

DELIVERED 8th SEPTEMBER 1975

MacPHERSON v. BROWN

No. 299 of 1975

Dates of Hearing: 14th and 15th August 1975

IN THE FULL COURT

Coram: Bray C.J., Zelling and Jacobs JJ.

J U D G M E N T of the Honourable the Chief Justice

(On appeal from Mr. B. St.L.Kelly, S.M., sitting as a
Court of Summary Jurisdiction at Darlington)

Counsel for the Appellant:

Mr. J.W. von Doussa

Solicitors for the Appellant:

Johnston, Layton, Withers
and Co.

Counsel for the Respondent:

Mr. P.Y. Wilson

Solicitor for the Respondent:

Mr. L.K. Gordon, Crown
Solicitor

Judgment No. 2614

MacPHERSON v. BROWNFull CourtBray C.J.

This is an appeal against an order or adjudication of a court of summary jurisdiction dated the 3rd January 1975 whereby the appellant was found guilty of common assault on an information alleging that on the 29th August 1974 at Bedford Park he assaulted David Norris Gibbs contrary to the provisions of sec.39 of the Criminal Law Consolidation Act 1935 as amended. However, the learned special magistrate who presided, after making the finding of guilt, dismissed the charge without proceeding to a conviction under the provisions of the Offenders Probation Act 1913 as amended and ordered the appellant to pay to the respondent \$360 costs within six months and in default of payment sentenced him to 36 days imprisonment with hard labour. The appeal was reserved to this court by order of Walters J. dated the 21st March 1975.

I take the following summary of the facts from the findings of the learned special magistrate in his reasons for judgment.

It appears that in August 1974 there were disturbances at the Flinders University at which institution at relevant times the appellant was a student and Dr. Gibbs, referred to in the charge, was a lecturer. Some students, including the appellant, were involved in the occupation of the administration section of the university: Dr. Gibbs and others were involved in its re-occupation on the 28th August. On the next day, the 29th August, there was some ill-feeling between the appellant and Dr. Gibbs. At about 5.15 p.m. Dr. Gibbs was walking towards the Registry Building. A large number of students were in the

vicinit , including the appellant who had a megaphone. When Dr. Gibbs and the appellant were quite close Gibbs was physically surrounded by a number of students "perhaps 30 or so". There was some interchange of words between the appellant and Gibbs, but the learned special magistrate rejected any suggestion that the appellant's words were of a threatening nature. He thought that the appellant's intention was to harass Gibbs by questioning him in public. Gibbs asked to be let through. He put his hand up, apparently to brush the appellant aside, whereupon the appellant made some comment about Gibbs assaulting him and this cry was taken up by "other members of the surrounding group". On at least two other occasions Gibbs requested in vain to be allowed to pass. At this stage Gibbs was in fear of physical danger from the group, including the appellant, though the fear did not persist into later stages of the confrontation. There followed some discussion between Gibbs and members of the group. After about 10-15 minutes one female student became somewhat hysterical, the appellant asked her to calm down, it was suggested that nothing was being achieved by the confrontation, the group finally dispersed and Gibbs was allowed to move.

The learned special magistrate discussed the credibility of the various witnesses and it is apparent that he accepted neither the evidence of Gibbs nor the evidence of the appellant without reservation. The findings recited above no doubt followed from his assessment of the witnesses.

He then discussed the law of assault where no physical contact is made with the victim. He held that the mens rea involved was "constituted by the threatener's intention to produce the expectation of unlawful physical contact in the victim's mind". He then went on to discuss the possibility of

a reckless assault. He quoted a passage from Howard, Australian Criminal Law, a passage to be found at p.133 of the 2nd Ed. in the following words:

. "There remains the possibility of reckless assault, the situation where D indulges in contact which he knows may harm someone, or may give someone reasonable grounds for supposing that he intends to inflict harm upon him, and, which in fact has one of these results even though D does not actually intend it."

The learned special magistrate then went on:

"I respectfully agree with all of the above statements of principle. I might add to Howard's statement, though it is probably implied, the observation that if D indulges in conduct which he knows or ought to know may harm or give cause for such a belief, then the necessary intention is there." (The underlining is the learned special magistrate's)

He then said that applying the facts he found to the law as stated he was satisfied beyond reasonable doubt that the defendant had committed an assault on Dr. Gibbs.

He rejected any suggestion that the defendant intended violence to Gibbs by himself or anyone else. He then said, and I think the crux of the appeal lies in the following words:

"However, as Kenny points out, the intention to inflict unlawful physical contact can be quite irrelevant provided that the threatener intended to produce an expectation of that contact. As to this proviso I don't think the evidence is strong enough for me to make such a finding. I doubt that it occurred to the defendant that Gibbs would be or was likely to be frightened. Rather, I think the defendant was utterly reckless in his conduct and again I refer to Howard's statement.

I consider that the defendant ought to have known that his conduct could have given Dr. Gibbs reasonable grounds for supposing that he intended to inflict physical force upon him."

He repeated his finding that Dr. Gibbs was in fear and

reasonably in fear of unlawful contact (as to the necessity for the fear to be reasonable I refer to my remarks in MacPherson v. Beath, judgment delivered contemporaneously herewith).

. Accordingly he found the appellant guilty of assault.

The learned special magistrate went on to discuss the question of an assault by false imprisonment. He held that false imprisonment and assault were distinct offences and hence, though if the appellant had been charged with false imprisonment he would have found the charge proved, he held that the appellant could not be convicted on a charge of assault simply because he had committed false imprisonment.

The grounds of appeal are, firstly, that the finding of guilt was wrong in law, i.e. presumably that it was wrong on the findings of fact. Next, the findings of fact themselves were challenged in various ways. As I think that the learned special magistrate did make an error in law in his analysis of the crime of assault, and as I think that on the facts as found by him the appellant should have been acquitted and the complaint dismissed, I do not find it necessary to examine the grounds of appeal relating to the facts.

It was contended, however, by Mr. Wilson on behalf of the respondent that it was open to the magistrate to convict the appellant of assault on his finding that the appellant was guilty of false imprisonment. In reply Mr. von Doussa for the appellant challenged both the legal proposition that false imprisonment implies in itself an assault and justifies a conviction for assault, and the factual proposition that on the evidence it was open to the learned magistrate to find the appellant guilty of false imprisonment. This matter therefore will also have to be examined.

In limine the question arises whether an appeal is competent at all in this case because the complaint was dismissed, and that is what would have happened if the charge had been found not proved. But sec.163 of the Justices Act 1921 as amended gives a right of appeal from "every conviction, order, and adjudication of a court of summary jurisdiction". It has been held that those words refer only to some order or adjudication which affects the substantive rights of the parties and not to interlocutory orders or orders which relate only to matters of practice or procedure, Stuart v. Allchurch 1923 S.A.S.R. 333. But here the order for costs is undoubtedly a final order affecting the substantive rights of the parties, and so, in my view, is the adjudication of guilt and the order of dismissal. For that order as drawn up is not in the form appropriate to a dismissal as a result of an acquittal. That form is Form No.26 in the Appendix to the Act. The form of this order is headed "Order of discharge under the 'Offenders Probation Act 1913 as amended' " and it recites that the court thinks the charge proved but is of opinion that it is expedient to release the defendant and that it is therefore ordered that he be discharged and the charge dismissed without proceeding to a conviction. If we think, as I do, that the defendant was entitled to an order of dismissal in the form of No.26 appropriate to an outright acquittal, instead of an order of discharge in the present form, then I think that the court can substitute the first for the second. Section 177(2)(c) empowers us to vary the conviction order or adjudication appealed from and to substitute or make any conviction order or adjudication which ought to have been made in the first instance.

The learned special magistrate has decided that there may be a reckless assault and I assume that this is so, as I

think that it probably is, but it is not necessary to canvass the matter here. He further decided that that phrase covers not only a case where the defendant knows, though he may not desire, that the victim may be put in fear of immediate unlawful violence by his conduct and nevertheless persists, but also a case where, though he does not know that, he ought to know it. This, as I see it, is another example of the persistent heresy of objective guilt, the defendant being judged not by what he actually foresaw but by what he should as a reasonable man have foreseen. That is the theory acted on by the House of Lords in Director of Public Prosecutions v. Smith 1961 A.C. 290, but rejected by the High Court for Australia in emphatic terms in Parker v. Reg. 111 C.L.R. 610 per Dixon C.J. at pp.632-3.

"Reckless" is in truth an unfortunate word. In one sense it means acting with foresight of the probable dangerous consequences of the act even without the desire for them. But as Howard says at pp.56-7:

"It should be said that although the meaning given to the word 'reckless' here is generally accepted (i.e. involving foresight of the consequences) and in common use, the courts sometimes use it to mean a high degree of negligence i.e., a highly blameworthy degree of inadvertence to consequences. In this sense recklessness is synonymous with criminal negligence. The usage adopted in this book is preferred because it avoids possible confusion between certain forms of advertent and inadvertent conduct."

(The underlining and the words in brackets are mine).

In other words, the term "recklessness" is sometimes confined to advertent conduct and sometimes used to include inadvertent conduct. The resulting confusion is considerable and deplorable. It is much to be desired that the word "reckless" should be confined to action where the relevant

consequences are adverted to even if not desired.

