THE POWER OF THE POLICE TO DETAIN WITHOUT ARREST

Blundell v. Attorney-General [1968] N.Z.L.R. 341

The recent Court of Appeal decision in *Blundell* v. *Attorney-General* is one of considerable constitutional importance. It involved the delicate balance of individual freedom and police powers and helped to define, in one area at least, just where this balance lies. Many writers about police powers in Britain have pointed out how extraordinary it is, that in a country which prides itself on individual liberties, these should be so obscure and ill defined.[1] Although in New Zealand, as the Court of Appeal pointed out, part at least of the common law relating to police powers has been codified by statute, substantial areas still remain undefined. In the words of Lord Devlin, "it is useless to complain of policemen overstepping the mark if it takes a day's research to find out where the mark is".[2] Perhaps the main significance of *Blundell's* case is that in one small, but very significant, area of police powers the mark has been made clear.

The Facts

The material facts before the Court of Appeal were these: the appellant, a married man living apart from his wife, had left New Zealand some considerable time before the dates involved, accompanied by a young girl called Barbara Coles with whom he lived in Sydney for some time. Miss Coles' parents ultimately went to Sydney and she returned with them. The appellant also went to Auckland and eventually Miss Coles again left her parents and went away with him. On the afternoon of September 17th 1964 the two were walking in Queen Street, Auckland, near the corner of Durham Street, where they encountered a Mr. Unsworth, an uncle of Miss Cole. Mr. Unsworth threw his arms around the appellant in an effort to detain him while the police were called. The police appeared promptly on the scene. Something appeared to have been said (although exactly what was not determined) about a warrant for the arrest of the appellant, and in the result, it was conceded before the Court of Appeal that the appellant was restrained for some period by the police constables, though without the application of any great force, while inquiries were being made as to whether or not a warrant had been issued for his arrest. He ultimately went or was taken, although it was not determined which, to the police station in a police car, but was allowed to leave without formally being taken into custody by the police officers. It was clear that, whatever anyone genuinely may have thought at any time during all that occurred on the afternoon of the 17th September,

1. Lord Devlin, (1966) 57 Journal of Criminal Law, Criminology and Police Science 128.
2. Ibid. at 128.

there was not any warrant issued at this time for the arrest of the appellant on any charge whatever. There was, however, a warrant out for the apprehension of Miss Coles pursuant to the provisions of the Mental Health Act 1911.

In these circumstances the appellant took proceedings against the Crown alleging assault and false imprisonment by the constables. In the Court of Appeal the issue was limited to that of false imprisonment and it is with this issue only that I shall deal.

The Trial before Hardie Boys J.[3]

In the Supreme Court before a jury the appellant failed in his action for false imprisonment. The judge had directed the jury to examine whether the actions of the constables were in all the circumstances reasonable, and that, if this were so, there would be a good defence to the action—that of justification. The trial judge left the question of justification as a matter of fact for the jury to determine as part of a general issue: was the plaintiff falsely imprisoned by the police on 17th September 1964? The jury held in answer to the issue that there had been no false imprisonment.

On a motion for new trial, based on several aspects of the proceedings, Hardie Boys J. examined the nature of the defence available in an action for false imprisonment and he concluded that there had been no misdirection of the jury. The main ground of the motion was that to such an action there is no defence of reasonable and probable cause.

The learned judge examined the law on the basis that there were two different and separate torts, namely false imprisonment and wrongful arrest. The judge concluded that, as there had been no arrest on the facts, the only tort in issue was that of false imprisonment. (It was concluded in the Court of Appeal also that there had been no arrest so I will examine this point later.) In dealing with the defences available in an action for false imprisonment, His Honour distinguished detention that was "custodial" from detention that was not. The distinction rested on the difference between a plaintiff who has been taken into or kept in custody, and the much rarer case of a restraint on liberty of movement short of being taken into custody and extending possibly over only a brief time. His Honour stated at page 503 that, although the term false imprisonment is used to describe both types of detention, that cannot mean that a man is to be treated as having been arrested or put into prison when neither has happened. Therefore the judge set aside all the cases where there had been an actual arrest or custodial detention on the grounds that the criteria for justification in those cases had no application, and concluded that, when the cause of action is detention falling short of arrest or custodial detention, reasonable cause for the detention—in this case the making of an inquiry whether there was a warrant out for the plaintiff's arrest—was a good defence.

