERAL

SUPREME COURT (Pizzarello, Ag. C.J.): June 28th, 2004

Police—obstruction of police officer—failure to stop on police command—statutory or common law authority necessary to require person to obey police command to stop—no such authority for police in territorial waters

The appellants were each charged in the magistrates' court with obstructing a police officer in the execution of his duty contrary to s.89(1) of the Criminal Offences Ordinance.

The appellants, Greenpeace activists, were coxswains of two fast launches (believed to be prohibited imports) which entered British territorial waters off Gibraltar. They were under observation by the Gibraltar police as a security alert was in force and a chase ensued. The police intention was to prevent the launches from approaching moored oil tankers and to stop them to ascertain the intentions of the appellants. Both appellants were aware that the police wanted them to stop but did not do so voluntarily, and the first appellant was eventually stopped and charged with obstructing the police. The second appellant's launch was only stopped following a collision and he was arrested and charged with obstruction. The appellants were convicted by the Stipendiary Magistrate of wilfully obstructing a police officer acting in the execution of his duty contrary to s.89(1) of the Criminal Offences Ordinance.

On appeal by way of case stated, the appellants submitted that (a) the police did not have the power to detain someone who was lawfully going about his business; (b) statutory authority was required for a person to be bound to follow police instructions, and although on land the Traffic Ordinance provided authority for the police to stop a vehicle, there was no such authority for them to do so in territorial waters; and (c) by not stopping, the appellants' actions had not therefore amounted to obstructing a police officer.

The Attorney-General in reply submitted that (a) the police, by apprehending a breach of the peace, of which there was a real possibility, were acting in lawful execution of their duty in requesting the appellants to stop; and (b) by ignoring the requests, the appellants were obstructing the police in the execution of their duty.

Held, allowing the appeal:

The appellants had not committed an offence in refusing to stop when

the police had required them to do so. The police had no power to detain except in the exercise of a lawful power of arrest, and therefore no one was bound to submit to detention by a police officer unless he was detained by arrest. In the absence of any statutory or common law obligation, no person was under a legal obligation to stop when called upon to do so by a police officer. The police were not intending to arrest the appellants when they chased them but merely to head them off from their apparent destination and to stop them to ascertain their intentions. As there was no authority extending police powers to the stopping of vessels, the appellants had not committed the offence of obstructing a police officer in the execution of his duty when refusing to stop (para. 20).

Cases cited:

(1) *Donnelly* v. *Jackman*, [1970] 1 W.L.R. 562; [1970] 1 All E.R. 987; (1970), 54 Cr. App. R. 229; 114 Sol. Jo. 130, distinguished.
(2) *King* v. *Hodges*, [1974] Crim. L.R. 424, considered.
(3) *Lavin* v. *Albert*, [1982] A.C. 546; (1982), 74 Cr. App. R. 150; *sub nom. Albert* v. *Lavin*, [1981] 3 All E.R. 878; (1981), 125 Sol. Jo. 860, distinguished.
(4) *Piddington* v. *Bates*, [1961] 1 W.L.R. 162; [1960] 3 All E.R. 660; (1961), 105 Sol. Jo. 110, distinguished.
(5) *R.* v. *Keyn* (1876), 2 Ex. D. 63; 2 Q.B.D. 90n, considered.
(6) *R.* v. *Waterfield*, [1964] 1 Q.B. 164; [1963] 3 All E.R. 659; (1963), 48 Cr. App. R. 42; 128 J.P. 48; 107 Sol. Jo. 833, considered.
(7) *Rice* v. *Connolly*, [1966] 2 Q.B. 414; [1966] 2 All E.R. 649; (1966), 130 J.P. 322; 110 Sol. Jo. 371, followed.

Legislation construed:

Criminal Offences Ordinance (1984 Edition), s.89(1): The relevant terms of this sub-section are set out at para. 4.

Interpretation and General Clauses Ordinance (1984 Edition), s.2: The relevant terms of this section are set out at para. 12.

C. Salter for the appellants;
K. Colombo, *Crown Counsel*, for the Crown.

1 **PIZZARELLO, Ag. C.J.:** This is a case stated by the learned Stipendiary Magistrate where the appellants had been charged and convicted of the following offences:

(a) Richard Pearson, on January 20th, 2003, wilfully obstructed a police officer, Charles Jurado, acting in the execution of his duty contrary to s.89(1) of the Criminal Offences Ordinance; and

(b) Waldemar Wichmann, on January 20th, 2003, wilfully obstructed a police officer, Andrew Watson, acting in the execution of his duty contrary to s.89(1) of the Criminal Offences Ordinance.

