Neutral Citation Number: [2019] EWHC 2673 (Admin)

Case No: CO/2269/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Bristol Civil Justice Centre
2 Redcliff St, Bristol BS1 6GR

Judgment handed down at:
Rolls House, 7 Rolls Buildings,
Holborn, London EC4A 7NL

Date: 17/10/2019

Before :

THE HONOURABLE MR JUSTICE KERR

- -

Between :

JOHN PEGRAM	**Appellant**
- and -	
DIRECTOR OF PUBLIC PROSECUTIONS	**Respondent**

- -
- -

Jessica Jones (instructed by **Kellys Solicitors**) for the Appellant
Benjamin Douglas-Jones QC (instructed by **Crown Prosecution Service Appeals and Review Unit**) for the Respondent

Hearing date: 8th October 2019

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Approved Judgment

The Hon Mr Justice Kerr:

Introduction

1. In this appeal by case stated, the appellant challenges the upholding by the Crown Court at Bristol of his conviction for an offence of assaulting a police officer, PC Millett, in the execution of his duty. The appellant was originally convicted of the offence on 22 February 2018 before the Bristol Magistrates' Court. The Crown Court (Mr Recorder Atkinson QC, sitting with two lay justices) dismissed his appeal and upheld the conviction on 25 May 2018.

2. The appellant asked the Crown Court to state a case for the opinion of this court. The learned recorder declined and provided reasons for refusing to state a case. The appellant successfully challenged that refusal by judicial review. On 27 March 2019 Andrew Baker J quashed the decision not to state a case and directed that a case be stated raising the following three points of law to be considered by this court:

(1) Whether, on the facts found in the Crown Court, PC Millett was acting in the execution of his duty when taking hold of the defendant;

(2) whether, upon the evidence before the Crown Court, a *prima facie* case of self-defence was raised and, if so, whether the Crown Court erred in law (a) by not considering self-defence or (b) by dismissing the appeal; and

(3) whether the approach adopted in the Crown Court at page 80E-F in the transcript of the appeal proceedings constituted or involved a misdirection of law as to character.

3. In accordance with Andrew Baker J's order, the recorder then stated a case for this opinion of this court. It was sent to the parties on 10 June 2019. In the case stated, the recorder set out the Crown Court's findings of fact, cross-referred to the transcript of the hearing. He then duly raised the three questions above, as directed by Andrew Baker J. It is those three questions which I address in this judgment.

4. Swift J directed that the hearing of the appeal should be listed before a single judge of the Administrative Court in Bristol. The parties agreed at the oral hearing before me that the case stated should be treated as annexing, or incorporating by reference, the transcript of the hearing, including the recorder's judgment delivered orally on 25 May 2018, which appears at the end of the transcript.

The Facts

5. On 10 September 2017 two opposing demonstrations took place in Bristol. The appellant took part in one of them. He was with a small group of counter-demonstrators opposed to the other demonstration, which had been advertised. The police were concerned to keep the two sets of protestors apart and separated from each other, to avoid trouble.

6. The appellant came into contact with PC Millett, who was on duty that day. It is common ground that PC Millett took hold of the appellant's arm and spoke to him

and that the appellant then moved his arm and made contact with PC Millett's face, leading to the appellant later being arrested by another officer and charged with assaulting PC Millett in the execution of his duty. The issue arose in the subsequent proceedings whether the officer had been acting in the execution of his duty when his face was struck.

7. The Crown Court heard evidence from PC Millett and the appellant. The appellant volunteered that he had been convicted of offences which were "mainly drugs related". The convictions were when he was in his late teens and early twenties. The last conviction was in 2003. He had pleaded guilty on each occasion. None of the convictions was for an offence involving violence or public disorder.

8. The case stated (quoted below except where indicated) shows that the Crown Court made the following findings. The appellant was with a small group of protestors who had departed from the agreed route. He told police officers to "fuck off" a couple of times. He was wearing a hoodie, a black mask and sunglasses. Members of the public were close by, were moving away and appeared shocked.