3. Reported [1967] N.Z.L.R. 492.

The Court of Appeal, in holding that "under the law of New Zealand a police constable has no power to hold a person for questioning or to hold a person while inquiries are being made",[4] did not examine in detail the basis upon which Hardie Boys J. made distinctions, firstly between the torts of wrongful arrest and false imprisonment, and secondly between detention that is "custodial" and detention that is not. It is, however, respectfully submitted that the cases which His Honour relied upon did not in fact support his ruling. The first was *Dallison* v. *Caffery* [1965] 1 Q.B. 348. This case decided only that a constable arresting a person commits no tort if he has reasonable and probable cause to believe that the person whom he is arresting has committed a felony. The reference to the test of reasonableness all relate to the question whether the constable acted reasonably in his belief. The case laid down no overall principle of the reasonableness of the restraint, and, as the case was one of actual arrest or in the words of Hardie Boys J. "custodial" detention, it was on this ground alone distinguishable from *Blundell's* case.

Reliance was also placed on *John Lewis* v. *Tims* [1952] A.C. 676. In that case store detectives arrested a woman whom they had reasonable and probable cause to suspect had committed a felony. She was held by them while inquiries were made, and the court held that the length of the detention was not unreasonable, and that therefore no action for false imprisonment would lie. Hardie Boys J. thought this was so near to a detention without arrest situation as to be of value; but it is submitted that there was a clear-cut distinction. There had been an actual arrest on grounds justified by law and the case dealt with the entirely separate question of how long the suspect could be detained after she had been lawfully arrested. The inquiries made during detention in that case were for the purpose of making a decision whether or not to prosecute and not, as in *Blundell's* case, for the purpose of deciding whether or not to arrest. The same point was in issue in *Beckwith* v. *Philby* (1827) 6 B. & C. 635, 108 E.R. 585; another case relied on by the judge.

The case of *Wiltshire* v. *Barrett* [1965] 2 All E.R. 271, also referred to by Hardie Boys J. was a case where a constable, pursuant to his power of arrest under the Road Traffic Act 1960 (U.K.), arrested a man whom he suspected to be drunk. He was taken to the police station and was later set free when it had been decided not to prosecute him for the charge on which he was arrested. This case is authority for the proposition that "once the officer in charge has satisfied himself that the man is innocent, any further detention in custody would be false imprisonment".[5] The case decided that a lawful arrest is not made unlawful by the subsequent release of the arrested person, and that no tort is committed if the suspect is not detained in custody after he is found to be innocent.

Wiltshire's case and almost all the other cases relied on by Hardie Boys J. were not concerned with the detention without arrest situation

4. MacArthur J. at 361.
5. *Wiltshire* v. *Barrett* (supra) per Davies L.J. at 279.

then before the court. *Peacock and Hoskyn* v. *Musgrave and Porter* [1956] Crim. L.R. 414 appeared to support the judge's conclusion and I will refer to this case later in discussing the decision of the Court of Appeal. In the face of what was otherwise an apparent lack of authority on the point, Hardie Boys J. sought to draw, from the cases mentioned, an overall principle of justification through reasonableness in actions for false imprisonment. It seems clear that his decision was based partly on his view of what was a reasonable answer to the problem posed by a new situation with which the courts had never before been called upon to deal. He concluded at page 507:

> If reasonable and probable cause is a proper ground of defence when there has been actual custodial arrest over a period of some two hours, as it was in *Wiltshire's* case, it seems to me to be quite illogical to suggest that it is not available as a ground when there has been no custodial detention but no more than a restraint on liberty of movement for a few minutes.

