GEYSER v. ASHMAN.

1909. *November* 23, 24, 25 and 26. MAASDORP, C.J., and FAWKES and WARD, JJ.

Criminal procedure.—Wrongful arrest.—Crime and offence.—Nominal damages.—Costs.

Where A had arrested G without a warrant for a contravention of sec. 41 of Ordinance 8 of 1903 by supplying a native with liquor in A's presence, *Held* (WARD, J., dissenting), that the arrest was wrongful.

Held, further, that as only nominal damages could be awarded, and as G had failed to establish the alibi set up, G should pay A's costs for the last three days of the trial and all costs in connection with A's witnesses.

The plaintiff was a speculator of Wepener and the defendant an official in the Criminal Investigation Department of the O.R.C. police. The plaintiff claimed £100 damages for wrongful arrest and false imprisonment in that the defendant had arrested him without a warrant for an alleged contravention of sec. 41 of Ordinance 8 of 1903. The defendant in his plea justified the arrest on the ground that the plaintiff had committed the crime alleged in his presence, and that therefore by sec. 24 of Ordinance 12 of 1902 he was authorised and required to arrest him.

The evidence for the defence went to show that on the 21st August last the defendant and one Corporal Touzel had concerted a plan to trap the plaintiff. They had employed a boy named Molefi for the purpose. On the morning of the day in question they all three met by arrangement about a mile from the town. From here they sent Molefi on horseback into the town. The defendant and Touzel waited in hiding in a spruit close to the spot where they had met. Molefi returned after 5 o'clock and waited within view of the defendant and Touzel. Shortly before 6 o'clock they saw a man, whom they identified as the plaintiff, come from the direction of the town,

on the horse Molefi had ridden in the morning, dismount and hand twelve bottles of brandy over to Molefi. Plaintiff then returned to the town, and the defendant and Touzel, after marking the bottles and handing them over to a native constable who had had charge of their horses, followed plaintiff into the town and arrested him in his house. The plaintiff set up an alibi, and called four witnesses to prove that on the afternoon alleged he had not been away from his house. It further appeared from the evidence that the plaintiff had been indicted before the circuit court on the charge on which he had been arrested by defendant, but that on his counsel raising the question as to the legality of his arrest he had been discharged. At a subsequent date he had been tried for the same offence before the assistant resident magistrate of Wepener and acquitted.

Dickson (with him *Brebner*), for the plaintiff: Sec. 24 of Ordinance 12 of 1902 authorises police officers to arrest "any person committing any crime or breach of the peace in their presence." The word "crime" does not contemplate a statutory offence. The section is borrowed from sec. 12 of Ordinance 73 of the Cape Colony. Compare the corresponding Ordinance of the Transvaal (1 of 1903, sec. 23), where the word "offence" is used, which has been previously defined as "any act or omission punishable by law." See *Encyclopedia of the Laws of England*, vol. 1, *sub voce* "Arrest"; Maasdorp's *Institutes of Cape Law* (vol. 4, p. 76); *Willemse* v. *Lategan* (12 S.C. 335); and Ordinance 7 of 1902, schedule B, sec. 99; *Rademeyer* v. *Van der Merwe* (12 S.C. 450).

[MAASDORP, C.J.: It would seem that the right to arrest granted under the Police Offences Ordinance would otherwise not have been necessary.]

Under the Liquor Licensing Ordinance, all offences are proper for the summary jurisdiction of the magistrate. Special power of arrest is given for certain offences, and the principle *expressio unius est exclusio alterius* applies.

Blaine, K.C. (with him *P. U. Fischer*), for the defendant: As to the definition of "crime," see Huber, *Heed. Rechts.* 6, 1, 3;

Van der Linden (Juta's translation), p. 174; *Boyes* v. *Southey* (2 Roscoe, 125); Stroud's *Judicial Dictionary, sub voce* "Crime and Offence." In the statute itself the words are interchangeable; see secs. 52, 53 and 55 of the Ordinance.

[FAWKES, J.: Why the addition of the words "breach of the peace"?]