There is no doubt, however, that in his discussion of the assault Howard, whom the learned magistrate was purporting to follow, was, as he says in the passage just cited, using the word "reckless" and its cognates in the narrower sense, see at pp.52-3, see at pp.55-6. Nor, despite Mr. Wilson's argument to the contrary, do I think that Lord Simon of Glaisdale in Reg. v. Morgan 1975 2 W.L.R. 913 at p.939 or Lord Edmund-Davies in the same case at p.947 was using the word "reckless" in the wider sense. One can hardly say that a man does something without caring about a certain circumstance or a certain consequence if he never directed his mind to that circumstance or consequence at all. Of course, in the context of rape, with which the learned Lords were dealing in Morgan's case, the question of possible inadvertence hardly makes sense. Except perhaps in the case of automatism or the like, one can hardly envisage a man having intercourse with a woman without directing his mind to the question of whether she was consenting or not.

I refer to the discussion of the question of recklessness amounting to malice aforethought by this court in Reg. v. Hallett 1969 S.A.S.R. 141 at pp.153-5 and to Smith and Hogan, Criminal Law 3rd Ed. at p.284 where the learned authors say in connection with assault:

"It is submitted that it would be in accordance with principle to hold D guilty if he were merely reckless whether P might not be alarmed by his gesture. It may be, though there is no authority on the point, that a civil action will lie for a negligent assault; but, in principle, it should not be a crime."

But it is needless to multiply citations. It is contrary to fundamental principles and the whole tenor of modern thought to judge a man in a criminal court, except under statutory

compulsion, not by his actual intention, knowledge or foresight, but by what a reasonable and prudent man would have intended, known or foreseen in the circumstances. I put to Mr. Wilson that if his argument were correct a man who drove negligently down the street putting a pedestrian in fear of injury might be guilty of an assault even if he did not know the pedestrian was there or direct his mind to any such possibility. Mr. Wilson did not shrink from that result but I do.

The analogy of manslaughter was mentioned. But manslaughter is sui generis amongst common law crimes. There, exceptionally, a very high degree of negligence causing death, even though inadvertent, may constitute the mental element in the crime. Even then the degree of negligence must be very high, far higher than that necessary to support a civil action, and in this case the learned special magistrate did not direct his attention to the degree of the negligence of which he found the appellant guilty. But there is no common law crime of causing injury by negligence when the injury falls short of death. There is no crime which stands to assault as murder stands to manslaughter. So, too, negligent conduct is often made punishable by statute, see for example R. v. Coventry 59 C.L.R. 633. But we are concerned here only with the common law.

I think, therefore, that the learned special magistrate was wrong when he said that if a defendant charged with assault indulges in conduct which he ought to know may harm or give cause for belief of imminent harm the necessary intention is there. Actual knowledge is necessary.

It was suggested that if we thought that, the proper course was to order a new trial. That would be an unfortunate consequence, because it would put the appellant in jeopardy of

a worse fate than a dismissal under the Offenders Probation Act without proceeding to conviction. But whatever notice we ought to take of that, it seems clear to me that the learned special magistrate has not merely applied the wrong test, but that he has found facts which demand an acquittal on the right test. I repeat his words, "I doubt that it occurred to the defendant that Gibbs would be or was likely to be frightened. Rather, I think the defendant was utterly reckless in his conduct and again I refer to Howard's statement". In those remarks the learned special magistrate could only have been using the word "reckless" in the second and wider sense of the word. If it did not occur to the appellant that Gibbs would be or was likely to be frightened, then he cannot have acted with foresight that Gibbs would be frightened. And the doubt expressed by the learned special magistrate can only mean that he was not satisfied beyond reasonable doubt that the appellant was guilty of an assault by recklessness in the limited and, as I think, the proper sense of the term. A fortiori that finding excluded any intentional assault.

I think, therefore, that the appeal should be allowed unless Mr. Wilson's argument about false imprisonment is sound. That is an obscure and difficult question.

Undoubtedly there are statements to be found in some authorities to the effect that every false imprisonment connotes an assault, e.g. Stephen's Digest of the Criminal Law 9th Ed. p.237, Halsbury 3rd Ed. Vol.10 p.741 note (f), Archbold, Criminal Pleading, Evidence and Practice 37th Ed. para.2632. Equally many eminent recent text writers say that the two crimes are distinct, though an assault or a battery may in practice very frequently accompany a false imprisonment, see Dr. Turner's article "Assault at Common Law" in the anthology edited by

Dr. Radzinowicz and Dr. Turner entitled The Modern Approach to Criminal Law at p.349, Smith & Hogan above cited pp.305-6, Kenny, Outlines of Criminal Law 19th Ed. p.222 (though, as this edition was edited by Dr. Turner, it is perhaps not astonishing that he adhered to his earlier opinion), Russell on Crimes 12th Ed. Vol.1 p.690 (also edited by Dr. Turner), Howard above cited p.132, Higgins, Elements of Torts in Australia pp.75-6. The weight of modern authority appears to favour the proposition that the two crimes are distinct despite the existence of decisions apparently to the contrary, mainly in the 19th century.

I think, therefore, that it is necessary to embark on a historical enquiry.

The crime of false imprisonment is mentioned by Coke. He bases it on Magna Carta. He says, with reference to the clause in that venerable document beginning "Nullus liber homo capiatur aut imprisonetur" (Inst. Pt.II c.29 p.55):

"He (i.e. the person falsely imprisoned) may cause him (i.e. the prisoner) to be indicted upon this Statute at the King's Suit whereof you may see a Precedent Pasch 3 H 8 Rott.71 coram Rege. Rob. Sheffield's case."

There is no suggestion of any confusion with assault. The crimes are treated as separate and distinct by Blackstone Comm. 19th Ed. c.XV. He says at p.216, after dealing with crimes against the person which amount to felonies:

"The inferior offences, or misdemeanours, that fall under this head, are assaults battery, wounding, false imprisonment, and kidnapping."

After dealing with assault he says at p.217 (para.VIII):

"The two remaining crimes and offences, against the persons of His Majesty's subjects, are infringements of their natural liberty: concerning the first of which, false

imprisonment, its nature, and incidents, I must content myself with referring the student to what was observed in the preceding volume, when we considered it as a mere civil injury."

In that volume he had treated the two torts as equally separate and distinct, see Vol.III c.VIII where he deals with assault at pp.120-1 and with false imprisonment at pp.126-7. As late as 1803 East in his Pleas of the Crown makes the same distinction. Assault is dealt with in c.VIII at pp.406-7 and false imprisonment in c.IX at pp.428-9. Again there is no suggestion that false imprisonment is a species of assault and not sui generis, though it is recognised that many common incidents apply to the two crimes and to the two torts. So far I have found nothing to support the respondent's proposition.

In 1824 Hawkins, Pleas of the Crown 8th Ed. Vol.I says at p.119:

"False imprisonment is necessarily attended with assault and battery, and is therefore an indictable offence, and is laid as an aggravation of the battery."

This is ambiguous language. It seems to me, despite the use of the word "necessarily", that he may well be referring to what happens in fact rather than what must be presumed to have happened as a matter of law. His definition of assault at p.110 is not wide enough to include a false imprisonment without violence or fear or threat of violence. And in Comyn's Digest 5th Ed. (1822) Vol.IV p.480 it is said that there is both an indictment and an action for false imprisonment without any suggestion that it necessarily connotes an assault.

However, before this a statement had appeared in Buller's Law of Nisi Prius in 1817 which, in my view, is the root of the subsequent change of opinion which appears in some of the cases to which I will refer hereafter. The learned

author says at pp.22a, 22b, 22c:

"Every restraint of a man's liberty under the custody of another, . . is in law an imprisonment; and whenever it is done without a proper authority, is false imprisonment, for which the law gives an action; and this is commonly joined to an assault and battery; for every imprisonment includes a battery, and every battery an assault."

The only authority cited for this proposition is Coke on Littleton 253.b., and the words of Sir Edward Coke at that page do not in fact support it. He was discussing, not trespass to the person or any crime at all, but the effect of fear, threats and the like in preventing entry on land by someone who is entitled to enter. He says:

"And it seemeth that feare of imprisonment is also sufficient, for such a feare sufficeth to avoid a bond or a deed; for the law has a speciall regard to the safety and liberty of a man. And imprisonment is a corporall damage, a restraint of liberty, and a kind of captivity."

"Corporal damage" is not synonymous with injury by battery, let alone injury by assault. That was a consideration which led the Court of Common Pleas in Emmett v. Lyne 1 Bos.&Pul. (NR) 255, 127 E.R. 459, to say with robust common sense, after counsel had cited the passage from Buller to which I have just referred:

". . it was absurd to contend that every imprisonment included a battery, and all that was said in Co.Litt.253, which was cited in support of that proposition in Bull.Ni.Pri. was that 'imprisonment is a corporal damage'."

With respect, I agree that it is absurd to contend that every imprisonment includes a battery, even if respect for the courts to whose decisions I am about to refer prevents me from saying that it is almost as absurd to contend that every imprisonment includes an assault, though I willingly grant that in fact in the vast majority of cases it does.

Mr. Wilson relied on eight cases. Some of them are civil cases, but I agree that the question of one crime or two separate crimes is the same question as that of one tort or two separate torts, at least for the purposes of the substantive law. There may, no doubt, be pleading differences. It is to be observed that in many of these cases, perhaps all of them except the last, there was the use of force or the threat of force where there was any imprisonment at all.