9. PC Millett decided to warn the appellant that he may commit an offence under the Public Order Act 1986. He did not intend to arrest the appellant. The appellant was facing away from the officer. There was noise and shouting in the background. The officer "decided to grab his arm to get his attention, deliver the warning and tell him once more to join his group of demonstrators".

10. The Crown Court preferred PC Millett's evidence to the appellant's where they differed. The officer took the appellant's arm "using such force he judged just enough to get the [appellant's] attention". The officer agreed that "having gained the [appellant's] attention he continued to hold his arm for a split second". The appellant said the grip was firm but did not hurt.

11. The giving of the warning was found appropriate in the circumstances. The Crown Court accepted that it was "necessary for the [appellant's] attention to be drawn to the giving of a warning and accordingly there was a short physical contact to attract his attention so as to ensure that [he] was made aware of the [warning]".

12. The transcript of PC Millett's cross-examination includes the following:

> Q. So you're … continuing to hold on to his arm even after the point at which it's clear you have got his attention, is that fair?
>
> A. It's really a split second but yes.
>
> Q. I would suggest Officer that your … purpose in holding his arm wasn't just to get his attention to make yourself known to him but also to make sure he stayed there and listened to what you had to say.
>
> A. … it may well have been but it was more, my decision making was to get his attention, if I held on to him to say it then it was more to just keep him in the place to listen to what I had to say.

> Q. There was an element, wasn't there, of hold on to him [while] you're saying it so that he doesn't just ignore you because he had been ignoring the police to an extent, hadn't he?
>
> A. It was a very short amount of time, half way through a public warning however long that is.

13. The appellant then "turned and swung his arm round and his hand made contact with the officer's face". The officer's grip was not displaced by the appellant turning round. The appellant swore at the officer, his arm still gripped. The officer began to deliver the warning. About half way through the warning the appellant swung his arm and his hand made contact with the officer's face.

14. The officer thought the swing of the arm was intended to free the appellant from the grip on his arm and not calculated to hit the officer in the face. The appellant did not recall making contact with the officer's face, had not intended to strike the officer and said that any contact was accidental.

15. The appellant's counsel sought a good character direction comprising both limbs, covering propensity and credibility. The Crown Court declined. In the case stated, the recorder explained that "the stale bad character played no part in the Court's consideration of the evidence … the decision of the Court … was reached without regard to either good or indeed bad character but simply upon … the evidence".

16. The Crown Court found that "[n]o prima facie case of self defence was raised". The appellant disavowed any such defence and confirmed through counsel that he had not run that defence before the magistrates. The Crown Court decided that PC Millett had been acting in the execution of his duty, that the appellant's arm had struck the officer's face and that the appellant's conduct had been reckless. He was therefore guilty of the offence.

<u>Relevant Law: Execution of Duty</u>

17. By section 89(1) Police Act 1996 any person "who assaults a constable in the execution of his duty" commits an offence. Blackstone's Criminal Practice (2019 edition) states (at B2.40) that the meaning of the expression "in the execution of his duty" "has never been the subject of precise judicial scrutiny". The source of that observation is said to be *Ahmed v. CPS* [2017] EWHC 1272 (Admin).

18. What Sir Wyn Williams (sitting as a judge of the High Court) actually said there was that somewhat to his surprise, the phrase "has not been the subject of much judicial scrutiny as to its ambit" (see the transcript, at [7]). However, only two of many cases on the point were cited to him, not including those cited to me, some of which I now mention though briefly since there was no dispute about the law before me.

19. The expression "in the execution of his duty" reappeared in section 89(1) of the 1996 Act in the same words as in its predecessor, section 51(1) of the Police Act 1964. The earlier case law discussing the latter provision remains good law.

20. It is a technical assault for a police officer physically to detain a person without violence and without any intention to arrest the person: *Kenlin v. Gardiner* [1967] 2 QB 510, per Winn LJ at 519A-C. However, it is lawful for a police officer or any

other person to make moderate and generally acceptable physical contact with another person for the purpose of attracting their attention.

