

Case No: CCR7F99/1047.B2  
99/1047/E2

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM ASSISTANT RECORDER GOODIN**

Royal Courts of Justice  
Strand, London, WC2A 2LL  
Thursday 6th April 2000

Before:

**LORD JUSTICE MORRITT**

**LORD JUSTICE PILL**

and

**LORD JUSTICE SCHIEMANN**

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**LESLEY EDWARD BIBBY**

**Appellant**

- and -

**THE CHIEF CONSTABLE OF ESSEX POLICE** **Respondent**

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(Transcript of the Handed Down Judgment of  
Smith Bernal Reporting Limited, 180 Fleet Street  
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Official Shorthand Writers to the Court)

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**MR G. POWELL** (instructed by Jefferies Westcliff on Sea for the Appellant)

**MR C. JOHNSTON** (instructed by Barlow Lyde & Gilbert for the Respondent)

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**Judgment**

**As Approved by the Court**

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### **LORD JUSTICE SCHIEMANN:**

This appeal concerns the conflict between the rights and duties of certificated bailiffs and policemen in circumstances where the bailiff is confronting a judgment debtor who does not wish to part with his assets and is uncooperative with the bailiff. What happened was that policemen were called by both the bailiff and the debtor to the debtor's shop and went to a room where the bailiff and the debtor were; temperatures and tempers in that room were raised, the policemen thought there would be a breach of the peace, told the bailiff to go, and, when he refused, arrested him and led him away to the police station in handcuffs. They released him about an hour later without charge, taking the view that at that time there was no longer any risk of a breach of the peace. The bailiff sued the police for assault and wrongful imprisonment.

The case, which raised some points of difficulty, rather surprisingly came on for trial, not before an experienced judge but before an assistant recorder, Mr Goodin, and a jury. The bailiff, Mr Bibby, gave evidence of the circumstances leading up to his arrest and detention. Thereafter, 3 policemen, including the arresting officer PC O'Hare, gave evidence. The Assistant Recorder in the event did not ask the jury to make any findings. He held that, although there were some differences in emphases, there were no disputes of fact which required resolution by the verdict of a jury. One can understand how he came to that procedural view. Claimant's counsel had submitted that even on the police version of events the arrest was not justified. Defence counsel had submitted that even on the claimant's version of events and accepting as he does that the bailiff was entitled to remove the goods, the arrest was nevertheless justified. The Assistant Recorder accepted the latter view and dismissed the claim. The bailiff appeals to this court.

It was conceded in the court below that PC O'Hare honestly believed that a breach of the peace was likely. The Assistant Recorder proceeded on the following legal basis. It was for the defendant to prove that PC O'Hare's honest belief was based on reasonable grounds. The test was whether a reasonable man, assumed to know the law and possessed of the information which was in fact possessed by PC O'Hare, would have believed on reasonable grounds what PC O'Hare in fact believed. He asked himself whether the decision to arrest the bailiff rather than the debtor was unreasonable on **Wednesbury** grounds and in particular whether the PC had taken into consideration matters irrelevant to the exercise of his discretion.

The Assistant Recorder found that the debtor had fallen behind in payment of his rates; that the bailiff was in possession of a liability order made by a Magistrates Court and of a walking possession agreement between his firm and the debtor which scheduled personal property at the premises; that the cheque sent by the debtor in purported payment of monies owing had bounced; that the bailiff was entitled to be at the

property and had not forced an entry; that he told the debtor that the money was due and that he required cash if they were to avoid the removal of their goods and that the debtor quite forcefully told him to leave saying that they would call friends to prevent their removal as they had done before. The Assistant Recorder held that PC O'Hare thought that the parties - namely the debtor and the bailiff - would come to blows; that the bailiff, a large man, was intimidating by being there and by being very forthright; that the bailiff was short tempered and at the end of his tether; that there were five people in their fifties, including a lady, in a small room; that PC O'Hare had asked the bailiff to leave but that the bailiff had refused to do so; that the bailiff was being unreasonable in not leaving; that the bailiff was told by the police that if he did not leave he would be arrested to prevent a breach of the peace but he still declined to leave; and that in those circumstances

there were reasonable grounds aplenty for PC O'Hare's belief that if he did nothing there would be a breach of the peace.