The first case is Arrowsmith v. LeMesurier 2 Bos.&Pul. (NR) 210, 127 E.R. 605. There there was no imprisonment and no assault either. The plaintiff merely walked up the street with the constable to the magistrate where he was discharged. The next is Pocock v. Moore Ry. & Mood. 321, 171 E.R. 1035. There there was a declaration for trespass and false imprisonment with a count for common assault. The defendant gave the plaintiff in charge of a constable. The constable said to the plaintiff, "You must go with me"; the plaintiff accompanied him but tried to escape en route whereupon the constable took hold of him, but not in the defendant's presence or by his direction. Abbott L.C.J. said:

"I am of opinion, that if a person send for a constable, and give another in charge for felony, and the constable tell the party charged that he must go with him, on which the other, in order to prevent the necessity of actual force being used, expresses his readiness to go, and does actually go, this is an imprisonment, and gives the party thus consenting to go, an action of false imprisonment. Then, as every imprisonment includes an assault, the plaintiff may recover on the count for a common assault."

The words of the Lord Chief Justice no doubt support Mr. Wilson's argument: but as the plaintiff apparently yielded to the threat of force to avoid the necessity of actual force, then assault

within the normal definition was committed, assuming the arrest to be unjustifiable, and there was no need to invoke the doctrine of implied assault by false imprisonment to entitle the plaintiff to the farthing he received from the jury.

The next case was Reg. v. March & Branston 1 Car. & K. 496, 174 E.R. 909. There the defendants got possession of a new born child from its mother by telling her they were going to take it to a nursery. Instead they put it in a bag and hung the bag on a fence. Tindal C.J. directed the jury that if they found that the defendants had done this they could convict them of an assault, but the handling of the child involved in putting it into the bag would constitute an assault anyhow.

The next case referred to was Reg. v. Leslie 8 Cox C.C. 269. The defendant was the captain of a ship on which certain political prisoners were placed at Valparaiso by the Chilean government and taken to England. He was charged with two counts in relation to each passenger, one count of assault and false imprisonment and one count of common assault only. He was also charged with conspiracy. The trial judge directed a verdict of guilty, apparently on the first count alleging assault and false imprisonment. When the case came before the Banco Court the conviction was affirmed, but the argument turned on the lawfulness of the detention. The conviction is referred to as a conviction for false imprisonment, not, be it noted, for assault, see at p.276. But there is nothing to show that the court would have upheld a conviction for common assault on the mere fact of the continued detention of the prosecutors on the ship after it had left Chilean territorial waters without any evidence of force or threat of force.

Bird v. Jones 7 Q.B. 742, 115 E.R. 668, was a case where the plaintiff's way was barred in the direction in which

he desired to go while he was left free to go in other directions. It was held that this did not amount to an imprisonment. The argument was not directed to the present question, though Lord Denman C.J. incidentally quoted the passage from Buller to which I have referred (see at p.672 of the English Reports) without citing the acid commentary on that passage in Emmett v. Lyne above.

Reg. v. Macquarie 13 S.C.R.(N.S.W.) 264 was a case where a bailiff, who had taken possession of a launch against the wishes of its owner, was set adrift in the launch by the defendants and left to extricate himself without any experience of navigation or the handling of engines. They were convicted on a charge of common assault (the bailiff was held by the arm and told to go ashore which he refused to do) and another count of assault and false imprisonment. Their conviction on the latter count was upheld. It was held that the defendants had committed a false imprisonment. The question of whether they had committed an assault by casting the boat adrift, apart from the act of physical interference to which I have referred, was not adverted to.

In Hunter v. Johnson 13 Q.B.D. 225 the defendant was a schoolmaster who had unlawfully kept a child in after school hours because he had not done his homework. He was charged with common assault, the charge was dismissed and a Divisional Court consisting of Mathew J. and Day J. allowed an appeal against the dismissal. Mathew J. said at p.227:

"I had some doubt also as to whether the facts stated on the case would amount to an assault; but bearing in mind the notice that had been sent to the schoolmaster by the mother and the fact that the child was kept in as a punishment, and could not have got away, I think the case

is brought within the authorities that have been referred to."

Those authorities appear to have been an earlier edition of Russell on Crimes and Bird v. Jones above. The respondent was not represented. It may be that the unlawful detention of the child was under threat of force, i.e. the infliction of corporal punishment in the event of disobedience. But there is no reference in the report to this and the case is, as far as I can discover, the sole example of a conviction on a charge of common assault on proof of a false imprisonment alone.

The last case cited was R. v. Linsberg & Leies 1905 J.P. 107. There the prosecutor was an accoucheur summoned to the bedside of a woman in imminent expectation of childbirth. He attempted to leave the room because he thought that he had been called too early, but his departure was frustrated by the defendants and the door was fastened against him. The defendants were charged with one count alleging both assault and false imprisonment, another count alleging false imprisonment alone, and a third count of common assault alone. They pleaded guilty to the second charge of false imprisonment and were bound over. The Common Serjeant undoubtedly said that a mere false imprisonment was an assault and an indictable offence, but this remark was clearly obiter since he was only concerned to deal with a plea of guilty to a charge of false imprisonment.

Before I consider the combined effect of the silence of the earlier authorities and the preponderating view of the modern text writers on the one hand and these decisions on the other, I think it is desirable to take some note of the curious method of pleading adopted in many of these cases where the indictment contained two or three counts, sometimes one alleging both assault and false imprisonment and another alleging common

assault alone (as in Leslie's case), sometimes, as in the case of Linsberg v. Leies, one alleging assault and false imprisonment, another alleging false imprisonment alone and a third alleging common assault alone. I would begin by saying that if indeed a conviction on a charge of common assault can follow from proof of false imprisonment without any assault in the normal sense it would seem a refinement of caution on the part of the pleader to have added the other charges. The practice of doing so, so far from proving that false imprisonment is an assault, seems to me to prove the contrary. But why the joint charge of assault and false imprisonment? This seems to have been common form under the old system of pleading, both in a civil action and a criminal indictment, see the precedents in Chitty's Criminal Law 1816 Vol.III pp.835-841, Starkie's Criminal Pleading pp.406 and 421-2, Chitty on Pleading 7th Ed. (1844) Vol.2 pp.653-4.

I claim no extraordinary expertise in this field, but two possible explanations occur to me. The first is that both in an action and in an indictment for false imprisonment the references to assaulting and beating may be merely formal words. In Hawe v. Planner in 1667 (1 Wms. Saund.13, 85 E.R. 15) the plaintiff sued for assault and battery because his hat was pulled off in church by a churchwarden. The declaration alleged that the defendant made an assault on the plaintiff and beat and wounded and illtreated him. In fact, of course, he was not beaten, wounded or illtreated and there was probably no battery. Note (3) to the report says (p.16 of the English Reports):

"However, where a person is only assaulted, still the form of the declaration is the same as where there has been a battery, 'that the defendant assaulted, and beat, bruised, and wounded the plaintiff'. Kitch. 76. 4 edit cites 40 Edw. 3, 40. 42 Edw. 3, 7."

If, then, it was common form to use the words about beating and wounding implying a battery where there was in fact no battery but only an assault, why may not it also have been common form to use not only such words but words implying a common assault when there was in fact not only no battery but no assault either, only a false imprisonment, so long as the false imprisonment itself was distinctly alleged? Some support is given to this suggestion by the report of Leslie's case above where the crime of which the defendant was convicted is spoken of by the judges as false imprisonment though the relevant count alleged both an assault and a false imprisonment. I think this is the most probable explanation of these pleadings. The usual and permissible practice was to use words about assault and battery as well as words about false imprisonment in a declaration in an action or a count in an indictment for false imprisonment, and, so long as the false imprisonment was proved, the plaintiff was entitled to judgment and the prosecutor to a verdict of guilty, even though no assault or battery was proved or attempted to be proved. This does not mean that a plaintiff could have recovered or a prosecutor have obtained a verdict of guilty on a declaration or a count alleging common assault where no violence or fear of violence was proved but only a false imprisonment. Of course, I repeat that in nearly all cases of false imprisonment there will be either force or the threat or fear of force and it is not perhaps surprising that cases of false imprisonment without any such force, fear or threat

have proved so rare as not to have attracted detailed analysis.

It is true, of course, that it is very common nowadays to allege assault only and to prove a battery as well and for the accused to be punished for the battery on conviction for assault. But this is because "in the current speech even of lawyers the word 'assault' is habitually used as if it included 'battery'" (Kenny above cited p.218). Indeed the word "battery" is absent from secs.39, 40 and 43 of the Criminal Law Consolidation Act, though it is clearly included in the word "assault" in sec.40 at least, since that section contemplates actual bodily harm from the assault and indeed I think it is so included in all of them. Strangely enough the word "battery" does appear in sec.46. But the current speech of lawyers does not use the word "assault" as if it included "false imprisonment".

