

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

SCA # 23/96

26-09-97

MICHAEL MILLER v REGINA

3546/94 - Resisting Arrest

3547/94 - Disorderly Conduct

3548/94 - Assaulting Police

3549/94 - Indecent Behaviour

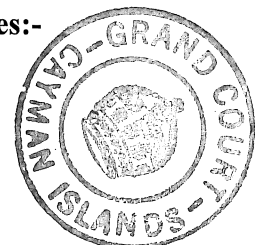
Appearances: Pierre Lamontagne, Q.C. for the Appellant
and with him Graham Hampson
Adam Roberts for the Crown.

1997: September, 12 & 18

JUDGMENT

The appellant was convicted by the Summary Court on the following offences:-

**Resisting arrest, assaulting police officer and indecent behaviour, but was
acquitted of disorderly conduct.**



On the 24th August, 1994 what is commonly known as a “session” was held at Mary Street, George Town. The crowd spilled out unto the main road. Loud music was being played and some of those who attended were drinking beer from bottles which was on sale, however, the premises was not licensed premises.

Following a report a group of police officers members of the Task Force arrived on the scene and requested the disc jockey to discontinue the music ; the disc jockey complied with their request and announced over the loud speaker system that the police had requested that the music be turned off; the police asked the crowd to disperse.

The police started to leave and some members of the public started throwing bottles in their direction. The police began walking towards the crowd in the direction from which the bottles were being thrown; at the same time telling the crowd to go home. There was a crowd of approximately 200 persons.

Police officer Donnelly said that he saw the appellant throw a bottle in his direction, that it broke and splinters from it actually hit him causing injury. Donnelly said he attempted to arrest the appellant for disorderly conduct but the appellant resisted and a struggle ensued, however with the assistance of other officers the appellant was arrested and taken to the police station where he was detained.

The grounds of appeal relied on are as follows:-

- “1. The Appellant had not been arrested when he was said to have resisted arrest and to have assaulted the police officer.**
- 2. There was, at the trial, no evidence that, the Appellant not having committed the offence of disorderly conduct of which he was charged, P.C. Donnelly suspected the Appellant, on reasonable grounds to have committed the said offence.**
- 3. The evidence at trial is to the effect that the Appellant did not commit the arrestable offence of disorderly conduct as charged in the presence of P.C. Donnelly or at all.**
- 4. P.C. Donnelly could not legally arrest the Appellant on 28th August, 1994.**
- 5. It was not the prosecution’s case at the trial, that P.C. Donnelly had reasonable grounds to suspect that the Appellant had committed the offence of disorderly conduct with which he was charged.**
- 6. Neither P.C. Donnelly nor any other police officer identified themselves to or would, under the prevailing circumstances, have been identified by, the Appellant as police officers at the relevant time.**

Learned Counsel for the Appellant submitted that there is a dispute as to whether Donnelly was acting in the execution of his duty. That the offence requires mens rea and the appellant must know that the person he is resisting is a police officer; also that the appellant must know that the police officer is acting in the execution of his duty.

Learned Counsel for the Crown argued that the prosecution does not have to prove that the appellant knew that Donnelly was a police officer and cited Maxwell v Clanchy (1909) C.A.R. p. 26 at p. 27 in support of his argument. He further submitted that there is no requirement that the appellant must know the police officer was acting in the execution of his duty.

One of the issues in this case is whether or not the appellant knew that Donnelly was a police officer. On the one hand Donnelly said he told the appellant that he was under arrest for throwing a bottle and he is supported in this by other police officers on the scene. This is disputed by the appellant and his witness.

It was submitted on behalf of the appellant that he did not throw any bottle, that he did not know that the person who accosted him was a police officer and that he was not told by Donnelly that he was under arrest.

That he was doing no more than defending himself and he was beaten by the police. He was supported by witnesses who said he did not throw any bottle and in particular by Sheena Hurlston who went on to say that the police notified the

crowd that they were cops and kept saying go home. That bottles were in fact thrown at the police.

She said when the appellant was about to open the door of the vehicle he was grabbed from behind by the police and pushed up against the vehicle and a struggle ensued between the police and the appellant. The appellant was eventually subdued and handcuffed and taken away by the police.

Hurlston said that there were some guys in front of them that were throwing bottles. Hurlston in answer to questions by the Court said, "I would say that the guys throwing the bottles by the truck was similar to the defendant". Also that it would be possible for someone else to confuse that guy with Michael.