21. This proposition qualifies the principle that every person's body is inviolate; see the famous exposition of Goff LJ (as he then was) giving the judgment of the court in *Collins v. Wilcock* at 1177A-1179H. It is a question of fact whether "the physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct" (*ibid.* at 1178C-D).

22. When not making an arrest, a police officer has no more right than an ordinary citizen to make physical contact with another person; but a police officer has his rights as a citizen like any other. In applying the test of "generally acceptable standards of conduct", whether by a police officer or any other citizen, account is taken of the context. In the case of a police officer that includes the duty to investigate crime.

23. As Goff LJ said in *Collins v. Wilcock* at 1178F-H:

> … a police officer has his rights as a citizen, as well as his duties as a policeman. A police officer may wish to engage a man's attention, for example if he wishes to question him. If he lays his hand on the man's sleeve or taps his shoulder for that purpose, he commits no wrong. He may even do so more than once; for he is under a duty to prevent and investigate crime, and so his seeking further, in the exercise of that duty, to engage a man's attention in order to speak to him may in the circumstances be regarded as acceptable: see *Donnelly v. Jackman* [1970] 1 W.L.R. 562. But if, taking into account the nature of his duty, his use of physical contact in the face of non-co-operation persists beyond generally acceptable standards of conduct, his action will become unlawful; and if a police officer restrains a man, for example by gripping his arm or his shoulder, then his action will also be unlawful, unless he is lawfully exercising his power of arrest.

24. *Collins v. Wilcock* was considered and applied by a Divisional Court in *Mepstead v. DPP*, transcript, 26 June 1995, a case where there was a confrontation over a parking ticket. Balcombe LJ observed at page 7 that a police officer may, depending on the facts, be acting in the execution of his duty if he "takes a man's arm, not intending to detain or arrest him, but in order to draw his attention to the content of what was being said to him".

25. Balcombe LJ went on to state (pages 7-8) that:

> it is … for the tribunal of fact to decide whether the physical contact goes beyond what is acceptable by the ordinary standards of everyday life … if the period of contact had gone on for any length of time it might well be said to be a finding of fact, to which no reasonable court would come, to say that there was not an intention to detain.

In such a case (see page 8):

> .. the real question is whether the taking by the arm lasted longer than could reasonably be said to be merely for the purpose of trying to attract his attention … .

Where the duration of gripping the arm is "very brief", it may be open to the tribunal of fact to find that (page 8):

> "it was solely an attempt to draw his attention to what was being said".

26. Two other cases of taking by the arm were among those cited to me, *Wood v. DPP* [2008] EWHC 1056 (Admin) (Latham LJ and Underhill J) and *Elkington v. DPP* [2012] EWHC 3398 (Admin) (Cranston J). They turned on their facts and I do not find it necessary to refer to them further. The above brief account of the relevant law is enough to determine the first question raised in the case stated.

Submissions, Reasoning and Conclusions

The first question: whether PC Millett was acting in the execution of his duty

27. For the appellant, Ms Jones submitted that on the findings of the Crown Court, PC Millett's conduct went beyond attracting the appellant's attention and was a technical assault. It did not assist the officer that his purpose was to warn the appellant against committing a public order offence. She noted that *Mepstead v. DPP* did not alter the law and submitted that the Crown Court was bound to find that the officer's conduct had amounted to physical restraint, not merely attracting attention.

28. She argued that there is a difference between conduct intended to attract a person's attention and conduct intended to maintain that person's attention, preventing him from escaping until the officer had finished saying what he wanted to say. The latter was the position here and amounted to physical restraint. She noted that the officer's action was a "grab" to the arm. The grip was sufficiently strong that it was not displaced by the appellant turning round to face the officer.

29. Ms Jones pointed out that the duration of the grip on his arm was long enough for him to turn round, swear at the officer and receive the first half of the warning against committing a public order offence. That was more than just a fleeting moment or split second. The arm grip was interrupted by the appellant breaking free but would have continued until the officer had finished giving the warning.

