FAGAN *v.* COMMISSIONER OF METROPOLITAN POLICE

1968
June 28;
July 1, 31

LORD PARKER C.J., JAMES and BRIDGE JJ.

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Crime—Assault—Police—Car driven on to policeman's foot—Doubt whether intentional or accidental—Deliberate delay in removing car—Mens rea—Actus reus—Whether subsequent inception of mens rea capable of converting original unintentional act into an assault.

Crime—Mens rea—Assault—Unintentional battery—Car driven on to policeman's foot—Supervening mens rea constituted by deliberate delay in removing car—Whether an assault.

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A police constable wishing to question the defendant driver directed him to park his vehicle at a precise space against the kerb, whereupon the defendant drove his car on to the police

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[Reported by MRS. JENNIFER WINCH, Barrister-at-Law.]

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constable's foot. After the latter had repeated several times, "Get off my foot!" the defendant reversed the car off the constable's foot. The defendant was convicted by justices of assaulting a police constable in the execution of his duty. He appealed to quarter sessions, who found that while they were left in doubt as to whether the initial mounting of the wheel was intentional or accidental, they were satisfied beyond all reasonable doubt that the defendant knowingly, provocatively and unnecessarily allowed the wheel to remain on the police constable's foot after he had been told to drive off, and that on those facts an assault was proved.

On appeal, on the ground that on the justices' finding the initial mounting of the wheel could not be an assault; that the act of mounting the foot came to an end without any mens rea and that, accordingly, there was no act done by the defendant which could constitute an actus reus:—

Held, dismissing the appeal (Bridge J. dissenting) (1) that where an assault involved a battery it could be inflicted through the medium of a weapon or instrument controlled by the action of the offender.

(2) That although the elements of actus reus and mens rea were necessarily present at the same time in an assault, it was not necessary for the mens rea to be present at the inception of the actus reus: it could be superimposed on an existing act provided it was a continuing act.

(3) That the defendant's act in mounting the policeman's foot with his car was an unintentional battery which his later conduct in purposely delaying the removal of the car from the foot rendered criminal from the moment the necessary intention to inflict unlawful force was formed.

Per curiam. An assault is any act which intentionally—or possibly recklessly—causes another person to apprehend immediate and unlawful personal violence (post, p. 444D).

Per Bridge J. There was no act done by the appellant after he had driven the car on to the police constable's foot which could constitute an assault (post, p. 446B–C).

CASE STATED by Middlesex Quarter Sessions.

On October 25, 1967, the appellant, Vincent Martel Fagan, appealed to Middlesex Quarter Sessions against his conviction at Willesden magistrates' court upon a charge preferred by David Morris, a constable of the Metropolitan Police Force, for and on behalf of the respondents. He had been convicted of assaulting David Morris when in the execution of his duty on August 31, 1967, contrary to section 51 of the Police Act, 1964. The appellant's appeal was dismissed.

On the hearing of the appeal the following facts were either proved or admitted.

A (a) David Morris was at all material times in the execution of his duty.

(b) On August 31, 1967, the appellant drove a motor vehicle in Fortunegate Road, London, N.W.10, near the junction with Craven Park Road, London, N.W.10. While the appellant was in the course of reversing his motor vehicle from the said road B on to a pedestrian crossing in Craven Park Road, David Morris asked the appellant to pull into the road against the north kerb so that he could ask the appellant to produce documents relating to the appellant's driving. First of all the vehicle stopped and it did not move. David Morris, who had walked into the middle of the road, pointed out to the appellant a suitable parking space C against the kerb. The appellant drove the vehicle towards David Morris and stopped it with its rear side a substantial distance from the kerb. David Morris went up to the appellant and asked him to park the vehicle closer to the kerb. David Morris walked to a position about one yard in front of the vehicle and pointed to the exact position against the kerb. The appellant drove the D vehicle in David Morris's direction and stopped the vehicle with its front off-side wheel on David Morris's left foot. David Morris said to the appellant, "Get off, you are on my foot!" The appellant's driving window was open. The appellant said "Fuck you, you can wait." The appellant then turned off the ignition or at least the engine stopped running. David Morris then said E to the appellant several times, "Get off my foot!" The appellant then said very reluctantly, "Okay, man, okay." The appellant thereafter very slowly turned on the ignition and reversed the vehicle off David Morris's foot.

(c) As a result of the appellant's act or omission David Morris's left big toe was injured. The toe was swollen and slightly bruised.

F It was contended for the appellant that David Morris was uncertain that the appellant deliberately mounted the wheel of his vehicle on to his foot. To establish the charge of assault the prosecution must prove that it was deliberate on the appellant's part. The incident might have been accidental. At any rate it was not proved to the satisfaction of the court that what the G appellant was alleged to have done was done by him deliberately. It was further contended for the appellant that if one drove a vehicle over some part of a man's body that might be accidental but if one held it there it required a rather more positive act and if one did hold the vehicle in the said manner it was not an assault, because the actual assault, whether it was by accident or not, was that the vehicle got on to the foot; the fact that the

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driver might have taken a little longer to take it off—if the court accepted the time deposed by David Morris, that is to say twenty-five seconds—could not be an assault, because the assault had already taken place. It was also contended for the appellant that the continued pressure on David Morris's foot was not a fresh assault.