The additional words are unnecessary, and can only have been added owing to greater caution of the draughtsman or his carelessness, but must not be presumed to have altered the law. Compare Maxwell's *Interpretation of Statutes* (2nd ed. p. 379) on imperfect alteration. The Transvaal Ordinance uses the more limited word "offence," which it defines and then actually incorporates the word "affray," which was clearly unnecessary, and arose probably from a slavish copy of some other statute. The suggested difference in meaning can clearly not depend on the gravity or mildness of the offence. See the Extortion Ordinance of 1908, where a penalty is admitted up to twenty years, but there is no special provision as to arrest in the Ordinance. The right of arrest specially granted in sec. 35 of Ordinance 21 of 1902 is accompanied by a proviso in order to limit the right which already existed under Ordinance 12. The two Cape cases quoted are not in point. In *Willemse's* case there is merely an *obiter dictum*, and in *Rademeyer's* case the crime was not committed in the presence of the policeman. DE VILLIERS, C.J., required the issue of a summons in these cases, because the arrest was being made on suspicion. See magistrates' court rule 68 (C.C.), and sec. 99, sch. B, of Ordinance 7 of 1902 (O.R.C.). The only case directly in point is *Coetzee* v. *Nimmo* (18 E.D.C. 33), where KOTZÉ, J.P., clearly laid down, under exactly similar circumstances, that the policeman was justified in arresting without a warrant. The charge was there also under the Liquor Ordinance (Cape).

MAASDORP, C.J.: In this case the plaintiff sues the defendant, a superintendent in the Criminal Investigation Department, for damages for false imprisonment on the ground that he had arrested him and put him in gaol for a contravention of sec. 41 of Ordinance 8 of 1903, though as a matter of fact no crime

had been committed in his presence. Defendant admits that he arrested plaintiff without a warrant, but he alleges that the arrest was justified under sec. 24 of Ordinance 12 of 1902. Now, what is the meaning of this sec. 24? Does it apply to every minor offence? For the sake of argument let us assume that the offence was committed in defendant's presence. The section reads: "All constables, police officers and other officers of the law proper for the execution of criminal warrants are hereby authorised and required to arrest any person committing any crime or breach of the peace in their presence." Does the word "crime" there used cover any minor offence such as the breach of a municipal regulation or other minor statutory regulation? There is a difference of opinion on this point. My brother FAWKES and I think that the word "crime" cannot be considered to cover an ordinary offence, but only means a crime under the common law. The word "offence" has in our view a different meaning from the word "crime." Every crime is an offence, but every offence is not a crime. The section uses the word "crime," and specifies an offence on the border-line—namely, a breach of the peace and also an affray. The legislature says in effect, "You may take it, if you have any doubt about it, that a breach of the peace is a crime for the purpose of this section, but you cannot arrest for every offence." It would be a sad state of things if any one of us, who had contravened a section of a municipal Ordinance, *e.g.* by leaving a gate open on a main road, could be seized and carried off to gaol. Life would be intolerable if one could thus be rendered liable to be kept a night in gaol for such a paltry offence. We are of opinion that the term "offence" can be distinguished from the term "crime." The latter does not include a statutory offence unless the statute says that the offence is to be considered a crime. Under these circumstances only does an offence justify an arrest without a warrant. My brother WARD holds that the word "crime" will cover an offence like the one before the Court. On the facts we do not differ much, but the difference of opinion on the law point leads to rather different judgments. My brother WARD'S goes further than that of my brother FAWKES and myself.

The plaintiff's action is for damages for false imprisonment. The defendant raises the defence that the arrest was a legal one. To meet that plea the plaintiff sets up an alibi and produces a number of witnesses to establish it. I must say that, after the defendant's witnesses had given their evidence, his seemed to me a very strong case indeed. It was very difficult to see how the plaintiff was going to upset it. We kept open minds, however. As to the evidence of the alibi, we did not think so much of Mrs. Philipson's evidence, because women are inclined to imagine they hear more than they really do; but Mr. Strohmenger impressed us. He gave his evidence in so reliable a manner that the view I had begun to form was upset to a very large extent. He swore that from 4 o'clock till dark he was conversing with the plaintiff in front of his house all the time. The plaintiff himself followed in the same line, saying that Strohmenger and Van Vuren were there the whole afternoon, but unfortunately evidence came from Strohmenger and Van Vuren to the effect that they never saw Molefi and heard no conversation between him and young Geyser, the plaintiff's son. In order to see how this would square with the evidence given by Strohmenger, we asked the plaintiff when that conversation took place, and he was at once ready for the occasion. He said, "It was immediately after my son had arrived. I then said, 'Do not buy the horse till he gets a pass.'" He said that neither Strohmenger nor Van Vuren were there. Why? Because he had sworn that they had not heard the conversation. They had been there since 4 o'clock, but just at that moment they had apparently disappeared, and if they were not there when the plaintiff's son arrived their observation must have been inaccurate. No doubt they came here to speak the truth, but did they give a correct account of the facts as they occurred? When the plaintiff's son came he says they were not there. When he went into the house and then went to Fraser's store and returned the first time they were not there, nor were they there when he came back the second time. The evidence of plaintiff and his son go to upset the alibi altogether. If at any time they say they were there and