The Decision of the Court of Appeal

The grounds of the appeal were firstly, that the learned judge in the Supreme Court had misdirected the jury as to the nature of the defence available, and secondly, that he had misconceived the respective functions of the judge and jury when he left the question of justification as a matter of fact to the jury. The appeal succeeded on both grounds but I shall deal only with the first which clarified the substantive law.

Turner and McCarthy JJ. delivered separate but concurring judgments with each of which MacArthur J. agreed, in a short separate judgment. The reasoning of the first-named judges can therefore be taken as that of the court.

In discussing the nature of the tort of false imprisonment the court made it clear that it does not necessarily involve the application of physical force to the person of the plaintiff but merely a restraint on his personal liberty. This must, however, be a total restraint, in the sense that it prevents movement in all directions. It was sufficient if there was a threat of force or the exercise of pressure, exerted for example by the production of an alleged authorising warrant or the demands of a police officer that the citizen go with him to the police station.[6]

Although the court did not advert to the problem, there will often be a difficulty in deciding on the facts whether a suspect has voluntarily complied with a policeman's request to submit to what is in effect detention without arrest, or whether the policeman has, by the kind of threats or pressure referred to, negatived the element of voluntariness and so subjected the suspect to an imprisonment. Whatever these difficulties may be, the court said it was clearly open to the jury to find that in this case there had been an imprisonment.[7]

6. See Turner J. at 351 and McCarthy J. at 357.
7. See Turner J. at 351.

If a restraint is established the onus then passed to the defendant to show what was done was authorised by law. There are, it was said, a variety of legal defences available as justification for restraint but the only one which was sought to be put forward was that the constables were acting in support of the criminal law to secure the public peace. This defence, referred to in *Salmond on Torts* (14th ed. 1965) 183-184, was regarded by the Court of Appeal as available in *Blundell's* case only if he had been restrained in the course of an arrest which was lawful either because a warrant had in fact been issued for his arrest on a sufficient criminal charge or because the constable was acting within the scope of his statutory powers to arrest without a warrant. The court found that neither circumstances existed. Although a police officer is justified under the Crimes Act 1961 in arresting a person where he has reasonable and probable grounds for believing that that person has committed an offence for which he may be arrested without a warrant it was clear that Blundell was not believed to have committed any such offence.

The Court of Appeal pointed to another reason why the considerations relating to lawful arrest were not relevant: on the facts of the case there had been no arrest. It is submitted that, in doing so it was making a distinction which, despite the loose equating of arrest with any form of imprisonment,[8] it is important to keep in mind in cases of this type. The reason is not that wrongful arrest is a different tort from that of false imprisonment but that lawful arrest, being a special justification for detention which would otherwise constitute a false imprisonment, only becomes relevant when there has been an actual arrest pursuant to a decision by the arresting officer to take a person into custody for the purpose of his answering to a specified crime.

The court relied on the decision in *Kenlin* v. *Gardiner* [1966] 3 All E.R. 931 to demonstrate the proposition that not every detention amounts to an arrest. In that case two police officers, being suspicious of the conduct of two young boys who were going from house to house, sought to detain them to ask why they were calling at the houses. The youths, being frightened, ran off; and upon being apprehended by the constables kicked them and struggled violently. They were charged with assaulting the constables, but the question of self defence was raised, and in the ultimate analysis the case turned on whether the detention by the police officer was lawful. Winn L.J. stated at page 934:

> But on the assumption that he had a power to arrest it is to my mind perfectly plain that neither of the respondents purported to arrest either of the appellants. What was done was not done as an integral step in the process of arresting, but was done in order to secure an opportunity, by detaining the appellants from escape, to put to them or either of them the question which was regarded as the test to satisfy the respondents whether or not it would be right in the circum-

8. See Lord Devlin—*The Criminal Prosecution in England* (1960), 68.

> stances, and having regard to the answer obtained from that question, if any, to arrest them.
>
> I regret to say that I think there was a technical assault by each of the respondents.