2 The learned Stipendiary, after stating the facts as he found them, posed this question of law for determination by the court:

> "Does failure to stop a vessel by its coxswain amount to obstruction contrary to s.89 of the Criminal Offences Ordinance, where the coxswain is aware that the police want to stop the vessel and where the police officer reasonably suspects that the occupants of the vessel intend to undertake acts which could lead to a breach of the peace or a criminal act and further reasonably suspect that the vessel is a prohibited import, but where the intention of the police is not to arrest the coxswain but to either ascertain the intention of the occupants of the vessel and/or to head them away from specific areas?"

3 Mr. Salter, on behalf of the appellants, takes no issue as to the conduct of the police. He conceded that what the police did was not illegal. The findings of fact by the learned Stipendiary, he says, amply justify the actions the police officers took to try and stop them, and this appeal, he submitted, is not concerned with the actions of the police, but rather with the actions or reactions of the appellants. It raises the question: Does an individual commit an offence in refusing to stop when called upon to stop by the police? He relies on *R.* v. *Waterfield* (6) to found this proposition.

4 Absent statutory or common law authority, the police have no power to detain someone who is lawfully (in the sense that it is not prohibited by law) about his business. This, he submits, is recognized by Marshall, J. in *Rice* v. *Connolly* (7), where the defendant appeared to a police constable to have been acting suspiciously in an area where there had been a number of break-ins during the same night. He was asked several times for his full name and address, which he refused to give, and when asked to accompany the police constable to a police box, declined to do so, unless arrested. The defendant was convicted of wilfully obstructing the police constable in the execution of his duty, contrary to s.51(3) of the Police Act, 1964, the equivalent of s.89. Section 89(1) provides: "A person who . . . obstructs . . . any police officer in the execution of his duty . . . is guilty of an offence . . ." The defendant appealed and his appeal was upheld. Marshall, J. said ([1966] 2 Q.B. at 420–421):

> "In order to uphold this conviction it appears to me that one has to assent to the proposition that where a citizen is acting merely within his legal rights, he is thereby committing a criminal offence. Nor can I see that the manner in which he does it can make any difference whatsoever . . ."

That, Mr. Salter submits, is the case on the sea as it is on land and he submits that whereas on land the Traffic Ordinance provides authority to stop a vehicle, no such authority exists with regard to the waters surrounding Gibraltar.

5 I raised the following point with Mr. Salter: Is it right to say the position of vessels entering Gibraltar waters is the same as road traffic? Was it not the common law that entry into Gibraltar by sea is prohibited and a right to detain arises therefrom? Of course there would be exceptions, *e.g.* peril of sea, *force majeure*, distress and innocent passage, and, under present legislation, a vessel has the duty to proceed to a reporting berth, but none of these exceptions applied to the appellants in the present appeal. Mr. Salter submitted that the point I raised would add a totally different dimension to the arguments marshalled in the case and on which the appeal does not stand. Mr. Colombo, for his part, did not pursue the point.

6 Nevertheless, I have researched the matter and have considered the case of *R.* v. *Keyn* (5) (the case of *The Franconia*). The facts in that case were that *The Franconia*, a German vessel under the command of the defendant, Mr. Keyn, a foreign national, was so negligently manoeuvred that it collided with *The Strathclyde*, a British ship which sank with loss of life, and the defendant was indicted at the Central Criminal Court for manslaughter. The facts are in no way related to those of the present appeal but it was recognized by the majority of the court that, in so far as the high seas is concerned (the high seas being the sea from the low water mark stretching out), the common law does not apply and, in so far as the waters adjacent to a state are concerned, that is the littoral waters extending up to three miles, the state may deal with them as it deems expedient for its own interest. Cockburn, C.J. said (2 Ex. D. at 208):

> "It is unnecessary . . . to the decision of the case, to determine whether Parliament has the right to treat the three-mile zone as part of the realm consistently with international law. That is a matter on which it is for Parliament itself to decide. It is enough for us that it has, so far as to be binding upon us, the power to do so."

7 Very relevantly for the purpose of the present appeal, he goes on (*ibid.*, at 208): "The question is whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation. I am clearly of the opinion that we cannot . . ." The learned Chief Justice gives an example of what Parliament can do by referring to 39 & 40 Vict., c.36, which was passed for the consolidation of Acts relating to the customs, that if a foreign vessel irrespective of having any British subject on board, is found within three miles of the coast conveying spirits, *etc.*, the articles in question, as well as the vessel itself, are made liable to forfeiture. He observes (*ibid.*, at 216):

> "In this section the legislature has also gone so far as to enact that any ship or boat liable to seizure or examination under this or any Act for the prevention of smuggling—which would include any foreign vessel within the respective limits above mentioned—not

bringing to, when required by any vessel employed for the prevention of smuggling, may be fired into."

