

“She took no reasoning”: Enticing Someone into a Public Place

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McMillan v Crown Prosecution Service
[2008] EWHC 1457 (Admin)

A police constable acted lawfully when he physically escorted a woman from a private garden to a public footpath and then arrested her for an offence that could only be committed in a public place.

Introduction

This case has implications for the use of section 136 of the *Mental Health Act 1983*, under which a person in a public place who appears to be suffering from mental disorder may be arrested by a police constable and taken to, and detained for up to 72 hours in, a place of safety, such as a police station or a hospital.²

Although it is frequently used, the section 136-power is rarely the subject of legal proceedings, and quite often, the best guidance as to its limits may be found in cases that have nothing to do with mental health.³ One such case suggests that a practice commonly thought to be dubious may in fact be perfectly lawful.

It is hard to find authoritative statistics on section 136. Data collected by the Mental Health Act Commission (MHAC) suggest that between 2002/3 and 2003/4, the power was used 4,450 times, with patients detained either in hospital or in a police station.⁴ More recent figures, however, suggest much greater usage. The Independent Police Complaints Commission (IPCC) has calculated that in 2005/6, patients detained under section 136 were held in police cells alone on 11,517 occasions. (The greatest use would appear to be in Sussex, where there were 277 such patients per 10,000 people in police detention. The lowest was in Cheshire and in Merseyside, where the proportion was one patient per 10,000 detainees.)⁵

Recently, a great deal of attention has been given to the places of safety to which patients apprehended under section 136 are taken.⁶ There is also concern, however, that on occasions, police constables keen to use the

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2 MHA 1983, section 136. See also: Department of Health, 2008, *Mental Health Act 1983 Code of Practice*, paragraph 10.12 et seq; Department of Health, 2008, *Reference guide to the Mental Health Act 1983*, paragraph 30.16 et seq.

3 See, for example: David Hewitt, *New perspectives on the Mental Health Act*, *Solicitors Journal*, vol 152 no 44, 18 November 2008, page 13.

4 Mental Health Act Commission, 2006, *In Place of Fear? Eleventh Biennial Report, 2003–2005*, TSO, paragraph 4.165 and figure 76.

5 Maria Docking, Kerry Grace and Tom Bucke, September 2008, *Police Custody as a “Place of Safety”: Examining the Use of Section 136 of the Mental Health Act 1983*, Independent Police Complaints Commission, IPCC Research and Statistics Series: Paper 11, pages 10 & 11. Also see ‘The use of section 136 to detain people in police custody’, Maria Docking, in this issue of the *Journal of Mental Health Law*.

6 See, for example: Paul Bather, Rob Fitzpatrick and Max Rutherford, September 2008, *Police and mental health*, Sainsbury Centre for Mental Health, Briefing 36; Royal College of Psychiatrists, 2008, *Standards on the use of Section 136 of the Mental Health Act 1983 (2007)*, College Report CR149; Maria Docking et al, *op cit*.

removal power have enticed a person into a public place. The MHAC, for example, says it has “heard of several [...] instances where s136 has been used to detain a person who has been asked or made to step outside of their home (or another private property) by police.”⁷ The Social Services Inspectorate (SSI) has suggested that this is so in a “significant minority” of section 136 cases.⁸ For its part, the MHAC adds:

“[A]t a meeting with one London-based social services authority [...] we noted that its audit showed that 30% of s.136 arrests were recorded as having been made at or just outside the detainee’s home. Police officers were ‘inviting’ people out of their homes, or arresting them for a breach of the peace and ‘de-arresting’ them once outside to then invoke s.136 powers.”⁹

The IPCC study found evidence to the same effect, and notes:

“It was stated that this was generally done because officers were either: concerned about the welfare of the individual; did not feel they had time to wait for a warrant to be obtained under section 135 of the Mental Health Act 1983 (in order to lawfully detain someone in a private premise); and did not feel they had any alternative options for detaining the individual.”¹⁰

But if this practice is widespread, Richard Jones says it is unlawful,¹¹ a conclusion he draws from the case of *Seal v Chief Constable of South Wales Police*.¹² There, police were alleged to have arrested a man for breach of the peace in his own home, and to have then detained him under section 136 “as a result of what happened in the street” outside. Passing judgment, Baroness Hale wondered, *obiter*, how the man could be said to have been “found in a place to which the public have access”.¹³ That case might not, however, represent the whole story.

The facts

The latest case came in the form of an appeal by Mary McMillan against her conviction for being drunk and disorderly in a public place. In Sunderland, in the early hours of a midsummer morning, two police constables had seen Ms McMillan in the street, waving her arms about and obviously drunk. When they told her to go home she did so, but a short time later the constables found her outside a house, shouting at the front door. The house belonged to her daughter and this time, Ms McMillan did not heed the suggestion that she go home. One of the constables, PC Spackman, went into the garden of the house, where he noted signs that Ms McMillan was intoxicated. She was shouting and swearing, although not towards the constable. He took hold of her arm and led her from the garden onto the pavement beyond. Because she had continued to shout and swear, the constable then arrested Ms McMillan for being drunk and disorderly in a public place.

The appeal judges noted that at first instance, the magistrates had accepted that:¹⁴

- At the front door, PC Spackman had tried to calm Ms McMillan down by warning her as to her behaviour, but she “took no reasoning”.

7 *Mental Health Act Commission*, 2008, *Risk, Rights, Recovery: Twelfth Biennial Report, 2005–2007*, TSO, paragraph 4.63.

8 *Social Services Inspectorate*, 2001, *Detained: Inspection of compulsory mental health admissions*, paragraph 6.8.

9 *Mental Health Act Commission*, 2008, *op cit*.

10 *Docking et al*, 2008, *op cit*, page 18.