It is clear that not only must the constable have the power to arrest in the particular circumstances, but he must also act pursuant to a decision to arrest.

As Turner J. pointed out at page 356, something short of formal arrest, if justified by the requirements for formal arrest, may be defended "if what was done was in fact the first step in an arrest which the constable intended to effect". What is important is that the intention to arrest must be formed in the mind of the constable.

The Court of Appeal did not formulate any definition of arrest since in a situation such as that in *Blundell's* case it was clear that there had been no arrest. What was done was not done as an integral step in the process of arresting but was done in order to secure an opportunity, by preventing Blundell's escape, to make inquiries whether it would be right in the circumstances to arrest him. The situation was directly analogous to that in *Kenlin* v. *Gardiner*, (supra).

Thus it was clear that the considerations relating to lawful arrest had no application to the present case. The issue then resolved into the question whether under our law any other justification was available in the circumstances. In approaching this question it is, I submit, important to bear in mind that the onus of showing justification is on the police and the absence of authority ought to be conclusive against them.

Turner J. concluded that the authority for arrest without warrant, afforded by the sections of the Crimes Act mentioned, constituted the only defence available in this country by way of justification for a constable to restrain the liberty of another on mere suspicion of a criminal charge against that person. He could find no authority at common law for the proposition that the reasonableness of the action of a constable in restraining a plaintiff, short of formal arrest, is a defence to an action for false imprisonment. At page 352 he considered that the reported decisions turned exclusively on justification for formal arrest, "and in these the defence has always been tested by the question, Did the constable (in arresting the plantiff) have reasonable and probable ground for believing that the plaintiff had committed a felony".

McCarthy J. put this defence in its true perspective when he stated at page 358:

> Now when it is said in the books that the defence of reasonable and probable cause, or grounds, to employ the word found in our statute, is open to a police officer, the statement should be confined to the defence based on suspicion of an offence for which the plaintiff could be arrested without warrant. It is not an omnipresent defence, it does not entitle

> the officer to rely on the reasonableness of his actions as an all embracing justification in all cases no matter what his legal powers might have been. It only applies when the legal justification pleaded is that the person he was arresting had committed an offence for which the offender could be arrested without warrant.

The court did point out that the reasonableness of the constables' actions would be an important factor in assessing damages, but held that Hardie Boys J. had failed to confine the defence to its true area.

Each member of the Court of Appeal made a special point of denying the power of a constable to detain a suspect while inquiries are being made.

MacArthur J.'s remarks at page 361 have already been quoted. Turner J. at page 354 declared:

> It is not sufficient for the constable to say:
> I may be going to arrest you; I do not yet know; but I will restrain you in the meantime, while inquiries are made. The citizen is entitled to inquire from the constable whether or not he is arrested. If he is not arrested he must be free to go his own way without restraint or molestation. If he is arrested, on the other hand, it must be upon grounds justified by the law.

Similarly, McCarthy J. said at page 359:

> I reject the Solicitor-General's submission that there can be some permissible form of custodial restraint falling short of arrest and which is not exercised in pursuance of a decision to arrest. I know of no satisfactory authority for the submission. No statute authorises it, and no case holds it directly.

He went on to point out that although the case of *Peacock and Hoskyn* v. *Musgrave and Porter* [1956] Crim. L.R. 414 did appear to suggest that the existence of reasonable and probable cause was a justification at law for stopping and detaining the plaintiff for questioning, the report was by no means satisfactory and he doubted whether the judge in that case would have conceded the power of the police to detain except in the course of arrest.

McCarthy J. added at page 360:

> but if he did, then with great respect I cannot agree, for I think that the proposition is contrary to the law of England which admits no interference with the subject's liberty which is not authorised by law.

The question whether or not the police have the power to detain a suspect in circumstances where they have no power to arrest has been the subject of much discussion and debate in recent years. The overwhelming weight of academic opinion has been in favour of the

view that no such power exists.[9] The courts have pointed out that the power to arrest is one which may be exercised only in strict accordance with the law.[10]

McCarthy J. in *Blundell's* case stated at page 357:

> One fundamental rule of the common law which we have inherited as part of the British system of justice is that any restraint upon the liberty of a citizen against his will not warranted by law is a false imprisonment.