Another possible explanation is afforded by a passage in Starkie above at p.246 where he is dealing with the allegation and an indictment of several offences conjunctively. There is much confusion and apparent conflict in the authorities as to the circumstances when, if at all, this was permissible under the old system of criminal pleading. I have referred to the subject in Romeyko v. Samuels 2 S.A.S.R. 529 at p.553-4 and in Reg. v. Elliott ex parte Elliott 8 S.A.S.R. 329 at pp.331-2. Starkie discusses the question briefly and he refers to R. v. Fuller 2 Leach 790, 168 E.R. 495. That was a charge of attempting to seduce a soldier from his allegiance and it was objected to one of the counts that it alleged two offences, one of endeavouring to seduce the soldier to commit mutiny and another of endeavouring to seduce him to commit traitorous and mutinous practices. Perryn B. said at p.499 of the English Reports:

". . that probably it would be found to be a sufficient answer to this objection, that (though this charge might have been branched out into separate offences) the whole may be but the parts of one fact of endeavour, which must be stated as it is."

So it may be that in some of these cases where there was one count alleging assault and false imprisonment, what was really alleged was one set of circumstances which could, if the prosecutor had wished, have been branched out into separate offences of assault and false imprisonment. However, I am dubious about the relevance of this and I think that the true explanation of a count where both assault and false imprisonment are alleged, though only false imprisonment was proved or ever expected to be proved, is the first one I have given.

However this may be, I think that assault and false imprisonment are distinct and separate offences. They were so treated by all the masters of the common law before 1800. The majority of the modern text writers say that they are so separate and distinct. The 19th century cases which appear to have held to the contrary were not decided by any court whose decisions are binding on us. In many cases the relevant remarks are obiter: in other cases there may well have been an assault in a technical sense. There is no case which directly holds that there may be a conviction for common assault on proof of false imprisonment without proof of force or the fear of force, with the probable, though not certain, exception of Hunter v. Johnson and in that case there was no-one to put the contrary argument. The view that every false imprisonment implies an artificial assault springs, I think, from the passage in Buller. That passage is not supported by the authorities cited for it. It was condemned shortly after its appearance in Emmett v. Lyne.

The view of the modern text writers commends itself to me as justified both in history and in logic. The traditional and normally accepted definition of assault is not apt to cover a case where there is no physical contact or fear of physical contact. In most cases of false imprisonment there is at least the fear of it, but that need not necessarily be so - e.g. when a man is secretly locked in a room without realising it until he tries the door. False imprisonment is undoubtedly a crime in itself. I think it desirable that crimes should be kept distinct and that a man charged with crime A and nothing else should not be in peril of being convicted of crime B, subject to well known qualifications, some created by statute and some by common law, which are not relevant here.

I hold, therefore, that in this case the learned special magistrate's finding that the appellant did not intend to put Dr. Gibbs in fear of unlawful physical contact, and his further finding that he was in doubt as to whether the appellant foresaw that Dr. Gibbs was being put in such fear should necessarily have led to his acquittal on the charge of assault, because the essential ingredients of the crime were negatived or put in doubt, and that it is nothing to the point that he thought that the appellant had been guilty of a separate and independent crime with which he had not been charged. As in theory he could still be charged with that crime I refrain from discussing whether on the facts as found he was guilty of it. I would only say that, in my view, the mens rea necessary to constitute the crime of false imprisonment is the intention to deprive the victim of his liberty and the intention to arouse fear of violence or foresight of fear of violence is not relevant.

I add that this conclusion at least avoids one anomalous consequence. If the appellant had been charged with the misdemeanour of false imprisonment as such without reference to assault, he could not have been tried for it summarily. It is not a minor indictable offence within the list contained in sec.120 of the Justices Act. That section excludes misdemeanours punishable by imprisonment for a term exceeding two years. False imprisonment is such a misdemeanour. At common law it was punishable by imprisonment for any term. If the respondent is right, the learned special magistrate could deal with something under the name of assault which he could not have dealt with if it had been described by its specific and proper name. I think such a result would be regrettable.

In my opinion the appeal should be allowed and the orders of the learned special magistrate set aside and in lieu thereof there should be substituted an order for dismissal on the basis of a complete acquittal.

MacPHERSON v. BROWNFull CourtZelling J.:

This is an appeal from an order of Mr. B. St.L. Kelly, S.M., made on 3rd January, 1975 which was referred to the Full Court for hearing and determination by order of Walters J. dated March 21st, 1975.

The defendant, the appellant in this Court, was charged on the information of Leonard Douglas Brown of Adelaide Superintendent of Police for that on 29th August, 1974 he assaulted David Norris Gibbs, contrary to Section 39 of the Criminal Law Consolidation Act.

The Magistrate found the defendant guilty of assault but, using the powers provided by the Offenders Probation Act, dismissed the complaint without proceeding to a conviction and ordered the appellant to pay \$350 counsel fees and \$10 witness fee, in all \$360. He ordered thirty-six days' imprisonment in default of payment and allowed the appellant six months in which to pay.

The Magistrate's findings of fact were as follows:-

- "1. The defendant and others were involved in the occupation of the administration section of the Flinders University.
2. Dr. D.N. Gibbs and others were involved in the re-occupation of that building on the 28th August 1974.

I pause here to stress that in making these specific findings I do not suggest that either MacPherson or Gibbs were the leaders of their separate groups, but merely involved with others.

- "3. As a result of this state of affairs there was ill feeling between the defendant and Gibbs. Indeed, this ill feeling could extend well prior to these incidents. But it is clear that on the 29th August 1974 (the date upon which the assault is alleged) there was ill feeling between the two.
4. At approximately 5.15 p.m. Dr. Gibbs came to Flinders University and went to the Registry Building. In this general area there were a considerable number of students who were there to demonstrate their annoyance with the staff reoccupation and also apparently to prevent academic staff leaving the building.
5. There is some dispute as to Gibbs' following movements, but suffice to say I am satisfied that before his confrontation with MacPherson there were a number of students following him in his progress, apparently attempting to question him without success. At this point again there is some dispute as to who had a megaphone in his or her possession, but the most likely person was the defendant himself. Certainly the defendant claims this and I see no reason to disbelieve him.
6. Whilst being followed in his progress Gibbs came across the defendant and a small group - approximately eight. When Gibbs and MacPherson were quite close - perhaps a foot or so - Gibbs was in fact physically surrounded by a number of students - perhaps thirty or so (there is considerable conflict on the actual number).

- "7. At this stage there were some comments from the defendant in relation to Gibbs assaulting him and also questioning as to Gibbs' part in the reoccupation. Again, there is considerable conflict in this area, but I reject entirely any suggestion that MacPherson's words were of a threatening nature. Gibbs' evidence suggests this, but I do not accept it. I believe it was MacPherson's intention to harass Gibbs in the sense of questioning him in public, firstly about alleged assault charges and secondly Gibbs' part in the reoccupation.
8. When questioned Gibbs asked to be let through but, when he put his hand up in an apparent attempt to brush MacPherson aside, MacPherson made some comment about Gibbs assaulting him (MacPherson), and this cry was taken up by other members of the surrounding group.
9. At this stage I accept without reservation that Gibbs was frightened of MacPherson and one of his companions. He says, and I accept it, 'I just regarded myself in physical danger I thought I might be hit'. I further accept that on at least two occasions before the group broke up Gibbs requested to be let through, but no move was made by any of the group to allow this.

I also indicate that I do not believe that Gibbs' feeling that he might be hit by MacPherson continued throughout this altercation. Clearly, on the evidence, in conflict as it is, Gibbs was frightened at the beginning but later on calmed down and carried on a discussion with the group. I consider that this discussion was not voluntary in the sense that the group were surrounding him, failed to allow him to pass on two occasions, and questions, comments and charges were being fired

at him consistently. Understandably he felt obliged to enter that discussion in a defensive way.

I should pause here to indicate that I do not accept that any persons linked arms nor did MacPherson's body touch that of Gibbs. I will refer to credibility in due course.

10. After some 10-15 minutes during which time Gibbs used the megaphone to answer certain allegations or questions: one student by name Britza became somewhat hysterical; the defendant requested her to calm down and one Callahan suggested that this confrontation would solve nothing; the group finally dispersed and Gibbs was able to move. Clearly, in view of the rather large discrepancies in the various versions of witnesses in the case, I have reached these findings on matters of general credibility and demeanour."

The Magistrate thought that both Dr. Gibbs, who is a lecturer at the Flinders University, at which University MacPherson was a part-time student, was exaggerating in his own cause and that his feelings had clouded accuracy in some instances and he made similar observations in relation to the appellant. He accepted the evidence of three other witnesses: Bardsley, Yates and Callahan, and found unacceptable the evidence of three witnesses called by the appellant: Clark, Whelan and a Miss Britza. Professor Russell, the Vice-Chancellor was also called, but as the Magistrate correctly says, his evidence has no bearing on the matters in issue in this prosecution.

