Privy Council Appeal No. 29 of 1968

Inspector Shaaban bin Hussien and others – – – *Appellants*

v.

Chong Fook Kam and another – – – – – *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH OCTOBER 1969

Present at the Hearing:
LORD UPJOHN
LORD DEVLIN
LORD WILBERFORCE

[*Delivered by* LORD DEVLIN]

This is an appeal in an action for false imprisonment. The three defendants in the action, who are the appellants before the Board, are two police officers and the Government of Malaysia. Nothing turns on the separate responsibility of any of the defendants and the action can be described as one brought against the police. The two plaintiffs in the action were arrested on 11th July 1965 for an offence, said to have been committed on the previous day against either s. 304A of the Penal Code or s. 34A of the Road Traffic Ordinance. The former of these sections corresponds to the offence of manslaughter and the latter makes it an offence to cause death by dangerous or reckless driving. The plaintiffs were held in custody overnight and brought before the magistrate on 12th July when he made an order for their retention for 7 days under s. 117 of the Criminal Procedure Code for further investigation. On the next day the plaintiffs were released, the police having found that there was not sufficient evidence to proceed against either of them. It was agreed that the false imprisonment, if any, was brought to an end by the magistrate's order. The plaintiffs' action was dismissed in the High Court of Malaya but was successful on appeal in the Federal Court of Malaysia, where judgment was given in their favour for damages of $2,500 each. From this judgment the defendants have appealed to the Board. The plaintiffs have not entered an appearance as respondents to this appeal so that their Lordships have not had the advantage of hearing argument on both sides.

The police inquiry began with a complaint made at the Mentakab police station at 10.15 p.m. on 10th July. The complainant stated that at 9.15 p.m. when he was driving home with four friends in his car, he passed a lorry, coming in the opposite direction, with a trailer loaded with timber. As he passed a piece of timber fell off the lorry, hitting his windscreen and two of the men in the car. One of the men died. The lorry did not stop. Police inquiries led them to conclude that the incident had occurred as stated and that the lorry involved in it was numbered PC 8200. It is unnecessary to give details of the enquiry up to this point since it is not disputed that the police had reasonable grounds for reaching this conclusion. Directions were given that the lorry PC 8200 was to be stopped and detained.

At 7.55 a.m. on 11th July PC 22927 of Bukit Tinggi police station found the lorry stationary in front of a coffee shop about a quarter of a mile from the police station. He found and detained the two plaintiffs, one of whom admitted to being the driver of the lorry and the other the attendant. The corporal in charge of the station arrived 10 minutes later. According to his evidence (the police evidence generally was accepted by the trial judge) one of the plaintiffs " asked me what wrong he had done. I told him that I had received instruction from Mentakab to detain him on suspicion of a fatal road accident case ". This was said in the hearing of the other plaintiff. About 1 p.m. the area inspector from Mentakab and his superior officer, the District Superintendent,—these are the two individual defendants in the action,—arrived at the coffee shop. They interrogated both plaintiffs there. The one who said he was the driver said that they had not met with any accident. The evidence is not very clear, but it is reasonable to infer that he meant by that that they were not at the scene of the accident at the relevant time, for both men were asked to give an account of their movements. The police officers did not regard their explanations as satisfactory and it was decided that they should be taken to Mentakab police station for further investigation. Since an attendant in a lorry is frequently an alternate driver and the police felt a doubt about which man was the driver at the relevant time, both men were treated alike. They left about 3 p.m. and arrived at Mentakab at about 5 p.m. Their story was that on the evening in question they had bought food at a shop in Mentakab and that one of them had had his hair cut at a barber's shop. They were taken to the two shops where they pointed out to the police two witnesses, but the witnesses were reluctant to answer any questions. At 6.15 p.m. they were taken back to the police station where, as already recorded, they spent the night and were brought before the magistrate on the following morning.

The law on arrest is contained in the Constitution and the Criminal Procedure Code. For the purposes of this case it is enough to say that under s. 23 (i) (*a*) of the Code the police were empowered to arrest the plaintiffs if a reasonable suspicion existed of their having been concerned in an offence of reckless and dangerous driving causing death. In any case of wrongful arrest it is important to identify at the outset the precise time of arrest, not only for the purpose of Article 5 clause 3 of the Constitution, which provides that an arrested person shall be informed as soon as may be thereafter of the grounds of his arrest, but also because it is the time when the existence of a reasonable suspicion must be proved. The statement of claim alleges in paragraph 6 that " both plaintiffs were stopped by the police at about 7 a.m. and after prolonged questioning were taken to Bukit Tinggi police station ". In paragraph 7 it is alleged that at about 6 p.m. on the same day both the plaintiffs were locked up in separate cells at Mentakab police station and kept falsely imprisoned.