we find they were not, their evidence of the alibi is useless. As to the question of time, the son says he arrived about 4·45 from Basutoland. There is a difficulty whether we find Strohmenger and Van Vuren were there before or most of the time after his arrival. At 6·45 plaintiff was arrested. The son accounts for thirty-five minutes including both occasions on which he went to Fraser's, or an hour at the outside. At 4·45, when he arrived, Strohmenger and Van Vuren were not there. This brings us to about 6 o'clock, the time of the occurrence at the spruit. We are told the sun set just before 6 o'clock. That may have been astronomically the correct time for the sun to set, but not necessarily the exact time it set near Wepener, owing, *e.g.* to the interposition of hills. It was just about 6 o'clock, and that was the time Strohmenger and Van Vuren ought to have been able to swear to the plaintiff's being there. But they were not there themselves. Taking it from the other point of view—the son says he was at the house at 4·45. If we add an hour to that it brings us to 5·45 P.M. When the son came back for the last time he passed Strohmenger, and when he got back to the house Van Vuren had left. So that at 5·45 both of them had left, and the crime was committed about 6 o'clock. Either way we look at it they were not there just when the crime was being committed. Mrs. Philipson's evidence cannot be regarded as of much value. She was supposed to have been there all the afternoon, but she did not see Molefi having a conversation with plaintiff's son, though she was there when the son arrived. She does not say Strohmenger or Van Vuren went away: she says they were there all the time. What is the value of her evidence? She evidently wanted to tell the truth; but a witness's intentions may be good and the evidence given be of no value. The evidence of plaintiff and his son is not of the same weight as that of Strohmenger and Van Vuren. There is much one might criticise, *e.g.* the explanation given by the plaintiff and his son as to how the horse ridden by Molefi came into plaintiff's stable; their account is very far-fetched, whereas Molefi's is natural. The plaintiff and his son say that it was there because they had a conversation with Molefi in regard to the purchase of a

horse. The arrangement they refer to was an extraordinary one. They say they had told Molefi to bring some horse and they would do business. They had agreed as to the time when the horse was to arrive. When it does arrive the son takes no notice of it, and does not even take the trouble so much as to look at it. All he does is to tell Molefi to go and get a certificate, a certificate which might eventually prove quite useless. We are asked to believe that Molefi proceeded to walk twenty-five miles when he might have ridden, especially as he would require the horse itself, as it had to be described to the authorities who were to issue the certificate. We have the fact that the horse was there in plaintiff's stable. The police recognised the horse and the plaintiff at the spruit. To ask us to hold that in the month of August it is impossible to recognise at sunset a man at a distance of less than the length of two cricket pitches is expecting too much. We know cricket can be carried on for a considerable time after sunset. The alibi therefore fails, and the defence set up that plaintiff had committed a breach of sec. 41 of the liquor law in the presence of defendant has been proved. In the view my brother FAWKES and I take of the law point judgment must be for the plaintiff for a farthing damages. I wish to have the questions of costs argued.

FAWKES, J.: I entirely agree with the judgment given by the CHIEF JUSTICE, and only wish to add a few remarks in view of the difference of opinion which exists upon the construction which should be placed on the words "crime or breach of the peace," which occur in sec. 24 of the Criminal Procedure Ordinance of 1902.

The word "crime" is not always used in the same sense in Acts of Parliament. Sometimes it is employed to denote every breach of the law which is punishable; sometimes in the restricted sense of serious crimes which would be clearly beyond the proper exercise of summary jurisdiction. The interpretation to be placed on the word must depend, I think, upon the context.