30. Those facts inexorably crossed the line into physical restraint, Ms Jones contended. She relied particularly on the answer given by PC Millett in cross-examination, accepting that his intention was "to get his attention, if I held on to him to say it then it was more to just keep him in the place to listen to what I had to say".

31. Mr Douglas-Jones QC defended the decision of the Crown Court. He submitted that the context was important: the officer had gripped the appellant's arm in an atmosphere of commotion and some alarm among nearby members of the public. That was why the officer properly intended to give a warning that the appellant could be close to committing a public order offence.

32. He submitted, in effect, that acceptable standards of everyday conduct tolerate a higher degree of contact to attract attention in such a febrile atmosphere than might be tolerated amid calm and tranquillity; since in a tense situation it takes more to attract someone's attention than usual, especially where the person whose attention needs attracting is a cause of the commotion.

33. Mr Douglas-Jones pointed out that in none of the cases relied on by the appellant had the purpose of attracting attention been to administer a warning against committing a crime. However, he made it clear that disavowed any submission that this case could be treated as one where reasonable force was used to prevent crime; something that

citizens and police officers alike may do. The Crown Court had not made any finding to that effect, as Mr Douglas-Jones accepted.

34. He contended that it would be a counsel of perfection to say that holding someone's arm in such circumstances for what was found to be a "split second" could take the officer outside the bounds of his duty; and that the quality of the touching – the gripping of the arm – was more readily acceptable in the context of administering a warning against committing a crime than it would be if that feature were absent, as in the other cases.

35. In my judgment, the facts here fall very close to the borderline. Despite the use of the phrase "split second", the officer must have held the appellant's arm for longer than would normally be consistent with merely attracting his attention, as distinct from physically restraining him. As Ms Jones pointed out, the officer's grip was on his arm for the time it took for the appellant to turn round, swear at the officer and receive about half the content of the verbal warning not to commit a public order offence.

36. On the other hand, the context was important, as Mr Douglas-Jones rightly pointed out. There was a need was to gain the appellant's attention not just to make him aware of the officer's presence, but also to keep his attention for long enough to receive the warning it was the officer's role to give him, for his own benefit as well as the public's. A civilian member of the public might have done as much, for the appellant's own sake.

37. In the end, I am persuaded that it was open to the Crown Court to find that PC Millett was acting in the execution of his duty. The Crown Court was the tribunal of fact. They heard and saw the witnesses and were best placed to assess the contextual evidence of the surrounding circumstances, the proximity of members of the public to the scene and the atmosphere at the time.

38. In a borderline case, an appellate tribunal should be cautious before concluding that the findings made were not reasonably open to the tribunal of fact. I am not prepared to draw that conclusion here. The Crown Court might have decided the issue the other way, but that does not mean their decision was wrong; the findings made were a sufficient evidential basis for the conclusion that PC Millett was acting in the execution of his duty. I therefore answer yes to the first question.

The second question: self-defence

39. The second question is whether a *prima facie* case of self-defence was raised and, if so, whether the Crown Court erred in law (a) by not considering self-defence or (b) by dismissing the appeal. As noted above, the appellant said in terms before the Crown Court, as he had before the magistrates, that he did not rely on self-defence. His evidence was that any contact with PC Millett's face was accidental. PC Millett, for his part, did not suggest the appellant deliberately struck him.

40. Ms Jones submitted that the Crown Court was bound to consider self-defence if the evidence disclosed a *prima facie* case, whether or not the defence chose to rely on self-defence. The evidence could come from the prosecution evidence as well as from defence: see the Divisional Court's decision in *R (Skelton) v. CPS* [2017] EWHC

3118 (Admin), per Lindblom LJ at [16], citing a passage in the 2018 edition of Archbold based on *DPP (Jamaica) v. Bailey* [1995] 1 Cr App R 257.

41. Ms Jones relied on PC Millett's evidence that the appellant "swung his arm round to … hit my arm off… it was a swing of the arm to get me off and which caught me across the face". She submitted that raised a *prima facie* case of self-defence, even though the appellant's evidence was that any contact with PC Millett's face was accidental.