In the great case of *Christie* v. *Leachinsky* [1947] A.C. 573 Lord Simonds in his celebrated speech said at page 591:

> I would say that it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. And I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful. . . .
>
> Is citizen A bound to submit unresistingly to arrest by citizen B in ignorance of the charge made against him?
>
> I think my Lords that cannot be the law of England. Blind unquestioning obedience is the law of tyrants and of slaves; it does not yet flourish on English soil.

It was against the backdrop of such principle that *Blundell's* case was decided.

The decision in *Blundell's* case clearly accords with the tradition of the common law in protecting individual liberty. No authority in law could be found to support the claim of justification by the respondents and this was conclusive on the issue of false imprisonment. It is respectfully submitted that in law the decision of the Court of Appeal is entirely correct and that, despite opinions to the contrary,[11] no power of detention against the will of any person without arrest, for any purpose whatsoever, has ever been conceded at common law.

The Desirable Scope of Police Powers

As the law has been defined in relation to detention without arrest, it remains to be considered whether the law so stated deals adequately with the problems and realities of law enforcement. It is necessary to ask whether, in the light of *Blundell's* case, legislation is necessary to give the police the power to detain a person who, under the present law, could not lawfully be arrested, but who has aroused police suspicion.

It must be recognised that an efficient police force with adequate legal powers is necessary if society is to secure itself against crime. It is however, in the opinion of this writer, increasingly clear that many

9. See Glanville Williams [1960] Crim. L.R. 325; Denys C. Holland [1967] C.L.P. 104; Lord Devlin—*The Criminal Prosecution in England* (1960), 68.
10. *Barnard* v. *Gorman* [1941] A.C. 378 at 390.
11. For example see [1959] Crim. L.R. 79.

of the procedures upon which the police rely to carry out their duties depend on the voluntary submission of the public and the legal authority for these procedures is highly ambiguous and in some cases non-existent. Where the police need powers to carry out the duties that society expects of them those powers should be conferred by law.

There is substantial evidence that in England the police exercise a power of detention without arrest.[12] I would submit that the same is true in New Zealand. However, in many cases the police are able to act effectively without infringing the law. Most people do not realise that they cannot be detained short of arrest, and submit voluntarily to police requests. The police certainly do not inform a suspect of his rights in this respect, and in the past it was possible to obscure these rights as it was uncertain exactly what they were. *Blundell's* case is the only reported decision in New Zealand on the point. Yet one may well ask: in the light of the decision in that case, the spread of education, the growth of education, the growth of anti-authoritarian feeling particularly amongst the young, the increase in social regulations bringing usually law abiding citizens into conflict with the police, will the same degree of co-operation and submissiveness on the part of the public continue? As long as there is pressure upon the police to keep down the rate of crime they are likely to disregard or evade restrictions which they feel to be unreasonable and to develop practices for which there is no legal authority. Yet if actions of the type in *Blundell's* case became more frequent a grave defect in police powers might become apparent. It would then be necessary to examine closely the legal framework within which the police are expected to act and to remove any restrictions and uncertainties for which there is no sufficient justification. Once certain practices are seen to be necessary for efficient police functioning and are supported by a substantial body of public opinion, then the law should be reformed. As Lord Devlin has stated:

> [There is] an urgent social necessity that time wasting procedures and traditional ideas which impede conviction of the guilty should be swept away.[13]

Yet it is vital to recognise just what is involved in the question of reconciling police power and individual freedom. While it is important that crime should be detected and criminals punished, it is necessary for all pre-trial procedures to provide adequate guarantees for the protection of those involved, and the law should protect the guilty as well as the innocent. Moreover, the problem transcends the fate of suspected or accused persons as individuals. It is the atmosphere of freedom as against a feeling of fear and repression on the part of society as a whole that is put in the balance every time the police are granted further powers. It must be recognised that some police practices have an impact on society at large, creating or destroying a sense of confidence and security. However efficient such a practice