The learned Editors of Archbold 1997 Edition at paragraph 19-275 says as follows:-

"Knowledge that the person assaulted was a police officer is not necessary to sustain a charge contrary to section 89 (1) of the 1996 Act: R v Forbes and Webb (1865) 10 Cox 362; R v Maxwell and Clanchy 2 Cr. App. R. 26 .CCA. See also Mc Bride v Turnock [1964] Crim. L R. 456, D.C. Nor is it necessary to prove that the accused knew that the officer was in the execution of his duty; the offence is not assaulting an officer knowing him to be in the execution of his duty, but assaulting him being in the execution of his duty."

"If the defendant has a genuine belief either that the victim was not a police officer or in the existence of circumstances which would mean the officer was not acting in the course of his duty, it is submitted that the general principle relating to mens rea and mistake of fact should apply and his liability should be judged on the basis of that belief: See R v Kimber, 77 Cr. App. R. 225, C. A; R v

Williams (G), 78 Cr. App. R 276. C.A.; R v Beckford (1988) A.C. 130, P.C.

There is first instance authority in support of this proposition: R v Mark, Brown and Mark (1961) Crim. L.R. 173, CCC (Judge Maxwell Turner). However, the direction to the Jury there was that the mistaken belief must be reasonably held. It is submitted that if mistake of fact is available to the defendant then the authorities now clearly establish that the mistake does not have to be reasonable .

In Kerilin v Gardiner [1967] 2 Q.B. 510, D.C. , Winn L.J. said, obiter, that whilst knowledge that the man attacked is a police officer is unnecessary, a genuine mistake of the fact as to the character of the person concerned, e.g. genuine and reasonable belief that he was a thug and not a police officer, would be highly material in judging the reasonableness of resistance exerted and the degree of force falling within the liberty or justification of self defence. This appears to be saying that such a mistake will not avail a defendant except where he is in law entitled to use some force because the officer is using excessive force or should not be using force at all. This appears to beg the question because if the officer should not be using force or is using excessive force he has presumably gone beyond the scope of his duty.”

The learned magistrate in his judgment stated that “the defendant was lawfully arrested by P.C. Donnelly”, he must therefore have come to the conclusion that the legal requirements to give effect to the arrest had been satisfied and that the police officer was justified in effecting the arrest e.g. That the police had

informed the appellant what he was being arrested for and that there were satisfactory grounds for the arrest.

Donnelly said that he informed the appellant that he was arresting him for disorderly conduct but even if he had not informed him the appellant could hardly have been in doubt that Donnelly was a police officer.

The police officers had brought the playing of the music to an end. The disc jockey announced that the police had stopped the playing of the music. The police informed the crowd that they should disperse and go home. They also informed them that they were cops . Bottles were thrown in the direction of the police officers. They moved in a group towards the direction from which the bottles were being thrown while continuing to tell the crowd to go home.

Hurlston who was beside the appellant saw and heard all of this. It is not plausible that in those circumstances the appellant did not become aware that Donnelly was a police officer. One would have expected that the appellant would have heard what Hurlston heard and most likely saw what she did.

Granted that at the time when the appellant was accosted by the police his back was towards the police but that was after the throwing of the bottles. In my view before that he would have had ample opportunity to see the police officers and to know that Donnelly was a police officer. There were four or five police officers together in a group moving towards the bottle throwers, a group which included Donnelly.

The police officers were all dressed the same way in blue jump suits with caps with inscription on the peak indicating they were police.

In Maxwell and Horace Clanchy (1901) Crim. App. R p. 26 p. 27. The Lord Chief Justice quoted from Forbes and Webb (1865), 10 Cox: C.C. 362 as follows:-

“Russell Gurney, Recorder of London laid it down that knowledge that the person assaulted was a police officer was not necessary to sustain an indictment for assaulting a constable in the execution of his duty. That decision has never been doubted, and we throw no doubt on it. Here the jury have found that appellants did know that the man who challenged them was a constable. At any rate, it must be established that the person charged did not know. Otherwise, even if the constable announced that he was one, it would always be open for the prisoner to say, “ I don’t believe it”.