The learned Special Magistrate then went on to deal

with the law as to the crime of assault. Here without doubt he misdirected himself. There is no doubt that the authorities support the proposition that an assault includes a threat to inflict lawful force slight or great upon another man, coupled with the intention by the person making the threat to produce the expectation of unlawful physical contact in the mind of the victim, and that it is irrelevant, where this is material, that the person making the threat had neither the intention nor the ability to inflict the unlawful contact which he had induced the victim to expect. After quoting from Kenny's Criminal Law and Howard's Australian Criminal Law on these matters, the Magistrate then added to the statement which he had quoted from Professor Howard's book, the observation that if a defendant indulges in conduct which he knows or ought to know may harm or give cause for such a belief then the necessary intention is made out. Here the Magistrate clearly went wrong. The conduct must be intentional in the sense that the accused adverted to the consequences of his reckless conduct. After dealing with questions which are really more relevant to assault arising out of a false imprisonment to which I shall return later, the Special Magistrate said that he rejected any suggestion that the appellant intended to strike or cause Gibbs to be struck by any person. He doubted that it occurred to the appellant that Gibbs was or was likely to be frightened. Rather he thought that the appellant was utterly reckless in his conduct and he again referred to what he wrongly believed the statement from Professor Howard's textbook covered by way of conduct. He said that he considered that the defendant ought to have known that his conduct could have given Dr. Gibbs

reasonable ground for supposing that the appellant intended to inflict physical force upon Gibbs. He found that there was no doubt that Dr. Gibbs did fear such unlawful contact and had very reasonable grounds for so doing. He then went on to find that if the defendant had been charged with false imprisonment he would have found such a charge proven, but relying on modern textbooks which I shall have to discuss in detail, he says that a mere finding of false imprisonment does not justify the further finding of assault. However for the reasons he had given there was in his opinion ample evidence of an assault and he so found and the defendant was convicted.

Dealing first then with an assault *stricto sensu* I have no doubt the learned Magistrate misdirected himself. It was held by Lord Parker, L.C.J., and James J., Bridge J. dissenting on the facts, in Fagan v. The Commissioner of Metropolitan Police (1969) 1 Q.B. 439 at 444 that --

"An assault is any act which intentionally - or possibly recklessly - causes another person to apprehend immediate and unlawful personal violence."

The word "possibly" in that quotation can now be deleted following the decision of the Court of Appeal in The Queen v. Venna "The Times" Friday August 1st, 1975 where the Court of Appeal stated that the mens rea of assault is sufficiently established by proof of the mental element of recklessness. The difficulty however with the Magistrate's finding is that "recklessness" in this context connotes an advertence to the consequences of the defendant's act or series of acts. His finding that the defendant ought to have known is not sufficient for this purpose. This would appear to follow also

from the judgment of the High Court of Australia in Vallance v. The Queen 108 C.L.R. 56, even though this is a decision on the wording of Section 13 of the Tasmanian Criminal Code.

Personally I wish that those dealing with this branch of the law would cease to use the word "reckless" with its emotional overtones and use the much more accurate periphrasis of conduct by an accused advertent of the relevant consequences.

Mr. Wilson, who appeared for the Crown on the appeal, valiantly attempted to extract from the speech of Lord Simon in The Queen v. Morgan 1975 2 W.L.R. 913 at 939 a third possible alternative meaning of the word "reckless" in which "reckless" was equated with "not caring" and said ~~that~~ the accused must be held not to have been reckless in that sense - a sense in which that word is sometimes used in the law. For example in the law of fraud, it is said that a statement may be made recklessly, not caring whether it is true or false, but even then as the Chief Justice pointed out arguendo if you use the words "not caring", the person whose conduct is under discussion must have adverted to the subject matter in issue to come to a state of caring or not caring. In my opinion in any case, Lord Simon was not intending to formulate a third category in relation to recklessness. The law is, in relation to assault as in some other cases in which recklessness is an ingredient in the mens rea of an offence, that the recklessness must be advertent of consequences, and not inadvertent. That being so the Magistrate's primary reason for convicting the accused of assault cannot stand.

For myself I would have had no difficulty in inferring from the facts as found by the learned Special Magistrate, and

from the appellant's own evidence at page 34 of the transcript lines 2-4 that the appellant did advert to the consequences of his acts and was reckless in the true sense, but the judgment of the High Court of Australia in Edwards v. Noble (1971) 125 C.L.R. 296 precludes me from doing any such thing on appeal.

The alternative argument of the Crown was that, having regard to the positive finding that the accused could have been found guilty of false imprisonment by the learned Special Magistrate if he had had jurisdiction to try the charge, the principles of Edwards v. Noble applied on this occasion in favour of the Crown and that as every false imprisonment includes an assault the finding of guilt must stand.

There is a respectable body of authority that every false imprisonment does indeed include an assault. Hawkins Pleas of the Crown Volume I (8th edition) 1824 page 119 says:-

"False imprisonment is necessarily attended with assault and battery, and is therefore an indictable offence, and is laid as an aggravation of the battery. It is a misdemeanour and punishable as other misdemeanours".

This statement of the law is repeated in Burn's Justice of the Peace 28th edition (1837) Volume 1 page 278 where it is bluntly stated:-

"Every unlawful imprisonment includes an assault" and there is a reference to Hawkins and to 4 Blackstone's Commentaries 218. The reference to Blackstone on examination does not bear out the comment in Burn. Blackstone says:-

"Inferior degrees of the same offence of false imprisonment are also punishable by indictment (like assaults and batteries), and the delinquent may be fined and imprisoned."

The author of Burn obviously read the word "like" as meaning "including" whereas the more probable meaning of the word in that context is "in the same manner as". However there is no doubt that the quotation from Hawkins given above does support the text in Burn's Justice of the Peace. Similarly Buller J. in his Introduction to the Law relative to Trials at Nisi Prius 7th edition (1817) at pages 22a to 22c Chapter 4 Of False Imprisonment says:-

"Every restraint of a man's liberty under the custody of another either in a gaol, house, stocks, or in the street, is in law an imprisonment and whenever it is done without a proper authority, is false imprisonment, for which the law gives an action; and this is commonly joined to an assault and battery; for every imprisonment includes a battery and every battery an assault"

and the reference which he gives is Co. Litt. 253. Again a reference to Coke on Littleton page 253 Section 419 does not bear out the text in Buller. Littleton's text deals with continual claim made, as evidence of possession and seisin in land, ~~just~~ as if the claimant had actually made entry on the land. Coke's comment is:-

"And it seemeth that Fear of Imprisonment is also sufficient, for such a Fear sufficeth to avoid a Bond or a Deed; for the Law hath a special Regard to the Safety and Liberty of a Man. And Imprisonment is a corporal Damage, a Restraint of Liberty, and a kind of Captivity."

The comment of Coke's however does not equate assault and false imprisonment per se.

This view of the law is however also sustained by one for whose views I have always entertained the utmost respect: Sir James Fitzjames Stephen who in his Digest of the Criminal

Law 5th edition (1894) article 262 says:-

"An assault is

- (a) an attempt unlawfully to apply any the least actual force to the person of another directly or indirectly,
 - (b) the act of using a gesture towards another giving him reasonable grounds to believe that the person using that gesture meant to apply such actual force to his person as aforesaid,
 - (c) the act of depriving another of his liberty,
- in either case without the consent of the person assaulted, or with such consent if it is obtained by fraud."

The law is similarly stated in Archbold's Criminal Pleading and Evidence 30th edition (1938) page 945 --

"An unlawful imprisonment is also an assault."

Similarly in the 2nd Edition of Halsbury's Laws of England Volume 9 pages 470-471 title "Criminal Law and Procedure", paragraph 803 under the heading 'False Imprisonment' and note (s) it is said:-

"A wrongful imprisonment amounts to an assault (1 Hawk. P.C. c.60 s.7) even though no violence or threat of violence is actually used (see R. v. Linsberg and Leies (1905) 69 J.P. 107)."

The principal author of that title in the 2nd Edition of Halsbury's Laws of England was a great master of the criminal law, Avory J. The same statement is found in the 3rd Edition of Halsbury Volume 10 page 741 note (f) where the principal author of the title "Criminal Law and Procedure" was Humphreys J. who was likewise a master of the criminal law. Wrongful imprisonment is stated to be an example of an assault in the

latest New South Wales textbook on the criminal law by Watson and Purnell (1971) page 91. The American view is to the same effect. It is stated in 35 Corpus Juris Secundum at page 635 that "False Imprisonment always includes at least a technical assault" and a similar statement occurs in Volume 6 of the Corpus Juris at page 797.

The only one of the earlier textbooks on the criminal law which deals with assault in which I have been unable to find a reference to the connection between false imprisonment and assault is in East's Pleas of the Crown 1st Edition (1803) pages 406 and 428.

In 1945 however Radzinowicz and Turner edited a book called "A Modern Approach to Criminal Law" of which Chapter XVIII relating to assault at common law was written by Turner. At page 349 he says:-

"It may be well at this point to refer to the crime of False Imprisonment, for in some authorities, it is confused with Assault. Indeed, false imprisonment is sometimes treated as though it were merely a special form of assault. Thus, in both Kenny and Stephen it is discussed only in connection with assault and not dealt with as a distinct and separate crime at all. This is strange, for long ago Coke pointed out that false imprisonment had been an indictable misdemeanour since Magna Charta, and neither he nor Comyns nor Blackstone identifies it with assault. Russell says, 'It usually, but not necessarily, involves an assault', which is true, for in most instances when false imprisonment occurs, assault and battery will also in fact have been committed. Statements have, however, been made to the effect that mere wrongful deprivation of liberty amounts, per se, to an assault. Hawkins has been given as authority for this proposition. Hawkins' words are: '. . . he who is

threatened to be imprisoned by another has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man', but as he proceeds to argue with reference to battery it would seem that he had in mind an imprisonment involving physical force, especially as when defining and discussing assault he says nothing of false imprisonment."