12. See Glanville Williams [1960] Crim. L.R. 325 at 328.
13. (1966) 57 Journal of Criminal Law, Criminology and Police Science, 123 at 128.

may be, it could well be incompatible with many other ends of government and society. Measures which do not comply with the minimum ethical standards of the community by reason of their unfairness or their failure in any way to respect basic human rights must be for that reason alone condemned, whether or not they are proved to be efficient. Our way of life depends to a great extent on the way the police discharge their duty. Thus in a democracy the contribution of the police could well be measured even more by what they do not do than by their positive accomplishments.

> The worth of a society will eventually be reckoned not in proportion to the number of criminals it crucifies, burns or hangs or imprisons but rather by the degree of liberty experienced by the great body of its citizenry.[14]

To enable the police to detain a person who under our present law could not lawfully be arrested would be a significant encroachment into civil liberties. Any deprivation of liberty, even when peaceably affected and legally authorised, is a violent invasion of human freedom and cannot be justified except for substantial cause. Any proposal for reform ought to be approached with caution. The dangers of abuse of power by irresponsible policemen are manifest. If new powers are granted there will be a need to incorporate adequate safeguards and to formulate clear tests and principles upon which the police are to act. The formulation of such safeguards and principles will pose great problems, but this does not appear to be sufficient reason for avoiding reform if the power of detention is seen as vitally necessary for efficient police functioning.

It is submitted that police powers must always be examined in relation to law enforcement problems in the society in which those powers are to be used. Greater powers may be needed for dealing with specific problems, and an illustration of this, whatever the merits of the case, can be seen in the grant of additional powers to the police in dealing with the illicit use of drugs. If a power of detention is seen to be necessary in a particular situation the reason for the detention ought to be considered. Different powers and safeguards may be necessary in different situations. For example, the grant to the police of a power to detain for questioning, involving the delicate problems of the duty to answer questions and the admissibility of confessions, requires special examination. These problems do not arise where, as in *Blundell's* case, the police merely wish to prevent the suspect's escape while inquiries are being made from some third person. Similarly, the police may wish to detain a person in order to search him or to prevent his committing a crime, and these situations may again require different powers and safeguards.

In applying the safeguards the courts, and not the police must be the final arbiters. It would not be sufficient for the law to state that a police officer is justified in detaining any person who has aroused suspicion if the grounds for that suspicion are not able to be examined

14. Schwartz 103 U.P.A. L. Rev. 157, 158 (1954).

in court. The power to detain is potentially a dangerous weapon in the hands of the police who could use it simply to harass citizens. Some writers, in advocating a power of detention, have suggested that a time limit of not more than two hours would provide a good safeguard, and furthermore have suggested that the use of the power should be limited to police investigations into serious crimes.[15]

If a power of detention is coupled with these or other safeguards and is used by the police with wisdom and restraint, the risk of an occasional temporary loss of liberty by an innocent citizen may be more than offset by greater efficiency in the discovery of crime, and without paying too great a price in life as a whole. However, such an authorised encroachment into the liberty of the subject may seem alarming. As McCarthy J. said in *Blundell's* case at page 357,

> The British people have always turned their backs positively on the grant of such powers to Police, no doubt bearing in mind how often history has demonstrated that even in modern and sophisticated communities such powers can be distorted into instruments of oppression and injustice.

Even so, the authorised extension of power would seem to be preferable to a situation in which the police, in order to function efficiently, exercise powers for which there is no legal justification. It is submitted that in such circumstances it would be socially desirable to amend the law in order to confer greater powers on the police but at the same time to ensure that they keep strictly within all the bounds that are thought necessary for the protection of civil liberties.

C. W. Reid

15. Glanville Williams [1960] Crim. L.R. 325; Denys C. Holland [1967] C.L.P. 104.

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