42. In my judgment, the recorder was fully alive to the possibility of self-defence. He did not in terms state his awareness of the proposition that the defence might need considering even if not raised by the defendant, but that does not matter. The decision of the court was that no *prima facie* case of self-defence was raised. The Crown Court therefore considered the issue of self-defence and did not fail to do so.

43. Nothing material turns on any distinction between whether a *prima facie* case was raised, and whether the defence succeeded. The issue was considered. In my view, the Crown Court was right to reject self-defence on the facts. PC Millett's evidence of a swing of the appellant's arm to dislodge his grip on the arm could at the most amount to the appellant defending himself against the gripping of his arm. It could not be self-defence against anything worse.

44. I have already upheld the finding that the gripping of the appellant's arm was justified and not a technical assault. There was, therefore, no unlawful act against which the appellant could have been defending himself. There was no evidence to support any far fetched theory that the appellant might have struck PC Millett to pre-empt a fresh assault on him.

45. All the evidence was that the contact with the officer's face was accidental, albeit the Crown Court found that it was reckless. The claimant could not, on his own evidence, remember any contact with the officer's face. He denied swinging his arm to rid himself of the officer's grip, though that evidence may not have been accepted since generally the Crown Court preferred PC Millett's evidence.

46. The impression of PC Millett that the appellant did swing his arm to rid himself of the grip on his arm does not come near to supporting self-defence. I find no error of law or approach in the Crown Court's treatment of the issue of self-defence and I answer no to the second question.

The third question: character evidence

47. The third question is whether the approach of the Crown Court (at pages 80E-F of the transcript of the appeal proceedings) constituted or involved a misdirection of law as to character. As I have noted, the case stated added to the extempore judgment the explanation that the decision "was reached without regard to either good or indeed bad character but simply upon … the evidence".

48. Both parties referred me, in the customary manner, to Hallett LJ's judgment of the court in *R. v. Hunter* (and other appeals) [2015] 1 WLR 5367, at [68]-[69] and [79]. Ms Jones criticised the Crown Court's approach to the appellant's character,

describing as an abdication of responsibility the decision to take no account of character evidence one way or the other.

49. She submitted that his guilty pleas ought to have counted in his favour on the issue of credibility; and that the irrelevance and age of the convictions should have gone in his favour on the issue of propensity to commit an offence of violence, something he had never done before. She submitted that a good character direction would have been relevant to the issue of self-defence and to the finding of recklessness.

50. Mr Douglas-Jones, for the Crown, took the rather extreme position that the Crown Court would have been acting perversely if it had chosen to treat the character evidence as favourable to the appellant rather than as a neutral factor pointing neither in his favour nor against him. He did not allow even that the Crown Court might have said to itself that the appellant had pleaded not guilty before when charged and had never committed a public order offence or one of violence.

51. In my judgment, the Crown Court clearly rejected the appellant's submission below that he was entitled to a fully-fledged two limbed good character direction. It was right to reject that submission. The appellant was not a man of absolute good character. Nor was the court made aware of the full picture concerning the appellant's previous convictions. The "mainly drugs related" very old convictions could have included, for example, offences of theft to fund a drug habit.

52. Applying the propositions derived from *Hunter*, it was then a matter for the Crown Court's judgment, in the light of the character evidence, to consider whether fairness required some kind of good character direction or not. At best, such a direction would have been limited.

53. In my judgment, it was well within the scope of permissible exercise of judgment to decide not to have regard to character one way or the other. The court had direct evidence from the two key participants in the altercation that led to the conviction. There was little room for character evidence to play much part in its assessment.

54. The extempore judgment itself contains no indication that the court held the appellant's character against him. The passage at page 80F-G supports the proposition that the recorder and his two lay colleagues placed reliance on the first hand evidence of the two main witnesses.

55. There was no misdirection in relation to the appellant's character. I find no fault with the Crown Court's treatment of the issue of the appellant's character and I answer no to the third question.

Conclusion

56. I would therefore answer the three questions, respectively, yes, no and no. It follows that the appeal must be dismissed.