The bailiff contended before the Assistant Recorder that he was entitled to remove the goods scheduled to the walking possession agreement, that his refusal to leave without either money or goods was reasonable and that in those circumstances the arrest for failure to leave was unlawful and that in any event his handcuffing was unreasonable.

The Assistant Recorder's conclusion from the facts which he found was that they entitled the PC to arrest the bailiff and take him off to the police station in handcuffs. He stated:

"Mr Bibby .... had placed himself in a position where his arrest was inevitable. I do not suggest that he had committed any criminal offence but his arrest, for the reasons given, was inevitable. He can not now complain of the use by the police of handcuffs to restrain him. If they need justification for it, it is amply contained within s.3 of the Criminal Law Act".

That section provides:

"A person may use such force as is reasonable in the circumstances in the prevention of crime ....."

The courts have frequently had to consider what constitutes a breach of the peace. This court stated in R v Howell (Errol) [1982] 1 Q.B. at p.427:

"... there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence that a constable, or anyone else, may arrest an offender without warrant".

It had stated on the previous page:

"We entertain no doubt that a constable has a power of arrest where there is reasonable apprehension of imminent danger of a breach of the peace; so for that matter has the ordinary citizen. We hold there is a power of arrest for breach of the peace where (1) a breach of the peace is committed in the presence of the person making the arrest, or (2)

the arrestor reasonably believes that such a breach of the peace will be committed in the immediate future by the person arrested although he has not yet committed any breach, or (3) where a breach has been committed and it is reasonably believed that a renewal of it is threatened".

The present case, if it falls into any of these categories, falls into the second. On the facts of the present case, the assistant recorder did not find, and there was no material upon which he could have found, that the bailiff had any intention of assaulting the debtor, absent a prior threatened assault by the debtor. So far as the debtor is concerned, the Assistant Recorder found that the debtor had forcefully told the bailiff to leave and stated that he and his wife would call friends to prevent the removal of the goods.

In substance the Assistant Recorder found that PC O'Hare reasonably considered that the bailiff was acting lawfully but provocatively and that, as a result of that provocation a breach of the peace was likely to result; that any attempt on the part of the bailiff to remove the goods scheduled to the walking possession agreement would be resisted by the debtor and that violence by one on the other or each on the other would most probably result; that in those circumstances it was reasonable of the PC to ask the bailiff to go and unreasonable of the bailiff to insist on staying until he had either the money or the goods.

Beldam L.J., with whom the other members of the court agreed, pointed out in Foulkes v Chief Constable of Merseyside Police [1998] 3 All ER 705 at p.710g, a case decided in this court, that:

"... there are many of cases in the books in which conduct not obviously illegal has nevertheless been held to be sufficient to justify an arrest if persisted in or provocatively done".

But Beldam L.J. went on to say at p.711:

"... the common law power of a police constable to arrest where no actual breach of the peace has taken place but where he apprehends that such a breach may be caused by apparently lawful conduct is exceptional. Many of the instances in which such a power has been upheld in the past are, as a result of the enactment of the Public Order Act 1986, unlikely to give rise to difficulty since for offences under that Act, and particularly under ss. 4 and 5, statutory powers of arrest without warrant are conferred on a constable. .... although I am prepared to accept that a constable may exceptionally have power to arrest a person whose behaviour is lawful but provocative, it is a power which ought to be exercised by him only in the clearest of circumstances and when he is satisfied on reasonable grounds that a breach of the peace is imminent. ... there must ... be a sufficiently real and present threat to the peace to justify the extreme step of depriving of his liberty a citizen who is not at that time acting unlawfully".

