## KOECHLIN v. WAUGH AND HAMILTON

*Ontario Court of Appeal, Laidlaw, F. G. MacKay and Schroeder JJ.A. February 13, 1957.*

*G. A. Macartney,* for appellant; *J. A. Taylor,* for respondent.

The judgment of the Court was delivered by

LAIDLAW J.A. (orally) :—This is an appeal by the plaintiffs from a judgment pronounced by His Honour Judge Shea, in the County Court of the County of York, on May 21, 1956, dismissing with costs an action brought by the plaintiffs for damages for alleged unlawful arrest and imprisonment.

At the conclusion of the hearing, reasons for judgment of the Court were given orally, but the reasons were not recorded and counsel has now requested that reasons in writing be prepared by the Court.

On the evening of October 11, 1955, the infant plaintiff, aged about 20 years, and his friend Victor Wassilgew, attended

a picture show in the Township of Scarborough. The show ended about midnight. They went to a restaurant for coffee and, afterwards, started to walk on the sidewalk on Kingston Road in the direction of the home of Wassilgew. They were stopped by the defendants, who are police officers of the Township of Scarborough. The police officers were in plain clothes and were in a police cruiser car. The police called the infant plaintiff and his companion to their car and asked for their identification. Wassilgew gave his identification at once and told the police officers that they were on their way home after the show. The infant plaintiff objected to giving his identification unless the police officer, Hamilton, who spoke to him, first identified himself. The defendant Hamilton produced a badge and said he was a police officer, but the infant plaintiff was not satisfied with that identification and requested the name and number of the officer. The officer did not give his name, but his number was on the badge. The infant plaintiff continued to refuse to identify himself, and a scuffle ensued during which the infant plaintiff fell into a deep ditch. Subsequently, force was used by the police officer and other officers who were called to the scene to put the infant plaintiff into a police car. He was not told any reason for his arrest. He was taken to the police station and told that he would be charged with assault of a police officer.



The adult plaintiff stated in evidence that he was informed about 2 o'clock in the morning that his son was in custody; he went to the police station; he asked the Sergeant of Police the reason his son was there in custody; the sergeant told him it was for assaulting a police officer. The adult plaintiff asked the sergeant how it happened and, according to the evidence of the adult plaintiff, the sergeant said "he would not tell me, that I would hear about it the next day in Court about 10 o'clock in the morning". He says he asked the sergeant if he could see his son and was refused permission. It was 9 or 10 o'clock the following evening before the infant plaintiff was released on bail. On November 18th, the charge against the infant plaintiff was heard and was dismissed.

The learned Judge stated in reasons given by him that the police officers stopped the infant plaintiff and his companion because they were sauntering along the street, and because of "their dress". There was in fact nothing distinctive about the dress of the infant plaintiff, but his companion was wearing rubber-soled shoes and a jacket. The learned Judge referred also to the fact that there had been a number of "break-ins" in the

neighbourhood a few nights before and that the police had reported that a person wearing rubber-soled shoes was involved in one or more of those break-ins. After referring to the reasons for stopping the infant plaintiff and his companion and asking for identification, the learned Judge said: "Then, from then on, the actions of Koechlin, and his words, would in my opinion justify the officers in believing that this man either had or was about to commit a crime." Later, he said, referring to Koechlin — "his refusal to cooperate — made the officers still more suspicious and firm in the belief, as I said, that something was wrong".

Counsel for the appellants in this Court based his case on the ground that the police officers had no reasonable or probable grounds for believing that the infant plaintiff had committed or was about to commit an indictable offence. We are satisfied, after perusal of the evidence, that neither of the police officers had such grounds. We do not refer in detail to the evidence, but observe from the evidence given by the defendant Waugh that the reason for him believing the infant plaintiff and his companion were about to commit an offence was "the way they were dressed and the way they were walking—sauntering along the sidewalk". We observe, also, that he said in his evidence: "We were going to take him up to the station and find out who he was . . . The reason we were going to take him to the station; we thought it would be better to take the man up to the station than argue out on the street."

