Lord Justice Rose:

1 The question raised by this appeal is whether on a charge, under section 38 of the Offences against the Person Act 1861, of assault with intent to resist lawful apprehension for failing a roadside breathalyser test, it is a defence that the defendant honestly believed that he had not failed the test. Put another way, and more widely, does the mens rea for assault with intent to resist lawful apprehension include an absence of honest belief in the defendant that the arrest was lawful?

2 The appellant was convicted at Maidstone Crown Court on February 28, 2000 of two offences contrary to section 38 and subsequently sentenced to two years' imprisonment on each concurrently, with a further concurrent sentence for handling stolen goods. He appeals against conviction by leave of the single judge on the ground that the trial judge failed to direct the jury that it was a defence genuinely, albeit mistakenly, to believe that the purported arrest was unlawful. Leave has not been granted to argue any other ground.

3 The relevant facts can be shortly stated. On September 24, 1999, the appellant was driving a motor car in Mace Lane, Ashford. He was stopped by police for a roadside safety check. His breath smelt of alcohol. He said he had only drunk a pint and a half. He was asked to provide a breath specimen. He did so in an alcolyser bag. It was common ground that the officers said the test was positive, in that the crystals had changed colour beyond the red line, but the appellant immediately, in subsequent interviews and in evidence, disputed this: he said there was a bubble in the crystals so that it was not clear that the line had been reached or crossed. According to the officers, after he had been told he was being arrested, the appellant punched both of them. The appellant admitted pushing one officer and punching the other. It is conceded on the appellant's behalf that there was evidence on which the jury could conclude that the officers were acting lawfully because the breathalyser test provided possible reasonable grounds to suspect the commission of a drink-driving offence.

4 The judge directed the jury as to the elements of the offence in a manner about which complaint is made by Mr Patterson, on behalf of the appellant, in only one presently relevant respect. The judge stressed that the offence could only be committed if the apprehension were lawful and that it would be lawful if the person arresting reasonably believed an arrestable offence had been committed. Mr Patterson submits that if the appellant genuinely, albeit wrongly, believed his arrest were unlawful he could not have intended to resist lawful apprehension: the judge should therefore have gone further and directed the jury that they must be sure that the defendant had no honest belief that he had not failed the breathalyser test. That is not a submission which Mr Patterson made to the trial judge when these matters were being discussed in the absence of the jury: but that would not be fatal to this appeal if the submission is well-founded.

5 The argument advanced by Mr Patterson before us proceeds as follows.

6 In his commentary on *Brightling [1991] Crim.L.R. 364 at 365* Professor Sir John Smith Q.C. said:

> "The mens rea of the offence is the intent to resist lawful apprehension. If the defendant believes in circumstances which would cause the arrest to be unlawful he does not have that mens rea."

7 In Blackstone, *Criminal Practice* (2000) at para. B 2.14, page 156, it is said that intent to resist "lawful arrest means that a subjective realisation of the lawfulness of the arrest must be proved". In Archbold (2000) para. 19-260 it is said "General principle suggests that where a defendant has made a mistake of fact his criminality should be judged on his mistaken view of the facts".

8 On this basis, although the appellant would be guilty of common assault, he had a defence to a section 38 offence, even if his belief that the officers were acting unlawfully was unreasonable (see *Williams (Gladstone) (1984) 78 Cr.App.R. 276*).

9 Mr Patterson also referred to *Director of Public Prosecutions v. Morgan (1975) 61 Cr.App.R. 136, [1976] A.C. 182*, *Beckford v. The Queen (1987) 85 Cr.App.R. 378, [1988] A.C. 130*, B (A Minor) v. Director of Public Prosecutions [2000] 2 Cr.App.R. 65, [2000] 2 W.L.R. 452 and Smith and Hogan, *Criminal Law* , (9th ed., 1999), at page 415, in which appears the following:

> "If D wrongly believes in circumstances in which the arrest would be unlawful his mistake of fact negatives the mens rea. Whatever the true facts he does not *intend* to resist *lawful* arrest".

10 For the Crown, Mr Fowler submits, in reliance on *Fennell (1970) 54 Cr.App.R. 451, [1971] 1 Q.B. 428*, that the direction sought on the appellant's behalf would have been inappropriate. In Fennell it was held that belief in the unlawfulness of custody was no defence to an offence of assaulting police in the execution of their duty. He submits that this principle still holds good, although the law has subsequently developed so that reasonable grounds for such a belief are no longer required. He submits that, although a defendant's intention is to be judged on the basis of the facts as he believes them to be, an honest mistake as to law or as to mixed fact and law affords no defence. He too relies on a passage in Smith and Hogan (9th ed.) at page 415 "the intent must be to resist 'lawful' arrest. If D knows of the circumstances which make the arrest lawful he probably has a sufficient intent even though he believes it to be unlawful *e.g.* having read in an out-of-date law book that conspiracy is not an arrestable offence he resists arrest for conspiracy".