11 Richard Jones, 2008, *Mental Health Act Manual*, Sweet & Maxwell, eleventh edition, paragraph 1-1253.

12 *Seal v Chief Constable of South Wales Police* [2007] UKHL 31; [2007] 4 All ER 177. See further: David Hewitt, *Protection from what? The nullifying effect of section 139*, *Journal of Mental Health Law*, November 2007, page 224.

13 *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, per Baroness Hale at [60].

14 *Judgment*, at [4] (unless stated).

- She came away from the door without force or struggle.
- The constable told her that he wanted to sort out the problem without an arrest.
- Although he took firm hold of her arm, it had not been against her will; there were steps in the garden and he wanted to steady her for her own safety.
- Ms McMillan continued shouting and swearing on the path and was warned several times about her behaviour.
- The pavement on which Ms McMillan was arrested was a public place.¹⁵
- The constable’s intention in leading her there was to speak to her in the street.

The issue

The issue in this case was whether PC Spackman had acted lawfully when physically taking hold of Ms McMillan and leading her from the garden to the public footpath. At first instance, it had been the basis for a submission of no case to answer and an application to exclude the constable’s evidence, both of which failed.

The appeal judges accepted that the disorderly behaviour on which the conviction was founded had to be limited to that on the public footpath, because the garden was a private place.¹⁶ For Ms McMillan, however, it was argued that from the moment PC Spackman took her arm and led her from the garden, he was assaulting her, and that when she shouted and swore, she was not acting in a disorderly manner, but in protest at a continuing assault of which she was the victim.¹⁷

Both the magistrates and the appeal court accepted that the question of whether the constable’s actions had amounted to an assault was to be answered by reference to *Collins v Willcock* [1984] 1 WLR 1172,¹⁸ which suggested that:

- (a) consent is a defence to assault, and most of the physical contacts of ordinary life are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact;
- (b) alternatively – and preferably – there is no assault where physical contact is of a kind that is generally acceptable in the ordinary conduct of daily life;
- (c) in either case, the test is whether the physical contact went beyond generally acceptable standards of conduct.

The judgment

In a judgment with which Mr Justice Penry-Davey agreed, Lord Justice McKay LJ said that the magistrates had been entitled to find that by taking Ms McMillan by the arm and leading her from the garden to the public footpath, PC Spackman was indeed acting within the bounds of what was generally acceptable.¹⁹

¹⁵ Judgment, at [1] & [15].

¹⁶ This appears to be consistent with *R v Edwards* (1978) 67 Cr App R 228, a case decided under the Public Order Act 1936, and also with *R v Leroy Lloyd Roberts* [2003] EWCA Crim 2753 and *R v Bogdal* [2008] EWCA Crim 1, which were decided under section 139(7) of the Criminal Justice Act 1988 and section 3(1) of the

Dangerous Dogs Act 1991 respectively. (See also: *Director of Public Prosecutions v Fellows* (1993) 157 JP 936.)

¹⁷ Judgment, at [8].

¹⁸ See, in particular, Goff LJ at pp 1177 & 1178.

¹⁹ Judgment, at [11].

It was clear that the magistrates were satisfied that the constable had hoped to achieve a “negotiated conclusion” and had therefore decided not to arrest Ms McMillan in the garden, perhaps for an offence under section 5 of the *Public Order Act 1936*. Furthermore, they had rejected the suggestion that the purpose of moving her from there was to justify an arrest for an offence that could only be committed in a public place.²⁰

Finding that PC Spackman had not assaulted Ms McMillan, and therefore dismissing her appeal, McKay LJ said:

“In my judgment, in acting as he did, the [constable][,] who had had in mind the steepness of the steps in the garden and had wanted [in his own words] ‘to steady her for her own safety’[,], can properly be said to have acted in conformity with ‘generally acceptable standards of conduct.’”²¹

Discussion

It is, of course, dangerous to compare cases from different areas of law; from different jurisdictions, indeed. There are, however, very few cases on the interpretation and use of section 136 of the *Mental Health Act 1983* and if we are to form a mature view of the limits and possibilities of that power, we are forced to look elsewhere.²² That, in fact, is a sensible approach, for experience suggests that whether they are brought under the *Public Order Act 1936*,²³ the *Criminal Justice Act 1988*,²⁴ the *Road Traffic Act* of the same year²⁵ or the *Dangerous Dogs Act 1991*,²⁶ the precipitating facts of many cases are colourably the same: someone has been arrested in a public place for an offence that can only be committed there.

The circumstances in which Mary McMillan came to be arrested do not seem exceptional and for good or ill, the actions of PC Spackman do not seem unusual. For present purposes, indeed, they resemble the approach reported by the MHAC, the SSI and the IPCC, and condemned by Richard Jones.

When considering the lawfulness of that approach, it seems that a great deal will depend on why a police constable took the action he or she did. If the court can be persuaded that he or she went no further than what is “generally acceptable”, it seems that an enticement – or even force – that persuades a mentally disordered person to quit a private place for a public will be eminently lawful.

20 *Judgment*, at [12].

21 *Judgment*, at [13].

22 David Hewitt, 2008, *op cit*.

23 *R v Edwards* (1978) 67 Cr App R 228.

24 *R v Leroy Lloyd Roberts* [2003] EWCA Crim 2753; *Harriott v DPP* [2005] EWHC 965 (Admin).

25 *David Lewis v Director of Public Prosecutions* [2004] EWHC 3081 (Admin); *May v Director of Public Prosecutions* [2005] EWHC 1280 (Admin).

26 *R v Bogdal* [2008] EWCA Crim 1; *Director of Public Prosecutions v Zhao and Zhao*, QBD (Admin), 30 June 2003, Owen J.