Simon Brown L.J. in Nicol and Selvanayagam v DPP (1996) 160J.P 155, a case decided in the Divisional Court, addressed the problem at p.162 in these terms:

"Before the court can properly find that the natural consequence of lawful conduct by a

defendant would, if persisted in, be to provoke another to violence, it should ... be satisfied that in all the circumstances it is the defendant who is acting unreasonably rather than the other person. ... some clear interference at least with the rights ... of others is bound to characterise any conduct of which it can properly be said that it would naturally provoke violence in others. Putting it another way, the court would surely not find a s.115 [sc. of the Magistrates' Courts Act 1980] complaint proved if any violence likely to have been provoked on the part of others would be not merely unlawful but wholly unreasonable - as, of course, it would be if the defendant's conduct was not merely lawful but such as in no material way interfered with the other's rights". Sedley L.J. in Redmond-Bate v DPP The Times 28.7.1999, another Divisional Court case, pointed out that:

"The ... critical question for the constable, and in turn for the Court, is where the threat is coming from, because it is there that the preventative action must be directed. ... It is only if otherwise lawful conduct gives rise to a reasonable apprehension that it will, by interfering with the rights or liberties of others, provoke violence which, though unlawful, would not be entirely unreasonable that a constable is empowered to take steps to prevent it. ... Mr Kealy for the prosecutor submitted that if there are two alternative sources of trouble, a constable can properly take steps against either. This is right, but only if both are threatening violence or behaving in a manner that might provoke violence".

Beldam L.J. in the passage which I have cited stated that the common law power to arrest for apprehended breach of the peace caused by apparently lawful conduct is exceptional. Simon Brown LJ and Sedley LJ, in the passages which I have cited seek to make more precise the nature of that exception. They considered that a person who is engaging in or threatening to engage in lawful actions which are likely to result in a breach of the peace can only be arrested on the basis that a repetition of those lawful actions is likely to result in a breach of the peace **if his lawful actions, actual or threatened are wholly unreasonable and in some way interfere with the other person's rights**. I express my general agreement with the views set out in those passages.

Counsel for the defendant did not suggest that those passages conflicted with authority but submitted that police officers are under a duty to prevent breaches of the peace and that there is a greater public interest in preventing violence than in the bailiff obtaining the goods and that if there is a conflict between these two desiderata then the quest for peace must prevail.

Counsel for the claimant submitted the case law justified the following. In order to exercise the now exceptional Common Law power of arrest certain conditions must be met in relation to the person who is to be arrested and his conduct :-

1. There must be the clearest of circumstances and a sufficiently real and present threat to the peace to justify the extreme step of depriving of his liberty a citizen who is not at the time acting unlawfully - Foulkes

2. The threat must be coming from the person who is to be arrested - Redmond-Bate
3. The conduct must clearly interfere with the rights of others - Redmond-Bate
4. The natural consequence of the conduct must be violence from a third party - Redmond-Bate
5. The violence in 4 must not be wholly unreasonable - Redmond-Bate
6. The conduct of the person to be arrested must be unreasonable - Nicol.

I consider that this accurately states the law. Of course I accept that it is desirable that violence be prevented. It is also desirable that citizens who are neither doing nor threatening any wrong are not deprived of their liberty. The problem in this type of case is the conflict between these two desiderata. The police are given various special powers under various acts to arrest without a warrant but none of these are relied on here. Mr Johnston relies on common law powers of arrest for apprehended breach of the peace which are possessed not merely by police officers but also by every other citizen.

If counsel for the defendant's submission were right it would make the police's own job difficult. Take this situation. A policeman is about to arrest a man who threatens violence to the policeman if the policeman touches him. A passer-by tells the policeman to go away because otherwise there will be a breach of the peace. Is the policeman bound to obey at the risk of himself being arrested by the passer-by ( or indeed the man threatening violence) for provoking a breach of the peace? That can not be right. It would be a charter for anyone who threatens violence.