11 Section 38, as amended, omitting immaterial words, makes it an offence to "assault any person with intent to resist or prevent the lawful apprehension or detainment of himself or of any other person for any offence". It is therefore an essential ingredient of the offence that the defendant intended to resist lawful arrest. But, provided he has that intention, the statute does not require proof of any particular belief on the part of the defendant.

12 In our judgment, the relevant authorities can be summarised in this way.

> (1) Fennell and Lord Diplock's speech in *Sweet v. Parsley [1970] A.C. 132 at 163* are no longer authority for the proposition that, in order to afford a defence to offences involving mens rea, a defendant's belief as to facts must be reasonable, as well as genuine or honest. That approach, in relation to self-defence, was rejected in Williams (Gladstone) which was approved by the Privy Council in Beckford and by the House of Lords in *B.* And, in the light of Morgan, Lord Diplock's observations were expressly

disapproved in *B* (see in particular, the speech of Lord Nicholls at 456B–457A and Lord Steyn at 470F).

(2) A genuine or honest mistake may afford a defence in relation to many criminal offences requiring mens rea, *e.g.* rape, if made as to the woman's consent (Morgan), indecent assault if made by a 15-year-old as to the girl's age (*B*) and offences of violence if made as to the nature of the victim's behaviour towards the defendant (Beckford) or another (Williams (Gladstone).

(3) Such a mistake may afford a defence in relation to assault with intent to resist arrest (Brightling (transcript, January 15, 1991, page 13D–F)) or assaulting an officer in the execution of his duty, (*Blackburn v. Bowering [1994] 1 W.L.R. 1324 at 1329A*) if it relates to whether or not the victim is a police officer. In such a case, the defendant's mistake may be relevant to whether he intended to assault a police officer and to whether he was acting in reasonable self-defence.

(4) But, to afford such a defence, the mistake must be one of fact. In Blackburn v. Bowering at 1329C Sir Thomas Bingham, then Master of the Rolls, referred to Fennell and to "the important qualification that the mistake must be one of fact (particularly as to the victim's capacity) and not a mistake of law as to the authority of a person acting in that capacity". This approach accords with the passage in Smith and Hogan on which Mr Fowler relies, with the passages in Archbold and Blackstone on which Mr Patterson relies and also with Sir John Smith's comment on Brightling, once it is understood that by "circumstances" in that comment he was referring to facts: this construction is supported by the passage in Smith and Hogan on which Mr Patterson relies, where circumstances are equated with facts.

(5) In Bentley (1850) 4 Cox C.C. 408, Talfourd J. put the point at page 410 in a way which in our judgment is still good law:

> "I think that, to support a charge of resisting a lawful apprehension, it is enough that the prisoner is lawfully apprehended, and it is his determination to resist it. If the apprehension is in point of fact lawful, we are not permitted to consider the question, whether or not he believed it to be so, because that would lead to infinite niceties of discrimination. The rule is not, that a man is always presumed to know the law, but that no man shall be excused for an unlawful act from his ignorance of the law. It was the prisoner's duty, whatever might be his consciousness of innocence, to go to the station-house and hear the precise accusation against him. He is not to erect a tribunal in his own mind to decide whether he was legally arrested or not. He was taken into custody by an officer of the law, and it was his duty to obey the law."

13 Applying these principles to the present case, it is clear that, even had the appellant given evidence (which it appears he did not) that he resisted arrest because his interpretation of the alcolyser lead him honestly to believe his arrest was unlawful, this would not have afforded a defence. Such a belief would have been not about any facts relating to the identity or conduct of the police officers at the time of the attempted arrest but about the legal consequences of believed antecedent facts. The appellant's position is, in our judgment, indistinguishable from that of a person sought to be arrested on grounds of reasonable suspicion for any arrestable offence which he knows or believes he has not

committed. If, in such circumstances, that person assaults an officer whom he knows is acting as a police officer, we have never known it to be suggested that belief in innocence could afford a defence to assault, either with intent to resist arrest or on an officer in the execution of his duty.

14 In our judgment, once the lawfulness of the proposed arrest is established, the mens rea necessary for a section 38 offence is an intention by the defendant to resist arrest, accompanied by knowledge that the person he assaults (who may or may not be a police officer) is a person who is seeking to arrest him. Whether or not an offence has actually been committed or is believed by the defendant not to have been committed is irrelevant.

15 We reach this conclusion without regret. Neither public order nor the clarity of the criminal law would be improved if juries were required to consider in relation to section 38 offences the impact of a defendant's belief as to the lawfulness of his arrest in cases where a lawful arrest is being properly attempted on reasonable grounds.

16 Accordingly this appeal is dismissed.