PAYNE v THE PEOPLE (1974) ZR 56 (SC)
SUPREME COURT
DOYLE CJ, BARON DCJ AND HUGHES JS
12th MARCH 1974
(Appeal No. 123 of 1973)

Flynote

Criminal Law - Assault on police officer - Officer unlawfully striking first blow - Whether officer in execution of his duty for purposes of criminal charge.

Headnote

The appellant was convicted of assaulting a police officer in the execution of his duty. The Supreme Court held that the matter must, for the reasons stated in the judgment, be approached on the basis that the police officer unlawfully struck the first blow and that the appellant retaliated. The State submitted that in a civil matter a person assaulted by a police officer could claim he was acting in the course of his duty and that the same position applied in a criminal matter.

Held:

Where a police officer commits an unlawful assault he is not acting in the course of his duty for the purpose of the offence of assaulting a police officer in the execution of his duty.

F G Sarah, Geoffrey Sarah and Co., Ndola, for the appellant.
D K Chirwa, Senior State Advocate, for the respondent.

Judgment

Doyle CJ delivered the judgment of the court. The appellant was convicted of the offence of assaulting a police officer in the execution of his duty, and the facts were as follows. On 27th February, 1973, the appellant was being driven through Mufulira by his wife. According to the complainant constable the driver went past the "Stop" white line and stopped in the wrong place. He spoke to the driver and asked her to drive back, and afterwards the constable spoke to her and said that if she drove again like that she would be charged. The appellant was then alleged to have replied, "Don't speak to my wife like that" and the constable told him to go on. The vehicle went on and stopped a short distance away. The appellant came back. Thereupon he spoke to the constable and said he wanted to see his superior officer. The constable refused to leave his traffic station, and according to him then the appellant grabbed him by the shirt and began hitting him with his hands. He was then arrested and charged with this offence.

The defence was that there was this argument, and after it had happened and the wife had driven on, there was a thump at the back of the car as if the policeman had struck or kicked it, and it was for this reason that the appellant had the car stopped and went back to speak to the constable. The appellant's evidence then was that when he spoke to the constable the constable hit him. He then retaliated, striking several blows. He called as a witness a doctor who deposed to having seen him

on 27th February and that he then had a small bruise on the face and a couple of minor scratch marks. The learned magistrate considered the evidence. He dismissed very cursorily the defence witnesses. He dealt with the doctor in a very extraordinary fashion. At the trial, which took place on 3rd April, some five weeks afterwards, he examined the appellant and saw no mark from a range of three or four feet. Upon that he permitted himself to make a very strong, and to our mind disgraceful, attack upon the doctor. He described him as being a conspirator coming to give false evidence, all on the basis that the magistrate could not see any mark on the date of trial. In our opinion the learned magistrate showed himself completely biased and that was reflected in the way in which he treated the remainder of the evidence in this case. He did not approach it judicially. He approached it in a protagonist manner, and in our view there was evidence which he should have considered and should properly have considered. The attack upon the doctor was utterly unjustified and should never have been made. In the circumstances we are quite unable to say that his acceptance of the evidence for the prosecution was proper. He really gave no consideration to it at all

but merely said no policeman could do such a thing, which in itself is of course absurd. All of us are human, even policemen. We are satisfied we must then approach this case on the basis that the defence evidence is true. Upon this basis we accept that the first blow was struck by the policeman and that the appellant did retaliate.

It is put by counsel for the appellant that by reason of the first blow by the policeman he took himself out of being in the execution of his duty and that therefore there could not be a conviction on this count. Counsel for the State very fairly states that if the law is such that this assault by the police took the policeman out of the execution of his duty, the conviction cannot stand, but he maintains that in fact the law is not such. He submits that, because in a civil action the plaintiff could have claimed that the policeman was acting in the course of his duty in striking the blow, in a criminal case the same position must apply. In fact of course this is entirely a matter of vicarious liability in a civil matter; it has nothing to do with a criminal matter such as this case. We do not accept that where a policeman acts in this way he can claim upon retaliation that he is acting in the course of his duty for the purpose of obtaining a conviction on a charge of assaulting a policeman in the execution of his duty. On the facts of this case we hold that the conviction for an assault upon a policeman in the execution of his duty was not justified. We allow the appeal against conviction and we set aside the conviction for that offence.

On the facts however it is plain that at best the appellant was guilty of common assault. We are satisfied that that common assault was only committed in extenuating circumstances. We intend to give the appellant an absolute discharge. The verdict of the court is that the appeal against conviction is allowed; the conviction is set aside and a conviction for common assault substituted, and the appellant is given an absolute discharge.

Appeal allowed; conviction for common assault substituted