

CLARKE *v.* BAILEY.

1933.

Crimes Act, 1900 No. 40, ss. 352 (2) (a)—Amendment Act, 1924 No. 10, ss. 12 (a), 13—Arrest by police constable—Offence punishable summarily—Removal to police station—Deviation—Delay—Search.

May 16,
17, 29.

Street C.J.
James J.
Davidson J.

A constable arresting a person under powers given by s. 352 (2) (a) of the Crimes Act, 1900, as amended by s. 12 (a) of the Crimes (Amendment) Act, 1924, must take him without delay, and by the most direct route, before a justice, unless the circumstances reasonably justify

1933.

CLARKE
v.
BAILEY.

a departure from these requirements. This sub-section gives such a constable power to search a person so arrested, where search is reasonably necessary and incidental to the arrest. Section 353A (1) does not restrict this power but, once the arrest has been completed and a charge made, extends the right of search to other constables.

Crimes Act, 1900 No. 40, s. 563 (1)—Action—Protection of official — Notice — Sufficiency.

C. caused a letter to be written to B., a police constable, which, although not expressly stated to be a notice of action, otherwise fulfilled the requirements of s. 563 (1) of the Crimes Act, 1900.

Held, that the letter constituted a sufficient notice of action.

NEW TRIAL MOTION.

This was an appeal in an action in which the plaintiff obtained a verdict for damages on a declaration charging (1) that the defendant, being a police constable, without warrant or reasonable cause, unlawfully arrested the plaintiff, and took him into custody upon a charge of having committed an offence under the Gaming Laws, and caused him to be searched, and searched him in the presence of certain clients and other persons; and (2) that the defendant "having arrested the plaintiff unlawfully in the office of the plaintiff and the parlour of an hotel caused him to submit to a search of his person and did search his person whereby the plaintiff suffered damage."

The defendant pleaded "not guilty," and also "not guilty by statute" and, in connection with the latter plea, referred to the following Acts and sections: No. 40 of 1900, s. 563; No. 25 of 1912, s. 58; No. 5 of 1901, s. 114; and No. 12 of 1908, s. 4. There was no plea of justification. The notice of action relied upon was a letter, written by the plaintiff's solicitor to the defendant, which did not contain the statement that it was a notice of action, but which set out the plaintiff's grounds of complaint, demanded payment of compensation and stated that, failing such payment, "we are instructed to proceed forthwith against you for the recovery of the same." The remaining facts are sufficiently set out in the judgment.

Badham, for the appellant. If the arrest was lawful, any subsequent acts of the constable which were merely in excess of duty were not unlawful. To become unlawful

such acts must be of such a nature as to be intrinsically unlawful, e.g., assault. But even if mere conduct in excess of duty might be unlawful, and give a right of action against the constable, the 4th and 5th questions were not apt. The jury should have been asked whether they found, on the facts, that the defendant acted in excess of his authority. A constable arresting, both in cases of felony and misdemeanour, has, at Common Law, and by statute, a right to search: *Nolan v. Clifford* (1 C.L.R. 429); *Barnett and Grant v. Campbell* (21 N.Z.L.R. 484 at 491); Crimes Act, 1900, ss. 352, 353A. This right arises out of the actual arrest, is incidental thereto, and can lawfully be exercised when it would be reasonable so to do; *Field v. Sullivan* ([1923] V.L.R. 70 at 80); *Barnett and Grant v. Campbell (supra)*; *Dillon v. O'Brien and Davis* (20 L.R.Ir. 300). It is similar to the right to handcuff, on arrest: *Reg. v. Taylor* (59 J. P. 393). No action will lie unless the constable acted unreasonably. If there was any evidence to show that he acted unreasonably the question of unreasonableness should have been left to the jury but there was no such evidence.

A notice of action, as required by s. 563 of the Crimes Act, was not given. The letter relied upon did not purport on its face to be a notice of action, and was conditional only. Such a letter does not satisfy the statute: *Union Steamship Company of New Zealand, Ltd. v. Melbourne Harbour Trust Commissioners* (9 A.C. 365); *Mason v. Birkenhead Improvement Commissioners* (6 H. & N. 72); *Norris v. Smith* (10 A. & E. 188); *Aslett v. Sydney Municipal Council* (6 L.G. Rep. 130); *Upper Chapman Roads Board v. Jupp* (14 W.A.L.R. 167).

Spender, for the respondent. The letter was a sufficient notice. In *Union Steamship Company of New Zealand Ltd. v. Melbourne Harbour Trust Commissioners (supra)* the alleged notice did not state that an action would be brought. In *Mason v. Birkenhead Improvement Commissioners (supra)* the actual ground of the decision does not appear in the judgment. *Norris v. Smith (supra)* is inapplicable as there the notice was bad in any event, and only one judge relied upon the fact that the notice was not unconditional. The policy

1933.