It has not been suggested that the bailiff was not entitled to take the goods away in the absence of payment. He was acting lawfully. He was not threatening to commit any crime. He was not threatening to interfere with any right which the debtor had in the scheduled goods. Nor in my judgment was he acting unreasonably in explaining to the debtor that the latter must either produce what he owed or let the bailiff remove the goods. It was the debtor who was not acting reasonably when he told the bailiff to leave and threatened to call friends to prevent the removal of the goods. There may be room for the assertion that the bailiff was not tactful and that his firmness and size intimidated those in that room. It may well be that the bailiff was at the end of his tether and did not want to have a discussion as to how it came about that he wished to exercise his rights in relation to the goods. It may be, though there seems no reason to believe it, that if the bailiff had engaged in reasoned argument with the debtor the latter would have voluntarily handed over the money or the scheduled goods. It may well be that if the bailiff had left and come back on some future occasion, either in half an hour or the next day, the debtor would have been persuaded by the police to see the error of his ways. But even if all that be so it does not justify the bailiff's arrest. For the debtor to react by violence to such behaviour as the bailiff was likely to engage in would have been unreasonable.

I have sympathy for the constable faced with an explosive situation which required fast judgments. No one criticises him for coming to the conclusion that a breach of the

peace was imminent. I am prepared to accept that he came to that conclusion on reasonable grounds. But as it seems to me P.C.O'Hare made the same mistake as the constable in Redmond-Bate. He failed to consider where the threat was coming from. True it is that had the bailiff not been seeking to exercise his rights there would have been no threat to the peace. But in circumstances such as these the threat, in so far as there was one, of violence should have been perceived as coming from the debtor rather than the bailiff. I am prepared to proceed on the basis that the debtor was not verbally threatening violence as such. He was however threatening to prevent the bailiff from doing what he could lawfully do and which did not interfere with any of the debtor's rights. Implicit in that was a threat to use violence if the bailiff went ahead.

In my judgment the Assistant Recorder fell into error in bringing the **Wednesbury** case into his consideration. That case is concerned with the limits of discretions in administrative law. The court is not in the present case reviewing a discretion. It is deciding whether a constable was justified in arresting a citizen. The mere fact, if it be a fact, that the constable reasonably thought that a breach of the peace was likely did not in my judgment justify the arrest of the bailiff.

Various other grounds were relied on by Mr Johnson in support of the submission that the arrest was unlawful and the detention was too long. In the circumstances it is not necessary to consider them and I do not do so. I only add that, as it seems to me, the use of handcuffs in the circumstances was not reasonable .

I would allow this appeal. If my brethren agree I would suggest that upon receipt of our judgments counsel consider what would be the appropriate modest damages which counsel for the bailiff indicated was all that he was seeking. We would be content to receive short written submissions before handing down our judgments as to the proper amount if no sum is agreed.

LORD JUSTICE PILL:

Mr Leslie Edward Bibby is a certified County Court bailiff. He questions the lawfulness of his arrest by police officers on 13 January 1995 at business premises occupied by Mr and Mrs E Brannan at 8 Broomfield Road, Chelmsford. He was attempting to enforce a liability order made by the Chelmsford Magistrates under Regulation 12 of the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989.

Regulation 14 empowers the authority which applied for the order, in this case Chelmsford Borough Council, to levy the appropriate amount by distress and sale of the goods of the debtor against whom the order was made, in this case Mr and Mrs Brannan. The bailiff was attempting to levy distress on behalf of the authority.

In his judgment, Schiemann LJ has set out the sequence of events. The bailiff told the debtors that he required cash if they were to avoid the removal of their goods and they quite forcefully told him to leave saying they would call friends to prevent the removal of goods as they had done before. Both parties called the police. The police officer has sought to justify the arrest on the ground that a breach of the peace was imminent. The bailiff had refused his request to leave the premises. It was not suggested that the bailiff

had been violent towards anyone else at the premises or had threatened violence. The bailiff had himself said in evidence, however, that there was a serious risk of imminent violence. Constable O'Hare described the bailiff's conduct in this way:

"He just didn't appear to me to be a person who would be reasonable. I actually asked Mr Bibby at some stage to calm down, and he wouldn't. He remained loud and he seemed to be channelled in one avenue, so to speak, and he didn't seem to be prepared to be flexible."