In this case the police claim that they had the right to

arrest for the offence of supplying liquor to a native committed in their presence, by virtue of the powers given them in sec. 24. The offence in question is clearly a matter for summary conviction, and the exercise of this jurisdiction is expressly provided by the enactment creating the offence, the punishment being a fine and imprisonment in default. Mr. *Blaine* contends that the word "crime" includes every offence punishable by law, and asks us to treat the words "or a breach of the peace" as mere surplusage. When words are introduced into a section of an Ordinance we must assume they are placed there with some object, and a meaning should be given them if possible. The object of the legislature to my mind is clear. To give the power of arrest and the right to interfere with the liberty of the subject for any trivial breach of a regulation such as municipal bye-laws would be unnecessary in the interests of justice, and liable to abuse; but where a breach of the peace is committed in the presence of a constable the interests of the public require an arrest to preserve good order. The fact that in this section a breach of the peace is singled out from the many minor offences usually dealt with by magistrates under their summary jurisdiction shows clearly that this section intended to restrict this power of arrest in minor offences to breaches of the peace, and the word "crime" being used in context with these words compels us, I think, to confine the word "crime" as used in this section to the more serious crimes which would be clearly improper for the exercise of a magistrate's summary jurisdiction.

WARD, J.: In this case the police suspected the plaintiff of supplying intoxicating liquor to natives contrary to the provisions of sec. 41 of Ordinance 8 of 1903, and took steps to trap him. The defendant, a member of the Criminal Investigation Department of this colony, swears that he saw the plaintiff supply liquor to a native, and in consequence arrested him, and he pleads that he was justified in making the arrest by sec. 24 of Ordinance 12 of 1902 (the Criminal Procedure Ordinance). That section reads as follows: "All constables, police officers, and other officers of the law proper for the execution of criminal

warrants are hereby authorised and required to arrest any person committing any crime or breach of the peace in their presence."

The Court finds as a fact that the plaintiff did supply liquor to a native, and that the defendant saw him. The question upon which the Court is divided is whether the section above quoted affords a justification to the defendant. In my opinion it does, and in this I have the misfortune to differ from my brethren.

It has been argued for the plaintiff that even if defendant did see the plaintiff commit the offence alleged, defendant was not justified under sec. 24 in arresting him, and three reasons are given for this: (1) That the word "crime" in that section does not refer to offences created by statute; (2) that it applies only to more serious offences; and (3) that it is unlikely that the legislature would empower the police to arrest for any offence, however trivial, simply because it was committed in their presence.

As regards the first contention, if there is any authority to support it there would be an end of the case. I have, however, never seen a distinction drawn between crimes which are created by statute and crimes at common law. The definitions of "crime" to which I shall presently refer make no distinction, and I can find nothing in the section with which we are dealing which limits the expression to common law crimes. Last year the legislature of this colony passed an Act (the Extortion Act of 1908) imposing penalties of twenty years' imprisonment with hard labour for certain forms of blackmailing, and it would be an astonishing position that a policeman in whose presence such an offence was committed could not arrest the blackmailers merely because it was a statutory offence.

As to the second contention, What does the word "crime" imply? In the latest treatise on criminal law published—I refer to the article on criminal law in Lord Halsbury's *Laws of England*, vol. 9, art. 499—"crime" is there defined as "an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment." Lord ESHER, M.R., in *Mogul Steamship Co.*

v. *McGregor, Gow & Co.* (23 Q.B.D. p. 606) says: "An illegal act which is a wrong against the public welfare seems to have the necessary elements of a crime." In Erskine's *Institutes*, a work of authority on Scots law, it is stated that "offences against the laws enacted for the good government of a country are truly crimes against the State" (vol. 2, p. 1037). If these definitions accurately state what a crime is, then, in my opinion, there can be no doubt that the act committed by the plaintiff was a crime. It is contended, however, that a more restricted meaning must be given to that word in sec. 24 of the Criminal Procedure Ordinance, and one of the grounds upon which it is so contended is this, that whereas in the other sections the expressions "crime or offence" or "crime and offence" are used, the word "crime" only is used in sec. 24. It is contended that in the Ordinance the expression "crime" refers only to the more serious contraventions of the criminal law, and that the expression "offence" refers to minor contraventions only. It would be idle to deny that the latter expression is so used, but never, so far as I am aware, without a qualifying adjective, such as "minor" or "police," or some similar expression. Taken by itself it is synonymous with "crime." COLLINS, J., in *Derbyshire Co. Co.* v. *Derby*, cited in Stroud's *Judicial Dictionary*, vol. 2, p. 1318, says: "*Primâ facie* an offence is equivalent to a crime." No definition is given in the Ordinance, or indeed in any other law, of "crime" and "offence," and there is nothing to show that they were intended to apply to infringements of the criminal law of higher and lower grades. On the contrary, an examination of the Ordinance will show that the expressions "crime," "offence," "crime or offence" and "crime and offence" are applied indiscriminately to all contraventions of the criminal law. And this use of two or more expressions to cover one idea is not peculiar to this Ordinance. We have the expression "goods and chattels," "lands, tenements and hereditaments," and in the English Interpretation Act, 1889, the English expression "felony" means, as regards Scotland, "a high *crime and offence*." In the Friendly Societies Act, 1896 (and many others), the English expression "misdemeanour" means, as regards Scotland, *crime and offence*.