An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go. It does not occur when he stops an individual to make enquiries. The moment when it occurred in this case was between 8.05 and 9 a.m. on 11th July when (their Lordships have quoted the relevant passage from the evidence) the corporal told the plaintiffs of the existing suspicion and said that he had instructions to detain them. Mr. Gratiaen for the appellants has very fairly conceded that, notwithstanding the pleading,—and their Lordships doubt whether it can be construed as alleging an arrest before 6 p.m.,—the plaintiffs were arrested by the corporal not later than 9 a.m.

At that point of time the police had good reason to suspect that one or other of the plaintiffs was driving the lorry from whose trailer the piece of timber fell. But there is a wide gap between a suspicion that one of the plaintiffs was the man driving the lorry and a suspicion that he was driving it recklessly or dangerously. The trial judge did not acknowledge

the existence of such a gap. He said in his judgment:—" Suspicion focused reasonably enough on the said lorry and it goes without saying on the driver." Granted that the fall of the timber is of itself some evidence of insecure loading and granted also that it would be reckless driving to drive at any speed or in any manner a lorry with a trailer which the driver knew or ought to have known to be insecurely loaded, the police had in their Lordships' opinion no reasonable grounds for suspecting that either plaintiff had any knowledge, actual or constructive, of the state of the load. Likewise, there was nothing at all to suggest that the lorry was at the time of the accident being driven in a dangerous manner. Mr. Gratiaen has argued that a driver ought to satisfy himself before he sets off that his load is secure. No doubt he ought to notice an obvious danger of collapse but the fall of a single piece of timber is no evidence of that. Mr. Gratiaen has relied strongly,—and it is a strong point,—on the fact that the lorry did not stop after the accident. But here again their Lordships must with respect differ from the trial judge when he describes it as " clearly a hit and run case ". It is quite possible that the fall of a single piece of timber from a trailer might not be noticed at the time, and even if it were and the plaintiffs speculated about it, it might not occur to them that it would lead to the unusual consequences that happened here. Their Lordships conclude that the suspicion that the plaintiffs or either of them was guilty of reckless driving was not reasonable.

Mr. Gratiaen has criticised the test adopted in the Federal Court. Suffian, F. J., who delivered the judgment of the Court, said that the information available to the police " was insufficient to prove *prima facie* a case against the plaintiffs under Section 304A of the Penal Code or under Section 34A of the Road Traffic Ordinance ". Mr. Gratiaen submits that this is the test appropriate in actions for malicious prosecution and not in actions for false imprisonment. Whether or not this is so,—and their Lordships do not wish to add any further formulae to those already devised for the action for false imprisonment,—it would appear to be a much stiffer test than the reasonable suspicion, which is the foundation of the power given in section 23 (i) (*a*) of the Criminal Procedure Code. Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; " I suspect but I cannot prove ". Suspicion arises at or near the starting-point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar. There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control. There is first the power, which their Lordships have just noticed, to grant bail. There is secondly the fact that in such countries there is available only a limited period between the time of arrest and the institution of proceedings; and if a police officer institutes proceedings without *prima facie* proof, he will run the risk of an action for malicious prosecution. The ordinary effect of this is that a police officer either has something substantially more than reasonable suspicion before he arrests or that, if he has not, he has to act promptly to verify it. In Malaysia the period available is strictly controlled by the Code. Under s. 28 the suspect must be taken before a magistrate at the latest within 24 hours. If the investigation cannot be completed in 24 hours and there are grounds for believing that the accusation or information is well founded, under s. 117 the magistrate may order the

detention of the accused for a further period not exceeding 15 days in the whole. By allowing 15 days after arrest for investigation, the Code shows clearly that it does not contemplate *prima facie* proof as a prerequisite for arrest.

The test of reasonable suspicion prescribed by the Code is one that has existed in the common law for many years. The law is thus stated in Bullen and Leake 3rd edition, p. 795, the "golden" edition of 1868:

> "A *constable* is justified in arresting a person without a warrant, upon a reasonable suspicion of a *felony* having been committed and of the person being guilty of it."

Their Lordships have not found any English authority in which reasonable suspicion has been equated with *prima facie* proof. In *Dumbell v. Roberts and Others* [1944] 1 A.E.R. 326 Scott L. J. said at 329:

> "The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon before acting to have anything like a *prima facie* case for conviction;"

There is another distinction between reasonable suspicion and *prima facie* proof. *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. There is a discussion about the relevance of previous convictions in the judgment of Lord Wright in *McArdle v. Egan* (1934) 150 L.T. 412. Suspicion can take into account also matters which, though admissible, could not form part of a *prima facie* case. Thus the fact that the accused has given a false alibi does not obviate the need for *prima facie* proof of his presence at the scene of the crime: it will become of considerable importance in the trial when such proof as there is is being weighed perhaps against a second alibi: it would undoubtedly be a very suspicious circumstance.