8 This is a draconian measure indeed but one which seems to me to go far in establishing the point made by Mr. Salter that statutory authority is necessary to bind a person to adhere to the command of a police officer. I am uneasy with the differentiation, made by the learned judge in *R.* v. *Waterfield* (6), between requiring a moving vehicle to stop and requiring a stationary vehicle not to move. It seems to me a tension is created, for, if that is so, no one could be stopped as he who is stopped is then free to move on, as it seems to me to follow, unless one adds an implied addition to the law—"and must not move thereafter." What degree of flexibility can the court give to do what is sensible? I am of the opinion that the law is that once a vehicle is told to stop it shall not move again despite the absence of the necessary expression. Why then should not a person be bound to stop when called upon by a police officer for the purpose of ascertaining what he is about? As Archbold, *Criminal Pleading, Evidence & Practice* (2004 ed.), para. 19–269, at 1769 states:

> "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 these, and would further include the duty to detect crime and bring an offender to justice . . ."

9 That was the initial situation in *Donnelly* v. *Jackman* (1). The main point taken by the appellant in that case was that the officer had no right to stop the appellant other than by arrest. That point was not answered, the court finding ([1970] 1 W.L.R. at 565) that the facts found "do not justify the view that the police officer was not acting in the execution of his duty when he went up to the defendant and wanted to speak to him."

10 In the present case, Mr. Salter concedes that had the police arrested the appellants for, say, importing a prohibited item, namely a fast launch, there would be no question of an appeal and yet, because the police fall short of that and instead exercised a sensible discretion (as conceded by Mr. Salter), the appellants have committed no crime. Cockburn, C.J., in the *Franconia* case (5) dealt with this problem (always recognizing it is in a different context to that in the present appeal) (2 Ex. D. at 236):

> "But for the opinion expressed by my Brother Denham, I should have thought it beyond all dispute that a foreign ship, when not in British waters, but on the high seas, was not subject to our law. Upon this point I had deemed all jurists unanimous, and could not have supposed that a doubt could exist. Upon what is the contrary opinion founded? Simply upon expediency, which is to prevail over

> principle. What, it is asked, is to happen if one of your officers, enforcing your revenue laws, should be killed or injured by a foreigner on board a foreign ship? What is to happen if a British and foreign ship meeting on the ocean, a British subject should be killed by a shot fired from the foreign ship? In either of such cases would not the foreigner guilty of the offence be amenable to the English law? Could it be endured that he should escape with impunity?"

11 His answer, as far as it is relevant to the present appeal, is this (*ibid.*, at 237):

> "If the conviction and punishment of the offender can only be obtained at the sacrifice of fundamental principles of established law, I, for one, should prefer that justice should fail in the individual case, than that established principles, according to which alone justice should be administered, should be wrested and strained to meet it."

It must not be overlooked that in the present appeal all the vessels concerned were in the waters of the local state and consequently amenable to Gibraltar law.

12 It is trite law that the legislature of Gibraltar may legislate for Gibraltar (subject to reserved powers and the power of disallowance). Gibraltar, under s.2 of the Interpretation and General Clauses Ordinance, means "the City of Gibraltar, the sea shore, port and harbour thereof, and so much of the sea adjacent thereto as is subject to the dominion of Her Majesty . . ." Mr. Salter concedes that there is a finding of fact by the learned Stipendiary Magistrate that the incident occurred in Gibraltar waters—the fast launches had crossed the median line. There is no appeal on that and so the question of a three-mile limit or otherwise is not a question for this court in the present appeal.

13 Mr. Colombo made the point that the law cannot be considered in isolation from the facts of a case. Each case must be considered on its exact facts (*Piddington* v. *Bates* (4)) and it is important to grasp that an essential matter was the need for the police to keep the peace. It is necessary to keep this essential ingredient in mind to the question asked. There is a duty on the part of the officers of the Royal Gibraltar Police to prevent breaches of the peace where they reasonably apprehend this is to happen. He refers to *Archbold* (2004 ed.), paras. 19–269 and 19–270, at 1769–1770. And an arrest does not have to follow (*King* v. *Hodges* (2)).

14 I go, then, to the facts of the case as found by the learned Stipendiary, with a little gloss on them garnered from counsel's agreed observations from the bar. Both appellants were Greenpeace activists. Each was the coxswain of a launch which, on January 20th, 2003, entered British territorial waters around Gibraltar. Both were fast launches and

were prohibited imports (RIBs). The learned Stipendiary dismissed the charge of importation against the appellant Pearson on the basis of facts that he found, and convicted the appellant Wichmann, although on the facts surrounding that charge he gave an absolute discharge.