As I have already stated, an examination of the Ordinance in my opinion clearly shows that the expressions "crime," "offence," "crime and offence" and "crime or offence" are all used in the same sense to denote contraventions of the criminal law generally. As to the two last-mentioned expressions being interchangeable, see sec. 12, clauses (*a*) and (*b*). The word "crime," apart from secs. 20 and 24, where it has obviously the same meaning, occurs alone in the following sections, namely, 17, 41 (where it is used interchangeably with the expression "crime and offence"), 53, 55, 56 (where it is used as equivalent to "offence," see sec. 52) and 58. In all these sections it is used in the sense of contravention of the criminal law generally.

Then as to the word "offence," which it has been suggested in argument means minor offence, it occurs by itself in secs. 10, 48, 52, 53 (where it is used interchangeably with "crime"), 64, 65, 67, 68, 69, 70, 79, 82, 84 and 87. In this last-mentioned section it is used interchangeably with "crime and offence," but in all it is clear that it refers to crimes generally. There is nothing to justify the suggestion that the expression refers to minor offences; on the contrary, the whole Ordinance shows that it is used in the widest sense. Thus the second contention in my opinion falls to the ground.

As to the third ground of objection, namely, that it is improbable that these wide powers of arrest for minor offences would be conferred on the police, I need only refer to the English Acts, 2 & 3 Vict. c. 47, and 10 & 11 Vict. c. 89, which confer on the police power to arrest without warrant for such acts as rolling a hoop or carrying a plank on a footpath. And quite recently an Ordinance was passed in the Transvaal which invests the police with power to arrest for "any act or omission punishable by law." If we are to go into the question of probability, is it not much more improbable that the legislature intended to impose on an ordinary policeman the duty of deciding on the spur of the moment by the light of nature (for neither the Ordinance nor any other law affords him any assistance) what acts amount to "crimes" for which he is authorised to arrest, and what are

merely "offences," arrest for which render him liable to an action for damages?

Two cases decided in the Supreme Court of the Cape of Good Hope, namely, *Willemse and Others* v. *Lategan* (12 S.C. 35) and *Rademeyer* v. *Van der Merwe*, at p. 450 of the same volume, have been referred to as laying down that arrests cannot be made for minor offences. It is only necessary to remark that the observations made by the court had nothing to do with the questions to be decided in those cases, and can only be regarded as *obiter dicta*. This seems to be the view taken by the Eastern Districts' Court in the case of *Coetzee* v. *Nimmo and Others* (18 E.D.C. 33), where the facts were precisely similar to those in the present case. There the court gave judgment for the defendants, members of the police, who had arrested the plaintiff on a charge of supplying liquor to natives. The law in the Cape and here is, as regards this matter, the same, and I have no hesitation in following the last-mentioned decision. In my opinion the judgment should be for the defendant with costs.

Blaine, K.C.: The plaintiff should be mulcted in costs. He has been using a court of justice to recover damages when he knew he had committed the crime he brought evidence to deny. He has grossly abused the legal machinery of the country.

Dickson: A successful party is never mulcted in costs. In cases where nominal damages are given there is generally no order as to costs. See *Marillac* v. *Lippert* (1876, Buch. p. 200); *Pullinger* v. *Harsant* (2 S.C. 111); *Rees and Others* v. *Willetts* (13 C.T.R. 1078).

[MAASDORP, C.J.: The attitude assumed by the plaintiff necessitated a longer trial than would otherwise have been required.

WARD, J.: See *Bosch* v. *Titley* ([1908] O.R.C. 27).]

MAASDORP, C.J.: There was a technical irregularity on the part of the defendant. If the plaintiff had stated his case just sufficiently to entitle him to damages on this ground, and, while admitting that he was guilty of the offence for which he had

been arrested, had contended that the defendant had acted illegally in arresting him without a warrant, the facts set up by the plaintiff would have been admitted and there need have been no evidence led, and counsel would only have had the law point to argue, which would not have taken more than one day. Plaintiff must, therefore, pay defendant's costs for the last three days of the trial and all costs in any way connected with the defendant's witnesses.

Plaintiff's Attorneys: *Botha & Goodrick;* Defendant's Attorneys: *McIntyre & Watkeys.*