A police officer has not in law an unlimited power to arrest a law-abiding citizen. The power given expressly to him by the Criminal Code to arrest without warrant is contained in s. 435, but we direct careful attention of the public to the fact that the law empowers a police officer in many cases and under certain circumstances to require a person to account for his presence and to identify himself and to furnish other information, and any person who wrongfully fails to comply with such lawful requirements does so at the risk of arrest and imprisonment. None of these circumstances exist in this case. No unnecessary restriction on his power which results in increased difficulty to a police officer to perform his duties of office should be imposed by the Court. At the same time, the rights and freedom under law from unlawful arrest and imprisonment of an innocent citizen must be fully guarded by the Courts. In this case, the fact that the companion of the infant plaintiff was wearing rubber-soled shoes and a windbreaker and that his dress attracted the attention of the police officers, falls far short of reasonable and

probable grounds for believing that the infant plaintiff had committed an indictable offence or was about to commit such an offence. We do not criticize the police officers in any way for asking the infant plaintiff and his companion to identify themselves, but we are satisfied that when the infant plaintiff, who was entirely innocent of any wrongdoing, refused to do so, the police officer has no right to use force to compel him to identify himself. It would have been wise and, indeed, a duty as a good citizen, for the infant plaintiff to have identified himself when asked to do so by the police officers. It is altogether likely that if the infant plaintiff had been courteous and co-operative, the incident giving rise to this action would not have occurred, but that does not in law excuse the defendants for acting as they did in the particular circumstances.



We direct attention to an important fact. The infant plaintiff was not told by either of the police officers any reason for his arrest. The infant plaintiff was entitled to know on what charge or on suspicion of what crime he was seized. He was not required in law to submit to restraint on his freedom unless he knew the reason why that restraint should be imposed. In *Christie* v. *Leachinsky,* [1947] 1 All E.R. 567, a decision of the House of Lords, Lord Simon, after referring to many authorities, said at pp. 572-3:

"These citations . . . . seem to me to establish the following propositions:

"1. If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.

"2. If the citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.

"3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.

"4. The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie,* entitled to his freedom and is only required to submit to restraint on

his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.

"5. The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, *e.g.*, by immediate counter-attack or by running away.

"There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or complete code, but to indicate the general principles of our law on a very important matter. These principles equally apply to a private person who arrests on suspicion. If a policeman who entertained a reasonable suspicion that X had committed a felony were at liberty to arrest him and march him off to a police station without giving any explanation of why he was doing this, the *prima facie* right of personal liberty would be gravely infringed. No one, I think, would approve a situation in which, when the person arrested asked for the reason, the policeman replied: 'That has nothing to do with you. Come along with me.' Such a situation may be tolerated under other systems of law, as for instance, in the time of *lettres de cachet* in the eighteenth century in France, or in more recent days when the Gestapo swept people off to confinement under an overriding authority which the executive in this country happily does not in ordinary times possess. This would be quite contrary to our conceptions of individual liberty."

In this case it was held that although the police officers *bona fide* and on reasonable grounds believed the plaintiff had committed an offence, they had not informed him as to why he was being arrested and were, therefore, liable in damages for false imprisonment. In *R.* v. *Hastings*, 90 Can. C.C. 150, [1947] 4 D.L.R. 748, 21 M.P.R. 23, it was held by the New Brunswick Court of Appeal that a person being unlawfully arrested without a warrant is entitled to resist such unlawful arrest.

There is one further matter that deserves comment. A person who has been arrested should not be held *incommunicado*. We do not find it necessary to find as a fact that the infant plaintiff was denied his right to communicate with his father at the first reasonable opportunity. If, however, the father of the infant plaintiff was refused permission by the Sergeant of Police to see his son at any time before the charge came on for hearing in Court, such practice cannot be justified in this or in any other case. A person in custody should never be denied

his right to communicate with his relatives at the earliest reasonable opportunity so that he may avail himself of their advice and assistance. That right ought to be recognized and given effect in all cases, and care should be exercised by police authorities to see that it is not wholly disregarded.

Finally, we are not in accord with the view expressed by the learned trial Judge that the actions of the infant plaintiff in resisting the efforts of the police officers can be regarded as justification for their belief that he "either had or was about to commit a crime". In the particular circumstances he was entitled in law to resist the efforts of the police officers, and they have failed in this case to justify their actions.

It was stated in the course of giving oral reasons for judgment that the Courts would strive diligently to avoid putting any unnecessary obstacle in the way of the detection of crime or the lawful arrest of persons in the proper performance of the duties of a police officer. We repeat an expression of that policy of the Courts. Nothing in these reasons for judgment should be taken as encouragement to any person to resist a police officer in the performance of his duties; on the contrary, it is not only highly desirable, but vitally important, that every person should co-operate to the utmost with police officers for the good of the public and to ensure the preservation of law and order in his community.

In this case the police officers exceeded their powers and infringed the rights of the infant plaintiff without justification. Therefore, the appeal will be allowed with costs. The judgment of the Court below will be set aside and in place thereof there will be judgment for the plaintiffs in the amounts assessed, respectively, for damages suffered by the infant plaintiff and by the adult plaintiff. The amount of judgment in favour of the infant plaintiff will be paid into Court in accordance with the usual practice. The plaintiffs are also entitled to the costs of the action.

*Appeal allowed.*