This analysis by Turner has altered the view of the law expressed in all the modern textbooks: for example, Smith & Hogan: Criminal Law 3rd Edition pages 281 and 305 deal with assault and false imprisonment as two separate crimes and at page 306 say:-

"Though some of the older authorities speak of false imprisonment as a species of assault, it is quite clear that no assault need be proved."

Archbold: Criminal Pleading Evidence and Practice 37th Edition (1969) states the law differently at two different parts of the same work. At paragraph 2632 on page 825 it is stated:-

"An unlawful imprisonment is also an assault" whereas at page 889 paragraph 2800 on false imprisonment the text reads:-

"It (i.e. false imprisonment) usually, but not necessarily, involves an assault or battery or some degree of threatened or actual violence to the person; but the essential element in the offence is the unlawful detention of the person or the unlawful restraint on his liberty."

In this state of the law it is necessary to go back to first principles. Street: "The Foundations of Legal Liability" (1906) Chapter 1 Trespass upon the Person pages 1-2 after pointing out that trespass was originally dealt with in the double aspect of both civil and criminal wrong, "and that in the same proceeding the wrongdoer was both mulcted in damages for the tort and fined for his criminal misdemeanor" goes on to

say at pages 12 and 13:-

"Falsely to deprive a man of the freedom to go whither-soever he may is clearly a trespass. False imprisonment was, indeed, one of the first trespasses recognised by the common law (and he refers to Bracton's Notebook II pl. 314 (1229), pl. 465). A laying of violent hands upon the person and an actual forceful deprivation of liberty is the element undoubtedly at the root of liability in this wrong. In other words, the typical original imprisonment involved a battery. But the wrong was not destined to be restricted to such narrow bounds. Just as the assault represents an extension of the conception of harm involved in the battery in one direction, so the wrong of imprisonment represents the extension of that conception in another direction. Accordingly it has long been settled that actual physical constraint, or physical contact, is not necessary to make an imprisonment. Coercion of any kind, as where the person imprisoned yields without resistance to superior force or to authority, is enough. But some form of coercion is essential. One who is prevailed upon by false representations to go and remain at a particular place is not imprisoned, unless, perchance, force or intimidation be used to prevent departure.

The tort of imprisonment is so far predicated upon restraint of personal freedom that one cannot be held liable therefor unless it affirmatively appears that detention was contrary to the will of the person alleged to be imprisoned. Thus, it has been decided that where the principal of a school wrongfully refuses to surrender to its mother a child committed to his care, an action for imprisonment cannot be maintained against him on behalf of such child in the absence of proof that the child was, against its will, restrained from going with its mother, or at least that the refusal to surrender was made in its presence (and he refers in a footnote to Herring v. Boyle 1 C.M. & R. 377).

"The law recognises the fact that one does not have to be actually incarcerated in order to be imprisoned, That other things besides stone walls and iron bars can make a prison was decided at an early day (and he refers to the judgment of Thorpe C.J. in Y.B. (1348) 22 Ass. 104 pl. 85)."

The fact is as Holdsworth points out: History of English Law Volume 3 pages 598-600, that the law of false imprisonment was developing throughout the middle ages basically through the medium of actions brought by persons arrested against their captors to test the validity of the captivity. See also Volume 8 at page 423.

This view is borne out by the various textbooks, abridgements and dictionaries of the period.

Staunford in his Plees del Coron (1574) refers under "false imprisonment" only to the Statute of Westminster the Second Chapter Thirteen which refers to false imprisonment in the Sheriff's tourn: see page 84C. As Hawkins says in his preface to his Pleas of the Crown:-

"The treatise of Sir William Staundforde seems to be writ with great judgment, but he takes in a very small compass, scarce mentioning any offences under felonies."

Brooke's Abridgement of 1576 has a long section on "faux imprisonment" at pages 320 - 322. The entry however deals with the question of when an imprisonment is false because the process is in some way invalid, with the question of who may arrest and who may be arrested, and with what ought to be done on arrest. It does not deal with the kind of false imprisonment which falls for consideration here.

Cowell: The Interpreter (1607) deals with false imprisonment very shortly and says:-

"False imprisonment (falsum imprisonamentum) is a trespassed committed against a man, by imprisoning him without lawfull cause: it is also used for the writ which is brought upon this trespassed."

And then follows three short references one of which I shall deal with a little later in this judgment.

Sir Edward Coke in his Institutes of the Law of England Volume II page 45 deals with false imprisonment almost entirely as a commentary on the great Chapter XXIX of Magna Carta, the foundation of our liberties, which reads:-

"Nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terrae. Nulli vendemus, nulli negabimus, aut differemus justitiam, vel rectum."

Basically he is commenting in that passage on the words "vel per legem terrae".

At page 483 where he is commenting on the Statute of Westminster II Chapter 48 he says:-

"In priso: Every restraint of the liberty of a Free man is an imprisonment, although he be not within the wals of any common Prison."

In Chapter C of his work at page 209 which is headed "Of False Imprisonment" he sums up the mediaeval law on the subject well but in much the same way as Brooke. Coke was of course fighting the cause of the common law against the Chancery and the civil law courts and he was principally

interested in false imprisonment in relation to testing the jurisdiction of those Courts and showing the bounds of their jurisdiction had been exceeded; thus for example in Volume IV of his Institutes pages 96 and 97 he speaks of false imprisonment as a way of showing that proceedings before the Court of Requests were coram non iudice.

There is no doubt from the Latin form of the information in Brownlow's Book of Entries compiled in 1653 and 1654 and published in 1693 at page 477 that the form of declaration for trespass in false imprisonment included an allegation of assault. The relevant part reads:-

"Quare vi et armis in ipsum R. (i.e. the plaintiff) apud London insultum fecerunt et ipsum verberaverunt vulneraverunt maletractaverunt et imprisonaverunt et (the plaintiff) in priona contra legem et consuetudinem hujus Regni Anglie diu detinuerunt et alia enormia ei intulerunt &c.".

There are similar precedents in Rastell's Collection of Entries (1670) pages 339 and 340 and in the Registrum Brevium (1687) page 93. The same form of pleading is seen in English in Lilly's Collection of Entries Volume 2 (1791) page 436.

The best comment on this form of pleading is in the 9th Edition of Fitzherbert's Natura Brevium (1794) page 86K where the author says:-

"And if a man imprison another, then the form of the writ of trespass is, to shew wherefore with force and arms he made an assault upon him the said A. at N. and wounded, imprisoned and illtreated him, and other &c.

And it is not material whether he be wounded or not, for the form of the writ is such; but the damages shall be increased for the same if he recover."

Clearly as Lilly points out in his Reports and Pleadings of Cases in Assise page xxxi, 170 E.R. 7, when speaking of the somewhat similar position in relation to a count in assault, that the reason was to keep up the ancient and approved forms. Accordingly there is no doubt that originally the allegation was an allegation of assault or battery together with false imprisonment and indeed in those days it is difficult to see how an imprisonment could be effected other than by an actual assault or battery.

Dalton's Country Justice (edition of 1697) says at Chapter 170 pages 446, 447:-

"Arrest and Imprisonment -

An arrest is the apprehending and restraining of a Mans person, depriving it of his own will, and may be called the beginning of Imprisonment.

1. Imprisonment is when a Man is arrested against his will, or is restrained of his Liberty, by putting him into the Gaol, Cage, or Stocks, or into some Houses, or otherwise by keeping him in the High-street, or Open Field, so as he cannot freely go at liberty, when and whither he would
3. The Liberty of a Man is a thing specially favoured by the common Law of this Land; and therefore if any of the Kings subjects shall imprison another without sufficient Warrant of him or his Law, the party grieved may have his Action, to recover Damages against the other; and the King also shall have a Fine of him. For Imprisonment of another without Offence of the Law, is one of the Kings Royal Prerogatives and only annex to the Crown.

Also by the Statute Magna Charta made 9 H.3. c.29 no Free-man shall be taken or Imprisoned &c. but by the lawful judgment of his Equals (sc. upon his Conviction (for some offence) by the Verdict of a Jury of 12 good and lawful Men) or by the Law of the Realm. See Petition

Anno 3 Caroli. Regis & Stat. 5 Ed. 3. cap. 9.

316,

And by the Statute of Magna Charta, every Arrest or Imprisonment, and every Oppression against the Law of the Land is forbidden; and if any Judge, Officer, or other Person, against the Law, shall usurp any Jurisdiction, and by color thereof shall Arrest, Imprison, or Oppress any Man, it is punishable by the Statute. See Co. 10.75."

Then follows the normal exceptions that a man may be put to answer by indictment or presentment and a man may be arrested for treason, felony or breaking the peace, and all sorts of other things for which a man may, or could in those days, arrest, e.g. vagabondage, or Justices of the Peace could arrest, or Constables might arrest.