For these reasons the Board considers that Mr. Gratiaen's criticism of the test applied in the Federal Court was well founded. This of course does not disturb their Lordships' conclusion that at the time of the arrest in the morning of 11th July there was no reasonable suspicion to justify it. Their Lordships have developed the distinction between reasonable suspicion and *prima facie* proof because of its materiality at a later stage. The plaintiffs when interrogated denied that they were at the place of the accident. The police, who had admittedly good ground for suspecting that it was the plaintiffs' lorry which was in fact involved, must be credited with equally good grounds for suspecting that the alibi was false. When checked, no corroboration was found for it. These facts, added to the failure to stop, were enough in their Lordships' opinion to raise at this later stage a reasonable suspicion that the plaintiffs were concerned in a piece of reckless driving. But the case falls far short of *prima facie* proof.

The result of their Lordships' conclusion is that, strictly on the case as pleaded, the claim for false imprisonment fails. Before the plaintiffs were locked up there was a reasonable suspicion. But Mr. Gratiaen has not relied upon the pleading point,—quite rightly, their Lordships think, in view of the way the case was argued in the Courts below. He has instead, accepting the arrest as being made in the morning of 11th July, invited the Board, if it is open to them to do so, to reduce the damages. Undoubtedly their Lordships' conclusion affects the amount of the damages. It is not merely that it cuts in half the period of false imprisonment and excises in particular the night at the police station. Much more important, it alters the character of the arrest. It becomes a premature arrest rather than one that was unjustifiable from first to last. The police made the mistake of arresting before questioning; if they had questioned first and arrested afterwards, there would have been no case against them.

The sum of $2,500 for each plaintiff seems to their Lordships on any view to be extremely high. Judging by the special damage pleaded in the statement of claim, it is equivalent to five months' wages with overtime. On the view that the Board has taken of the facts of this case, this is undoubtedly excessive. On this view the scope for compensatory damages is limited; they must be confined to approximately nine hours' detention in the company of the police. The Court is not in this category of case confined to awarding compensation for loss of liberty and for such physical and mental distress as it thinks may have been caused. It is also proper for it to mark any departure from constitutional practice, even if only a slight one, by exemplary damages: but these do not have to be large. The subject has been considered by the House of Lords in *Rookes v. Barnard* [1964] A.C. 1129 at 1221. The Board approves also of what was said on this topic by Scott L. J. in *Dumbell v. Roberts.* In particular, the Lord Justice said: "The more high-handed and less reasonable the detention is, the larger may be the damages; and, conversely, the more nearly reasonably the defendant may have acted and the nearer he may have got to justification on reasonable grounds for the suspicion on which he arrested, the smaller will be the proper assessment."

Their Lordships would not in any event think it right in this case to substitute a figure of their own. What is necessary by way of an award to ensure respect for constitutional principles is a matter that should be settled, at least in the first instance, by the Courts of Malaysia. Their Lordships have said "in any event" because there is in fact a formidable obstacle to a review of the damages by any court. At the conclusion of the argument in the Federal Court, the Court said that it would allow the appeal giving its reasons later, and then adjourned before judgment was entered so that counsel might agree upon the quantum of damages. When judgment was entered the figure of $5,000 was awarded as agreed damages. The agreement must have been reached on a view of the case which the Board has found to be incorrect. Whether this or any other of the circumstances in which the agreement was made are such as to permit a review is a matter for the Federal Court to determine. The case should be remitted to the Federal Court for it to decide whether it is open to it to review the amount of the damages, and, if so, to settle the appropriate figure.

In discussing reasonable suspicion their Lordships, it will be observed, have referred to several English authorities as illustrative of the test to be applied. In so doing their Lordships have not ignored the observation of Suffian F. J. that the existence of the local written law makes it unnecessary and indeed confusing to refer to English authorities. In saying this the learned judge was echoing remarks that have several times in the past been made by judges when dealing with codifying statutes; in particular by Lord Herschell in *Bank of England v. Vagliano Brothers* [1891] A.C. 107 who said at 145 that "an appeal to earlier decisions can only be justified on some special ground".

It is quite clear that the law of Malaysia has to be taken from the Code and not from cases on the common law. But where as here, the Code is embodying common law principles, decisions of the courts of England and of other Commonwealth countries in which the common law has been expounded, can be helpful in the understanding and application of the code. Their Lordships have confined their citations within these limits.

Their Lordships will accordingly report to the Head of Malaysia their opinion that the case should be remitted to the Federal Court for it to decide whether it is open to it to review the amount of the damages and, if so, to settle the appropriate figure in the light of their Lordships' judgment and vary its Order accordingly.

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In the Privy Council

INSPECTOR SHAABAN BIN HUSSIEN AND OTHERS

v.

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DELIVERED BY
LORD DEVLIN

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