The authorities seem to indicate that it is not necessary for the appellant to know that Donnelly was a police officer. However the circumstances of each case has to be looked at and there may be particular circumstances where the defendant may be justified in resisting arrest. However in my view such circumstances does not exist in this case based on the evidence adduced.

The submission of Learned Counsel that the appellant must know that the police officer is acting in the execution of his duty in my view has no basis in law.

In my opinion the learned magistrate was fully entitled to come to the decision that he did.

Learned Counsel for the appellant vigorously argued that since the learned magistrate had found that the appellant was not guilty of disorderly conduct then he must of necessity acquitted the appellant of the offences of resisting arrest and assaulting the police. That because the evidence led by the Crown was that the police had seen the appellant throwing a bottle the learned magistrate could not based the conviction on the basis that the police officer had reasonable grounds to suspect that the appellant had thrown the bottle and could thereby effect his arrest there and then. It was argued that the learned magistrate must have come to the conclusion that the police was lying that is why he did not convict the appellant of disorderly conduct.

Learned Counsel for the Crown contended that what the magistrate found looking at the totality of the evidence is that the police had made a mistake not that the police was lying. The evidence show that there was a man in the vicinity of the appellant who had thrown a bottle this man was similar in built to the appellant, that in those circumstances the police could have made a mistake. That if the police say I saw someone do something it flies in the face of logic to say he had no reasonable ground to suspect that that person had done it.

As I indicated earlier the Learned Magistrate found that the arrest was lawful, he further went on to say that the police officer had reasonable grounds to suspect that the appellant had thrown the bottle.

It must be borne in mind that the police officers were some 50 yards away from the appellant at the time the bottles were thrown, there was a crowd of approximately 200 persons, there were other persons in the vicinity where the appellant was and although the area was well lit it was night. In those circumstances it is not unreasonable to come to the conclusion that the police were mistaken as to the person who threw the bottle. If the Learned Magistrate had come to the conclusion that the police officers were deliberately lying then he would have most likely acquitted the appellant of all offences. Based on the Learned Magistrate's findings it is my view that he came to the conclusion that the police officers were mistaken and on the totality of the evidence it is my opinion that his findings can be supported by the evidence. On this issue this Court is in as good a position as the Learned magistrate to arrive at that conclusion based on the evidence. See: *Brookers Stores Ltd v Mustapha Ally* (1972) 19 W.I.R.P.C. p. 230 and *Bertolino v R* (1990-1991) CILR p. 112. I cannot agree with the submission of Learned Counsel for the appellant that because the Learned Magistrate found that the appellant did not throw the bottle he could not come to a finding that the police had reasonable grounds for suspecting that he did.

Seeing one doing a particular act is merely a higher level than suspecting them of doing the act. And in my view in these circumstances the larger includes the lesser.

If the police had made a mistake in identifying the appellant as the person who threw the bottle then that would not exclude a finding that they had reasonable grounds for suspecting that he had thrown the bottle, and that is a finding that

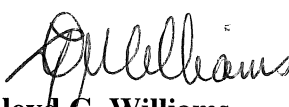
can be supported by the evidence. The fact that the Crown was alleging that the appellant had thrown the bottle does not mean that the limb of reasonable ground for suspecting that the appellant had thrown the bottle had been abandoned or was closed to them. I do not agree with the submission that since the police said they saw the appellant threw the bottle that they shut the door to them making a mistake.

The Learned Magistrate had a reasonable doubt in his mind as to whether the appellant had thrown the bottle or not and he resolved that doubt in favour of the appellant. Clearly reasonable grounds emerged from the evidence for consideration before the Learned Magistrate and in my view he was justified in giving consideration to such evidence and arriving at the finding which he did.

The Learned Magistrate have a tendency when he ask questions of witness to make a notation on the record "cross-examined by the Court" or cross-examination by Court". This is unfortunate, the appropriate note ought to be "questions by the Court". The Learned Magistrate is entitled to ask questions of witnesses but he is not entitled to cross-examine witnesses. I do not think that the Learned Magistrate intended to cross-examine any witnesses but his note conveyed the wrong impression. The Learned Magistrate would be well advised in future to make the appropriate note which is, "questions by the Court".

For the reasons given I can find no ground for disturbing the decision of the Learned Magistrate. The appeal is therefore dismissed and the convictions and sentences affirmed.

Dated this th26 day of September, 1997.


Lloyd G. Williams
Judge of the Grand Court