15 To return to the facts on the obstruction charges, both RIBs were under observation by Gibraltar law enforcement agencies and, on entering Gibraltar waters, a chase ensued. Each RIB was chased separately by a number of law enforcement vessels. The law enforcement vessels switched on their beacons and sirens. At this stage, the primary objectives of the officers of the Royal Gibraltar Police, who are responsible for laying the charges, were (a) to prevent the RIBs from approaching specific areas; and (b) to stop the RIBs, so as to ascertain the intentions of the occupants. The appellant Pearson's RIB was chased among others by P.M.B. 2, the coxswain of which was P.C. Charles Jurado. The appellant Wichmann's RIB was chased by other law enforcement vessels which were joined by P.M.B. 4, the coxswain of which was P.C. Watson. Pearson was aware that the police wanted him to stop. Wichmann was similarly aware. Pearson's RIB was eventually stopped and boarded by customs officers and subsequently by the police, and Pearson was arrested and conveyed to Royal Gibraltar Police Marine Base where he was charged with obstructing police and dangerous navigation. Wichmann's RIB came to a halt following a collision with P.M.B. 4 and thereafter with the port launch *Samurang II*. Wichmann could have stopped before either collision. Wichmann's RIB was detained by Customs.

16 The occupants of the RIB demanded to know what they had done wrong and asked why they should stop. Police Insp. Barabich, the officer in charge of the operation, then arrived and ordered the release of Wichmann's RIB. Neither Mr. Wichmann nor the occupants of his RIB were warned in any shape or form that their presence in British waters of the RIB amount to an offence. On release, Wichmann steered his RIB to *The Vegamagna*, a vessel lying in Gibraltar waters, and delivered two Greenpeace activists on board that vessel. He then left Gibraltar waters and made for *The Esperanza*, a Greenpeace vessel which was lying in Spanish waters. He then returned to Gibraltar waters where his RIB was boarded by Royal Gibraltar Police officers and he was arrested for obstruction and dangerous navigation. He, too, was taken to the Royal Gibraltar Police Marine Base.

17 It is important to keep in mind that the obstruction for which he was charged is the obstruction said to have occurred before his RIB was released by Insp. Barabich. There seems to have been nothing untoward in his behaviour once he returned to Gibraltar waters from *The Esperanza*, or at least which is relevant to this appeal.

18 Set against this background, Mr. Colombo argues that there was a real possibility that a breach of the peace would have occurred. The evidence before the Stipendiary, and as found by him, was of an incursion into Gibraltar waters by vessels (being prohibited imports) driven at high speed approaching oil tankers during a state of security alert. The occupants of the two rigid inflatable vessels had not made known to the Gibraltar authorities what their intentions were. The use of prohibited imports made it incumbent on every police officer to assist in the enforcement of the Imports and Exports Ordinance, although it is right to say that this was not in the forefront of the minds of the police officers during the incident. Mr. Colombo submits that Royal Gibraltar Police officers, properly apprehending a breach of the peace, there being a real possibility of such a breach, were acting in the lawful execution of their duty at the time in requesting Messrs. Pearson and Wichmann to stop to ascertain their intention. These requests were ignored deliberately and the appellants took evasive action. Thus they obstructed the two officers named in the execution of their duty. Mr. Colombo refers to *Piddington* (4) in support of his submission.

19 In my view, *Piddington* does not answer the question inherent in this appeal, as identified by Mr. Salter. That was a case where acts were done in furtherance of a trade dispute where the constable sought to limit the number of pickets. His order was flouted by the appellant (Mr. Piddington) and he was arrested. It was held on the facts that there was a real possibility of a breach of the peace and that the police officers were fully entitled as reasonable men to anticipate such a possibility and the prosecutor was entitled to take such steps as seemed to him to be proper to prevent such a breach and that the appellant had been rightly convicted. It seems to me that the breach of the peace envisaged was apprehension on the part of the workers (8 in number) who were not on strike (given a telephone call to the police), even though there was no actual intimidation or threats or intimation of violence and that having regard to the number of pickets involved (18 in the street) there was a real danger of something more than mere picketing to collect or impart information or peaceable to persuade—a far cry from navigating in the sea.

20 What I distil from the authorities is that the police may not compel any detention except where they have a power of arrest and use it. It follows, therefore, that no one is duty-bound to accept a detention by police officers unless he be detained by arrest. It follows from this that an individual does not have a legal obligation to stop when called upon by a police officer to do so, absent any statutory or common law obligation. It might be foolish on the part of that individual not to do so, as the example given by Cockburn, C.J. exemplifies. The principles enunciated in *Lavin* v. *Albert* (3) do not, in my view, apply since the common law does not extend to the sea.

21 On the given facts in this case stated, particularly the finding that the police officers had no intention to arrest when they called upon the appellants to stop and that Wichmann's RIB was indeed released, the answer to the exact question posed is No.

Answer accordingly.