It was contended for the respondents that if the vehicle was deliberately left in a position where pressure was still being exerted and if the appellant had reasonable time in which to get the vehicle off David Morris's foot and if the appellant in those circumstances left the vehicle on his foot, an assault in law would commence as soon as the reasonable time had elapsed for the appellant to get the vehicle off altogether, if the appellant deliberately delayed in getting the vehicle off, that would be an assault in law. No authorities were cited to the deputy chairman and the justices.

On those facts the deputy chairman and the justices were left in doubt as to whether the initial mounting of the motor wheel on David Morris's foot was intentional on the part of the appellant or accidental. They were satisfied beyond all reasonable doubt that the appellant knowingly, provocatively and unnecessarily allowed the motor wheel to remain on David Morris's foot after the latter said, "Get off, you are on my foot." They came to the conclusion that the charge of assault on David Morris had been made out, and dismissed the appeal.

The question of law for the opinion of the High Court is whether upon the facts stated above the deputy chairman and the justices were right in dismissing the appeal.

A. Abbas and *A. Azhar* for the appellant. The actus reus consisted of the appellant driving his car on to the policeman's foot. The justices had been in doubt as to whether the mounting of the wheel on to the policeman's foot was intentional or accidental, accordingly there was no mens rea at the time of the actus reus and there could not be an assault. The continued pressure on the policeman's foot was not a fresh assault. The appellant's failure to remove the car from his foot could not be an assault in law: Stone's Justices' Manual (1968), Vol. 1, p. 651.

James Rant for the respondent. The actus reus was a continuing act and the intervention of mens rea turned that act into an assault: *Hunter* v. *Johnson*.[1] The essence of assault was an attempt to injure or put into fear. There was no reason why a sustained

[1] (1884) 13 Q.B.D. 225.

attempt should not be an assault. Alternatively, there might be a duty to act in which case an omission to act in breach of duty would amount to an assault.

Cur. adv. vult.

July 31. LORD PARKER C.J. I will ask James J. to read the judgment which he has prepared, and with which I entirely agree.

JAMES J. The appellant, Vincent Martel Fagan, was convicted by the Willesden magistrates of assaulting David Morris, a police constable, in the execution of his duty on August 31, 1967. He appealed to quarter sessions. On October 25, 1967, his appeal was heard by Middlesex Quarter Sessions and was dismissed. This matter now comes before the court on appeal by way of case stated from that decision of quarter sessions.

The sole question is whether the prosecution proved facts which in law amounted to an assault.

On August 31, 1967, the appellant was reversing a motor car in Fortunegate Road, London, N.W.10, when Police Constable Morris directed him to drive the car forwards to the kerbside and standing in front of the car pointed out a suitable place in which to park. At first the appellant stopped the car too far from the kerb for the officer's liking. Morris asked him to park closer and indicated a precise spot. The appellant drove forward towards him and stopped it with the offside wheel on Morris's left foot. "Get off, you are on my foot," said the officer. "Fuck you, you can wait," said the appellant. The engine of the car stopped running. Morris repeated several times "Get off my foot." The appellant said reluctantly "Okay man, okay," and then slowly turned on the ignition of the vehicle and reversed it off the officer's foot. The appellant had either turned the ignition off to stop the engine or turned it off after the engine had stopped running.

The justices at quarter sessions on those facts were left in doubt as to whether the mounting of the wheel on to the officer's foot was deliberate or accidental. They were satisfied, however, beyond all reasonable doubt that the appellant "knowingly, provocatively and unnecessarily allowed the wheel to remain on the foot after the officer said 'Get off, you are on my foot'." They found that on those facts an assault was proved.

Mr. Abbas for the appellant relied upon the passage in Stone's Justices' Manual (1968), Vol. 1, p. 651, where assault is defined. He contends that on the finding of the justices the initial mounting of the wheel could not be an assault and that the act of the wheel

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mounting the foot came to an end without there being any mens rea. It is argued that thereafter there was no act on the part of the appellant which could constitute an actus reus but only the omission or failure to remove the wheel as soon as he was asked. That failure, it is said, could not in law be an assault, nor could it in law provide the necessary mens rea to convert the original act of mounting the foot into an assault.

Mr. Rant for the respondent argues that the first mounting of the foot was an actus reus which act continued until the moment of time at which the wheel was removed. During that continuing act, it is said, the appellant formed the necessary intention to constitute the element of mens rea and once that element was added to the continuing act, an assault took place. In the alternative, Mr. Rant argues that there can be situations in which there is a duty to act and that in such situations an omission to act in breach of duty would in law amount to an assault. It is unnecessary to formulate any concluded views on this alternative.