CLARKE

v.

BAILEY.

1933.

CLARKE
v.
BAILEY.

of the Court now is to construe alleged notices liberally, where no hardship will be caused the defendant thereby: *Aucher Ltd. v. The Sydney Harbour Trust Commissioners* (31 S.R. 73; 48 W.N. 1).

Arrest does not involve the necessity to search which, to be legal, must be justified either by statute or at Common Law. The only right of search given by s. 353A of the Crimes Act is a right to search at a police station after a formal charge has been made. Such a right, being an interference with the liberty of the subject, must be given in express terms. A right to search on arrest is nowhere given in the Crimes Act. Section 352 adds nothing to the Common Law. The powers of a constable to search on arrest are derived, not from Statute, but from the Common Law: *McLaughlin v. Fosbery and Others* (1 C.L.R. 546); and are limited to cases where it is necessary to search in order to prevent violence or escape, or to maintain the arrest. Even if s. 353A does give a right to search on arrest, it affords no defence here as, when searched in the hotel, the plaintiff was not in lawful custody. It was the defendant's duty to take the plaintiff to the nearest police station by the shortest route. The deviation to the hotel from the direct route was outside the constable's duty and both it, and the search in the hotel were unlawful: *Wright v. Court* (4 B. & C. 596); *Morris v. Wise* (2 F. & F. 51); Stephen's Commentaries 17th Ed., Vol. 4, p. 273; Halsbury's Laws of England, Vol. IX, p. 306. The burden of proof lies on the constable to show that his actions were justified and that what he did was necessary or reasonable: *Leigh v. Cole* (6 Cox. C.C. 329). A plea was filed of not guilty by statute. This is the only plea under which justification can be raised, and it only goes to the right to search. If the defendant relies on reasonableness, in connection with the deviation to the hotel, he should have seen that a question as to reasonableness, in this respect, was left to the jury. This he failed to do. In any event no reasonable jury would be entitled to say that there was any necessity to search, or even if there was, for the manner in which, and place where, it was carried out.

Badham, in reply. At Common Law a constable would have a right to search in circumstances such as these: Halsbury's Laws of England, Vol. XXII para. 1027; Stone's

Justices Manual, 64th Ed., 202. The declaration states that the defendant was a police constable and that he unlawfully arrested and searched. The plaintiff therefore, took upon himself the onus of proving the unlawfulness of the act, and, as this raises the question of justification, there was no need to plead it specifically. There is no duty on a constable to take a person, whom he arrests under the powers given by s. 352, before a justice. The word "may" governs the whole section, including the word "take." Even if "may" is mandatory, the word "found" imports the act of searching. Power to search given by s. 353A is a power to search at any time after arrest. There is no definition of the word "charge." This word must be given its ordinary meaning, i.e., an allegation against a man of having committed an offence, and does not mean a formal charge before a justice.

1933.

 CLARKE
 v.
 BAILEY.

Cur. adv. vult.

May 29.

The following judgment, with which STREET C.J. and JAMES J. agreed, was read by

DAVIDSON J. [after referring to the declaration and pleas, continued :] The Statutes mentioned in connection with the plea of not guilty by statute related to an issue as to whether the plaintiff had given a sufficient notice of action in accordance with the provisions of s. 563 of the Crimes Act. Any objection on this ground, however, was overruled during the argument for the reason that, whilst not expressly stated to be a notice, the letter of demand relied upon provided, substantially, all the information and for all other matters required by the Statute.

There was a complete conflict of evidence at the trial, the plaintiff and his witnesses asserting that the defendant arrested the plaintiff at his office in the vegetable market, partly searched him there, and afterwards took him to the bar parlour of an hotel across the road and completed the search whilst he was made to hold his hands above his head.

The defendant denied arresting or searching at all in the office, but said that, upon information received, he told the plaintiff that a private interview was required, and that, thereafter, the plaintiff's own request, that he should be taken

1933. to the hotel so that he might disclose everything he had on
 CLARKE his person, was accepted, and there was no compulsory search
 v. of any kind.
 BAILEY.
 Davidson J. Five specific questions were left to the jury which, with the
 — — answers given, were as follows :—

“ Q. 1. Did the defendant arrest the plaintiff ? A. Yes.

Q. 2. If so, did he at the time of such arrest reasonably suspect that the plaintiff had committed an offence under the provisions of the Gaming and Betting Act ? A. Yes.

Q. 3. If the defendant arrested the plaintiff unlawfully, what damages do you find for the arrest, the manner of the arrest, and subsequent happenings ? A. Not arrested unlawfully.

Q. 4. If the defendant arrested the plaintiff lawfully, did the defendant subsequently compel him to undergo search in the hotel ? A. Arrested lawfully ; was compelled to undergo search in hotel ; damages £250.