Bohun's Institutio Legalis or an Introduction to the Study and Practice of the Law of England (1708) has several references to false imprisonment. At page 363 under the heading "Misfeasance" he has at the bottom of the page - "See Presidents for arresting, holding to bail, and Imprisoning without cause of Action: see 1 Brownl. 36; Clif. 33, 34, 35; Bro. Red. 47, 59, 61; Thom. 72; 9 Vid. 36; Platt. 53; Rob. Entr. 90; Clerk's Ass. 213, 230, 255, &c." -- and at page 383 he goes on --

"The Statute of 8 Eliz. cap. 2 directs, That if any shall maliciously cause any person to be arrested or attached at the Suit of any Person, not in being, or without such Party Plaintiff's consent the Party procuring such arrest or Attachment being thereof convicted by Indictment, or presentment on the Oath of two or more Witnesses or other due proof, shall suffer six months Imprisonment without Bail and shall not be enlarged 'til he hath satisfied the Party grieved his treble Damages, and shall also forfeit to him ten l. to be recovered with the said treble Damages by action of Debt, Bill or Plate in any Court against the

Party so offending, his Executors or Administrators in which no Essoin, &c. to be allowed.

See Presidents on this Statute Rast. Entr. 598, 599; Thom. 82; Bro. Red. 460; Rob. 326."

At page 452 he says under "Imprisonment":-

"A Man is said to be unlawfully Imprisoned, when either there is no good cause for his Imprisonment, or he that Imprisons him hath no good Authority so to do, or if having good Authority he does not pursue it, or doth Arrest at a forbidden time, or in a forbidden place, or the like. So

If one lay his hands upon me, and hold me in his Arms, restrains or keeps me in my own or another Man's House, tie me to a Tree or Post, put me in a Prison or Stocks, or any other way restrain me of my Liberty against my Will all these are Arrests and False Imprisonment.

43 E.3. 20. Bro. Imprison. 37. 10 Co. Rep. 66, 69. So If one to whom I owe money, or hath done a Trespass, of his own Head, without any Writ Imprison me til I pay him his Debt, or give him a Recompence for the Trespass, or if one Imprison me until I pay him Money, enter into a Bond or Statute, or make a Release or the like, I may have this Act. F.N.B. 88; Old Book of Entries 587. And yet where I am duly Imprisoned, by some Legal Warrant in a false or faned Suit, tho' no money be due, or the Money is paid, or the like, in such Cases I may not have this Action. 43 E.3. 3."

Jacob's Law Dictionary (1739 edition) has a long entry under "False Imprisonment" and it sums up in very great detail the mediaeval and early modern common law but it throws no further light on the connection between assault and false imprisonment.

Sir Michael Foster's Crown Law 1st Edition (1752) does not appear to deal with this point at all.

There is no doubt that the indictment for assault and false imprisonment at common law conjoined these two concepts: see Chitty's Criminal Law Volume III (1816) page 835 where the indictment reads as follows:-

"Middlesex. The jurors for our lord the king upon their oath present, that A.B. late of the parish of L. in the county of M. yeoman, on the day of in the year of the reign of our sovereign lord George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the faith, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one M.D. in the peace of God and our said lord the king then and there being, did make an assault, and him the said M.D. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of; and him the said M.D. then and there unlawfully, and injuriously, against the will and without the consent of the said M.D. and also against the laws of this realm, without any legal warrant, authority, or justifiable cause whatsoever, did imprison and detain, for a long time, to wit, for the space of, &c. then next following, and other wrongs to the said M.D. then and there did to the great damage of the said M.D. and against the peace of our said lord the king, his crown and dignity."

Clearly from the form of indictment in Archbold (1969) 37th Edition paragraph 2802 page 890 that, in a shortened form, is still the position in England.

I turn now to the cases on which the Crown relied in support of its contention that every false imprisonment imports an assault. They are as follows taking them in chronological order:- first Arrowsmith v. Le Mesurier 2 Bos. & Pul. N.R. 211; 127 E.R. 605. This case shows that a voluntary submission to authority by a plaintiff is not a false imprisonment but does

not appear to help the Crown except that the action without doubt was an action of trespass for assault and false imprisonment but, as I have shown from the precedents, that was in any case the standard form of pleading.

Then comes Pocock v. Moore (1825) Ry. & Mood. 321; 171 E.R. 1035. This again was a civil action for trespass for assault and false imprisonment and the point relied on by the Crown occurs in the very short judgment of Abbott, L.C.J., at page 322 where it is said:-

'Then, as every imprisonment includes an assault, the plaintiff may recover on the count for a common assault.'

The next case is The Queen v. March and Branston (1844) 1 Car. & K. 496; 174 E.R. 909. This does not help the Crown because whilst it is true that Tindal C.J. in summing up referred to the putting of a child in a bag as an assault, clearly it was both an assault and a false imprisonment any how and accordingly this reference which is at page 500 of the report in Car. & K. and at page 911 of the English Reports does not take the Crown case any further.

The next case is again a civil case: Bird v. Jones (1845) 7 Q.B. 742; 115 E.R. 668. The passage referred to is in the judgment of Patteson J. at pages 751-752 in 7 Q.B.; 671-672 in the English Reports; where the Judge said:-

"I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room: and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched."

And there is a further reference to the judgment of Lord Denman, C.J., at page 754 of the report in 7 Q.B., page 672 of the

English Reports, which cites the passage that I have already cited from Buller that every imprisonment includes a battery and every battery an assault.

Mr. Wilson then referred to The Queen v. Lesley (1860) 8 Cox's C.C. 269. This case is quite unimportant except that the indictment alleged both assault and false imprisonment but as I have said previously all the indictments were so drawn and this one is no exception.

Similarly with the next case: the New South Wales case of The Queen v. MacQuarie and Budge (1875) 13 N.S.W. S.C.R. 264 where it was held that where the defendants cast adrift a launch on Sydney Harbour with a bailiff on board this amounted to a false imprisonment of the bailiff, it does not, so far as I can see, take the point any further than the previous cases.

The next case however is of more importance: Hunter v. Johnson (1884) 13 Q.B.D. 225. In this case a child was detained at school after school hours for the purpose of doing homework which the child had not done at home. It was held that there was no power to require children to do homework at home and that a parent's liability to have a child educated extended only to sending the child to school during school hours for instruction. It shows how far we have moved from 1875 that Mathew J., who delivered the first judgment, regarded compulsory education as a statutory interference with the liberty of the subject. However the Judge, whilst in doubt whether an assault within the ordinary meaning of the word had been committed, held that because the child was kept in as a punishment and could not have got away, the detention was, as argued for by the appellant, an unlawful imprisonment and consequently an assault. Regrettably this case was not

argued on behalf of the respondent and the judgment of Mathew J. in which Day J. concurred, was not a reserved judgment. Nevertheless it is an authority for the proposition that a false imprisonment does, at least in most circumstances, include an assault.

The last case on which the Crown relied was The King v. Linsberg and Leies (1905) 69 J.P. 107. This again is not a very satisfactory judgment. The Common Serjeant said at page 108:-

"Does false imprisonment without any actual assault and battery constitute an indictable offence? I am satisfied by the authorities quoted (i.e. Pocock v. Moore and Hunter v. Johnson) that the mere false imprisonment is an assault and can be, and is in this case, an indictable offence

In a criminal court, any person who has imprisoned another, that is, has deprived him of his liberty, without justification, and without even a belief that he has a legal right to do so, is guilty of a criminal assault."

Unfortunately the accused pleaded to the second count in the indictment without any question being raised as to the sufficiency of the count.

My own view after this survey of the law and of the authorities, which regrettably has had to be a rather long one in the present state of the law, is that a false imprisonment can amount to an assault but does not necessarily do so and one has to look at the facts of each case to ascertain whether this is so.

As I have said earlier, it would have been impossible in earlier days to effect a false imprisonment without physical constraint and a putting in fear, it is now possible to do so quite easily by mechanical means.

Thus for example, one may arrange doors which open by means of sensors as a person approaches them, so that the sensors operate on one side only. Accordingly when the victim goes through the door and essays to return, the doors stay closed. There is no doubt he is falsely imprisoned but there is no violence or threat of violence and no putting in fear. The victim's mind will be filled with rage, not fear, and that will no doubt be the result intended by the perpetrator, so that neither the actus reus nor the mens rea of assault will exist in such a case.

Turning now to the instant case, the facts on the defendant's own story are that he approached Gibbs with a group of people of whom about eight were behind or beside him and another group of people approximately fifty were behind or beside Dr. Gibbs, but more concentrated around the appellant. As Gibbs stopped, the group that had been around him came round and enclosed the group that the accused had been in, making it approximately an evenly spread group of approximately sixty people. It is obvious that the defendant intended to question Gibbs in a hostile manner and he intended to question him for the edification of and with the aid of these sixty people. He used a megaphone when he was only one or two feet away from Gibbs and clearly he had no need of a megaphone except to involve the group in their harassment of Gibbs and their impeding Gibbs from going about his lawful business. Gibbs protested that he did not wish to answer questions but for some fifteen or twenty minutes he was not allowed to get away. The appellant says that he wished the crowd to know his (i.e. Gibbs') answers. In my opinion the appellant used the crowd

to imprison Gibbs by the implied threat of force to keep him there until he answered the questions to the appellant's satisfaction. The appellant only lost interest in the confrontation when it was obvious that Gibbs was not going to answer the questions either at all or certainly not to the appellant's satisfaction. Bardsley deposes to the considerable antagonism which existed on the part of the defendant towards Gibbs and that Gibbs was distraught. The appellant's own witness Callahan at page 58 agreed that Gibbs was embarrassed and a bit scared. In my opinion the evidence established beyond all reasonable doubt that the appellant used this group as a means of falsely imprisoning Dr. Gibbs by inducing fear in Gibbs that if he tried to get away, his progress would be impeded and if necessary restrained until this confrontation had taken place. This is not something which the appellant merely ought to have known. He did know it. It is true that the learned Special Magistrate says that the appellant knew or ought to have known that students would gather around. In fact the appellant knew perfectly well that they had gathered round. He could see them there and they were there to serve his purpose, namely to hear what answers Gibbs would give, to surround Gibbs, to heckle him, and to stop him getting away until he answered the questions which the appellant was putting to him through a loud hailer, which instrument could be used for no other purpose than for the information of the group and not the appellant. In my opinion this particular false imprisonment does encompass within it both the actus reus and the mens rea of an assault. As Barwick, C.J. said in The Queen v. Phillips (1971) 45 A.L.J.R. 467 at 472:-

"Such an assault (i.e. an assault in the common law

sense of that word) necessarily involves the apprehension of injury or the instillation of fear or fright. It does not necessarily involve physical contact with the person assaulted: nor is such physical contact, if it occurs, an element of the assault."