The constable said that he found Mr Bibby to be "quite threatening just by his mere physical presence". Mr Bibby said that he wanted to stand his ground and stay where he was entitled to be. That was his job. He said that Mr Brannan threatened violence to him.

There was no finding of fact that the bailiff was likely to strike anyone present. Such a finding would not have been tenable on the evidence. Indeed, the suggestion was not even put to the bailiff when he gave evidence.

This type of situation was considered by this court in *Foulkes v Chief Constable of the Merseyside Police* [1998] 3 All ER 705. A man was locked out of the matrimonial home which he owned jointly with his wife, following a family dispute. The police told him, as was the fact, that his wife and children did not want him to re-enter the house and the police suggested that he leave the vicinity of the property until tempers had abated. He was arrested when he refused to leave and insisted that he wished to enter the house. It was held that the arrest was not justified.

Beldam LJ stated, at p 711, that "... the common law power of a police constable to arrest where no actual breach of the peace has taken place but where he apprehends that such a breach may be caused by apparently lawful conduct is exceptional ... In the circumstances of this case, although I am prepared to accept that a constable may exceptionally have power to arrest a person whose behaviour is lawful but provocative, it is a power which ought to be exercised by him only in the clearest of circumstances and when he is satisfied on reasonable grounds that a breach of the peace is imminent."

Beldam LJ continued:

"In the present case PC McNamara acted with the best of intentions. He had tried persuasion but the plaintiff refused to be persuaded or to accept the sensible guidance he had been given but in my judgment that was not a sufficient basis to conclude that a breach of the peace was about to occur or was imminent. There must, I consider, be a sufficiently real and present threat to the peace to justify the extreme step of depriving of his liberty a citizen who is not at the time acting unlawfully."

In *Redmond-Bate v Director of Public Prosecutions* (The Times 28 July 1999) Sedley LJ, in the Divisional Court, contemplated a possible situation in which the conduct of a group of persons was "so provocative that someone in the crowd, without behaving wholly unreasonably, might be moved to violence [so that the officer] was entitled to ask them [the group] to stop and to arrest them if they would not".

The bailiff in this case was acting lawfully. Indeed, he was attempting to enforce an



order of the court. The task of a bailiff is often a difficult one, as the Assistant Recorder rightly acknowledged. In this case the bailiff's behaviour towards others present was thought by the police officer to be unreasonable and inflexible. It was not found, and could not on the evidence properly have been found, that the bailiff was likely to initiate violence by striking anyone. Insofar as there was a fear of violence, the inference must be that any violence would have come from another source.

Nothing the bailiff did, in attempting lawfully to levy distress, could have begun to justify a resort to violence by another person present. In those circumstances, the police officers were not justified in arresting the bailiff on the ground that he declined to accede to their request that he should leave the building he had lawfully entered. I do not of course exclude the possibility that a bailiff, or someone in a similar position, might behave so outrageously, short of violence, that he was likely to provoke a not wholly unreasonable violent reaction from others, thereby justifying his arrest. The unreasonableness and inflexibility which the officers believed to exist in this case fell far short of conduct justifying arrest.

In agreeing with Schiemann LJ that the appeal should be allowed, I add that placing the bailiff in handcuffs and taking him in handcuffs through a public place and on the journey to the police station in a police car was in my view wholly unjustified. Even if the arrest had been justified, which it was not, the situation did not require that further indignity.

**LORD JUSTICE MORRITT:**

I agree with my Lords, for the reasons they have given, that neither the arrest of the Bailiff nor the use of handcuffs with which to lead him away was justified. I too would allow this appeal.

**Order: Appeal allowed; order in terms of agreed minute.**

**(Order does not form part of the approved judgment)**