Q. 5. If the arrest was lawful, is the plaintiff entitled to any damages on account of search in office ? A. No.”

Several grounds of appeal have been submitted, but substantially they may be summarised in the contention, on behalf of the defendant, that, once it appeared that the arrest was lawful, the right of search at the office and hotel also lawfully existed, or, at least, was justified in the circumstances.

Objection was taken at the trial to the 4th question, but only upon the ground that the lawful arrest would, of itself, justify the search at the hotel, and no further objection was taken to the summing up, although it is now claimed that the learned trial Judge was in error, by reason of the following directions :—“ There is another aspect of the case which I think might be put to you, and I have framed a question accordingly, and that is, supposing the arrest was lawful, supposing the constable, when he arrested him, had reasonable suspicion that he had committed an offence, the plaintiff complains that, nevertheless, even if the arrest was lawful, taking him over to the hotel and searching him there was unlawful, so I have framed another question in this way : ‘ If the defendant arrested the plaintiff lawfully, did he subsequently compel him to undergo search in the hotel and, if so, what damages do you find ? ’—because it appears to me

that, even if the arrest was lawful, the plaintiff is entitled to complain that he was compelled to go to the hotel and undergo search there. So the question will be, if you consider the arrest lawful, was he compelled to go to the hotel? If the defendant had made a lawful arrest, is there any reason that suggests itself to you why he should have compelled the plaintiff to go over to that hotel to be searched when he might have taken him to a police station where search would have been quite proper and justifiable? These are matters that you must consider."

1933.

CLARKE
v.
BAILEY.

Davidson J.

The argument submitted on behalf of the appellant raises the questions as to the power of a constable to arrest persons, and to keep them under arrest, and as to the extent of the right of search, in such circumstances.

Section 352 of the Crimes Act, 1900-1924, provides that any constable may, without warrant, apprehend any person whom he, with reasonable cause, suspects of an offence punishable on summary conviction, and take him and any property found upon him before a justice to be dealt with according to law.

At common law it was compulsory for a constable, in order to justify an arrest, to shew that he had taken the arrested person without delay, and by the most direct route, before a justice, unless some circumstances reasonably justify a departure from these requirements: *Wright v. Court* (4 B. & C. 596). And, in my opinion, the effect of the section is merely to reinforce the common law principle, and is not intended to give the constable discretion in the matter except to the same extent as existed before.

Accordingly, unless there are some circumstances which would reasonably warrant the constable in taking the plaintiff to the hotel, such an act would be unlawful and a trespass. The jury were asked to consider whether they could find any such circumstances, and answered in the negative, and, seeing that the defendant's only allegation was that the plaintiff was not taken to the place compulsorily but only at his own request, when that version of the facts was not accepted no evidence of justification appears.

1933. Section 353A of the Act provides that, where a person is in lawful custody upon a charge of committing any crime or offence, any constable may search his person and take from him anything found upon his person.

CLARKE
v.
BAILEY.

Davidson J.

But the terms of the three sub-sections to this section indicate clearly that the intention of the Legislature was directed to the time when an arrested person is in custody after a formal charge had been laid against him, and it contemplates search not merely by the arresting constable but also by any other in the police station.

Apart from the statute, however, there was, at common law, a right of search, the necessity of which depended on the circumstances in each case. It was based upon the principle of safety in some cases, and in others on the interests of justice, in order that evidence of crime might not be destroyed or lost : *Dillon v. O'Brien and Davis* (20 L.R. Ir. 300).

Moreover, s. 352, by requiring the constable to bring the arrested person to the police station with any property found upon him, clearly appears to authorise a search for such a purpose.

It is claimed that, if it was intended that such a thing should be allowed, it was only to the extent permitted at common law, but when the right to arrest was extended to the case of offences punishable by summary conviction there seems to be no reason why there should not also be the extended right of search, as the section seems to contemplate.

And, in my opinion, s. 353A was not intended to restrict the powers of arresting constables, but only to extend them, in amplified form, to others, after the arrest was completed and a charge actually laid.

There was no reason, having regard to the manner in which the counts in the declaration were framed, for the defendant to plead justification, as the plea of not guilty would be sufficient to raise the issue whether the defendant's acts were lawfully done : *Bullen & Leake, Pleadings*, 3rd Ed., 697.

But, in order that the defendant should be able to justify his right of search, he would have to establish that it was reasonably necessary and incidental to a valid arrest. And, as it appears on the evidence that there were no circumstances, having regard to the jury's answers, to justify the constable

in taking the plaintiff to the hotel, the power to search failed with the right to retain under arrest in such conditions.

1933.

CLARKE

v.

BAILEY.

In my opinion, therefore, the matter was properly submitted to the jury, and the appeal should be dismissed with costs.

Davidson J.

Appeal dismissed, with costs.

Solicitor for the appellant : *J. E. Clark* (Crown Solicitor).

Solicitors for the respondent : *D. Lynton Williams, Ellis & Co.*