In my opinion the evidence proves beyond reasonable doubt that the conduct here involved the apprehension by Dr. Gibbs of injury to him and certainly the instillation of fear or fright in Dr. Gibbs and that this was done consciously and advertently by the appellant. Accordingly this false imprisonment does involve an assault and the finding of assault against the appellant was rightly made though on the wrong grounds.

In discussing the facts necessary to come to this conclusion I have of course been guided by the principles in Edwards v. Noble to which I have referred earlier because the finding of false imprisonment is in favour of the Crown on this aspect of the case, and to the comments of Wells J. in Haskell v. Samuels (1974) 9 S.A.S.R. 59 at 61 as to the way in which an appeal court should act in drawing inferences from the primary facts. Regrettably the learned Special Magistrate does not seem to have applied his mind on this aspect of the case to inferences from the other witnesses whom he accepted, largely I suspect because he again misread his authorities and thought that a false imprisonment could never in the present state of the law, amount to an assault. However what I have found in this judgment very largely turns on the defendant's own evidence and he can hardly complain if he is convicted out of his own mouth. Either he used this group as his means of committing an assault on Dr. Gibbs or if it be thought that the group committed the assault by what they

did, he was without doubt an aider and abettor (see R. v. Coney (1882) 8 Q.B.D. 534 per Cave J. at p. 541) and liable to be convicted as a principal offender. He encouraged and procured what they did for his own ends and did nothing in the fifteen or twenty minutes of the confrontation to urge them to disperse because that would have frustrated his purpose of arraigning Gibbs and preventing Gibbs getting away by putting him in fear of physical obstruction if he tried to do so. Either way the result is the same. The finding of guilty of assault should stand.

In my opinion the observation of the learned Special Magistrate at page 72 of the transcript "I doubt that it occurred to the defendant that Gibbs was or was likely to be frightened" applies only to the question of fear by Gibbs of assault by physical violence by MacPherson directly applied to Gibbs. In my view the Magistrate never applied his mind to the question of MacPherson's advertence of Gibbs' fear of assault per alios in the course of a false imprisonment and so I am entitled to draw my own deductions from the evidence as I have done.

That then leaves only the order for costs below for consideration. A substantial amount of the time taken up in the hearing below turned on assault *stricto sensu*, that is to say whether or not physical contact was made. The remainder of the evidence is just as relevant on the issue upon which I have ultimately found against the appellant. I think that justice will be done if the amount ordered for costs against the appellant is halved in these circumstances and the appellant be ordered to pay \$175 for costs and the \$10 witness

fee, in all \$185. As the Crown sought to support the judgment on two grounds, one of which has failed, in my opinion there should be no costs of the appeal.

I find this a very unsatisfactory way of disposing of this appeal. However at an early stage of Mr. Von Doussa's address, I foresaw that this was a likely possibility and we invited him to amend his grounds of appeal by applying for a new trial. He conferred with his client in the presence of the Court and it was obvious from his reply that the client elected not to ask for a new trial. In these circumstances the appellant cannot complain that he was not given the opportunity of seeking a rehearing of the facts with the focus on false imprisonment as the true ground of a finding of assault against him. The finding was open on the particulars supplied by the Crown which were tendered before us and there is therefore no question of surprise but I would have preferred that the matter be argued directly at another hearing in the Court below limited to this particular issue. Notwithstanding the appellant's choice during the hearing I would still give him the opportunity to have the matter remitted for rehearing under Section 177(2)(d) of the Justices Act, as the most satisfactory course of dealing with the matter in the circumstances which have occurred: see Hannan: Summary Procedure of Justices 4th Edition p. 195 note (m).

In the result the order for costs below should be varied in the manner set out above and otherwise the appeal should be dismissed.

The appellant should be heard as to time to pay and a substituted period of imprisonment should be imposed in default of payment.

Full CourtJacobs J.

I have had the advantage of reading the judgments of the Chief Justice and Zelling J. Putting on one side for the moment the difficult question of whether false imprisonment, if proved, necessarily justifies a conviction for assault, I agree with my brethren that the reasons of the learned magistrate disclose an error of law, as to the 'mens rea' necessary to sustain the charge of assault, and that on the facts as found, the appellant should have been acquitted. There is nothing I desire to add on that branch of the argument, although I shall come later to consider the relevant findings in another context.

Does it make any difference, then, that the appellant was, upon the findings and in the opinion of the learned magistrate, guilty of false imprisonment? On this aspect of the case, there is nothing I can usefully add to the historical review of the law that has been undertaken by my brethren. My own research, albeit less extensive, had led me to the same conclusion. I agree with Zelling J. that a false imprisonment can amount to an assault but does not necessarily do so, from which it would seem to follow that assault and false imprisonment can be, and sometimes are, separate and distinct offences. No doubt in many cases a person guilty of false imprisonment will be guilty of assault, whether by way of battery or otherwise, but this can only happen if all the elements in the crime of assault accompany the false imprisonment. Let it be assumed that we have here the 'actus reus' and the necessary 'mens rea' to sustain a charge of false imprisonment, and there is certainly the 'actus reus' of a technical

assault, for there can be no doubt that Dr. Gibbs was put in fear by the acts of the appellant. True it is that the learned special magistrate considered the question of mens rea only in relation to a charge of assault, and true it is that he misdirected himself upon that, so that he has not, strictly speaking, applied his mind to the proper test. But in the course of his judgment he said "I doubt that it occurred to the defendant that Gibbs would be or was likely to be frightened." Upon the incorrect tests applied by the learned magistrate this remark was not relevant to his decision, for it would have mattered not that the appellant did not apply his mind to the question of whether Dr. Gibbs was or might be in fear, if he ought to have appreciated that possibility. Nevertheless, if the correct test had been applied, it seems clear that the appellant would have to be given the benefit of the learned magistrate's doubt. If there is a doubt as to whether the appellant adverted to the consequences to which he was said to be reckless, or (as I would prefer to say) indifferent, then there is a doubt as to whether he had the necessary mens rea to sustain the charge of assault, and it seems to me necessarily to follow that he was not guilty of an assault in the course of committing the crime of false imprisonment.

If we were free to consider the question of assault de novo, in the context of false imprisonment, I do not think I could have shared the learned magistrate's doubts. There was clearly evidence to support a finding not only that Dr. Gibbs was in fear by reason of the conduct of the appellant, but that his state of mind was apparent to others. That it was not apparent to the appellant, as the appellant asserts, or indeed that it might not have been so apparent, seems scarcely credible,

unless the appellant is a much more callous and insensitive person than I believe him to be. Whether the learned special magistrate would have had a doubt about the matter, or whether he would have rejected the appellant's evidence if he had been called upon to weigh it without resorting to the objective standards which he applied, it is impossible to say, but in all the circumstances I do not think we should go behind the doubt which he has in fact expressed, albeit unnecessarily, in the context of his own reasons.

Accordingly, I agree with the Chief Justice that the appeal should be allowed, and the conviction quashed, but before parting with the case, I draw attention to what appears to me to be a curious anomaly in the law as applied to the facts of a case such as this. It seems clear enough on the whole of the evidence that Dr. Gibbs maintained considerable calm and self-control. Although it was apparent to some witnesses, perhaps those who knew him better or were more sympathetic to him, that he was distressed and apprehensive, his own words, in cross-examination by the appellant, are probably a fair summary of the position -

"Q. I put it to you that you were acting in quite a calm manner and were not fearful at all as you have described.

A. I was fearful but I have considerable control and I may not have shown it."

As I have already said, he did show his feelings to others, if not to the appellant, but however that may be, it would seem that the protection of the criminal law is less readily available to those who show restraint and self-control in such an ominous situation

as Dr. Gibbs found himself. Had he given obvious vent to his feelings - which might well have provoked the very conduct of which he was fearful - it would hardly lie in the appellant's mouth to say that he was not aware that he was putting Dr. Gibbs in fear. It is no sufficient answer to say that the criminal law in such a situation protects the timid and the weak, but not the brave and the strong, and I should like to think that the law gives more encouragement than the outcome of this case might suggest, to those who act with restraint and self-control in a situation such as that in which Dr. Gibbs found himself. Perhaps it is sufficient answer that the appellant may well have been guilty of an offence, i.e. false imprisonment with which he was not charged.