In our judgment the question arising, which has been argued on general principles, falls to be decided on the facts of the particular case. An assault is any act which intentionally—or possibly recklessly—causes another person to apprehend immediate and unlawful personal violence. Although "assault" is an independent crime and is to be treated as such, for practical purposes today "assault" is generally synonymous with the term "battery" and is a term used to mean the actual intended use of unlawful force to another person without his consent. On the facts of the present case the "assault" alleged involved a "battery." Where an assault involves a battery, it matters not, in our judgment, whether the battery is inflicted directly by the body of the offender or through the medium of some weapon or instrument controlled by the action of the offender. An assault may be committed by the laying of a hand upon another, and the action does not cease to be an assault if it is a stick held in the hand and not the hand itself which is laid on the person of the victim. So for our part we see no difference in principle between the action of stepping on to a person's toe and maintaining that position and the action of driving a car on to a person's foot and sitting in the car whilst its position on the foot is maintained.

To constitute the offence of assault some intentional act must have been performed: a mere omission to act cannot amount to an assault. Without going into the question whether words alone can constitute an assault, it is clear that the words spoken by the appellant could not alone amount to an assault: they can only shed

a light on the appellant's action. For our part we think the crucial question is whether in this case the act of the appellant can be said to be complete and spent at the moment of time when the car wheel came to rest on the foot or whether his act is to be regarded as a continuing act operating until the wheel was removed. In our judgment a distinction is to be drawn between acts which are complete—though results may continue to flow—and those acts which are continuing. Once the act is complete it cannot thereafter be said to be a threat to inflict unlawful force upon the victim. If the act, as distinct from the results thereof, is a continuing act there is a continuing threat to inflict unlawful force. If the assault involves a battery and that battery continues there is a continuing act of assault.

For an assault to be committed both the elements of actus reus and mens rea must be present at the same time. The " actus reus " is the action causing the effect on the victim's mind (see the observations of Park B. in *Regina* v. *St. George* [1]). The " mens rea " is the intention to cause that effect. It is not necessary that mens rea should be present at the inception of the actus reus; it can be superimposed upon an existing act. On the other hand the subsequent inception of mens rea cannot convert an act which has been completed without mens rea into an assault.

In our judgment the Willesden magistrates and quarter sessions were right in law. On the facts found the action of the appellant may have been initially unintentional, but the time came when knowing that the wheel was on the officer's foot the appellant (1) remained seated in the car so that his body through the medium of the car was in contact with the officer, (2) switched off the ignition of the car, (3) maintained the wheel of the car on the foot and (4) used words indicating the intention of keeping the wheel in that position. For our part we cannot regard such conduct as mere omission or inactivity.

There was an act constituting a battery which at its inception was not criminal because there was no element of intention but which became criminal from the moment the intention was formed to produce the apprehension which was flowing from the continuing act. The fallacy of the appellant's argument is that it seeks to equate the facts of this case with such a case as where a motorist has accidentally run over a person and, that action having been completed, fails to assist the victim with the intent that the victim should suffer.

We would dismiss this appeal.

[1] (1840) 9 C. & P. 483, 490, 493.

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BRIDGE J. I fully agree with my Lords as to the relevant principles to be applied. No mere omission to act can amount to an assault. Both the elements of actus reus and mens rea must be present at the same time, but the one may be superimposed on the other. It is in the application of these principles to the highly unusual facts of this case that I have, with regret, reached a different conclusion from the majority of the court. I have no sympathy at all for the appellant, who behaved disgracefully. But I have been unable to find any way of regarding the facts which satisfies me that they amounted to the crime of assault. This has not been for want of trying. But at every attempt I have encountered the inescapable question: after the wheel of the appellant's car had accidentally come to rest on the constable's foot, what was it that the appellant did which constituted the act of assault? However the question is approached, the answer I feel obliged to give is: precisely nothing. The car rested on the foot by its own weight and remained stationary by its own inertia. The appellant's fault was that he omitted to manipulate the controls to set it in motion again.

Neither the fact that the appellant remained in the driver's seat nor that he switched off the ignition seem to me to be of any relevance. The constable's plight would have been no better, but might well have been worse, if the appellant had alighted from the car leaving the ignition switched on. Similarly I can get no help from the suggested analogies. If one man accidentally treads on another's toe or touches him with a stick, but deliberately maintains pressure with foot or stick after the victim protests, there is clearly an assault. But there is no true parallel between such cases and the present case. It is not, to my mind, a legitimate use of language to speak of the appellant " holding " or " maintaining " the car wheel on the constable's foot. The expression which corresponds to the reality is that used by the justices in the case stated. They say, quite rightly, that he " allowed " the wheel to remain.

With a reluctantly dissenting voice I would allow this appeal and quash the appellant's conviction.

Appeal dismissed.

Solicitors: *Clinton Davis, Hillman & Parkus; Solicitor, Metropolitan Police.*