CO/6358/2006 and CO/6579/2006

Neutral Citation Number: [2007] EWHC 739 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2
Monday, 5th March 2007

B E F O R E:
LADY JUSTICE SMITH
MR JUSTICE GROSS

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B & R

Appellants

-v-

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

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MR TIM BALDWIN (instructed by Michael Fisher Solicitors, London SW1 1UG) appeared on behalf of Appellant B
MR BEN CONLON (instructed by Messrs Green & Bull, London SW11 2PJ) appeared on behalf of Appellant R
MR SIMON MURRAY (instructed by Crown Prosecution Service, London SE1 2NE) appeared on behalf of the Respondent

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J U D G M E N T
(**As approved by the Court**)

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1.LADY JUSTICE SMITH: I will ask Mr Justice Gross to give the first judgment.

2.MR JUSTICE GROSS: This is an appeal by two appellants (to whom I shall refer as B and R, given their ages) by way of case stated from the decision of District Judge Coleman on 17th March 2006, sitting in the Youth Court at Balham, convicting them of robbery, for which they both received Action Plan Orders with three months' supervision. At the time, as I understand it, B and R were aged 14 or 15.

3.The facts were these. I take them from the case:

> "4.1. At about 4pm on the 13th December 2005 the victim [W, a 16-year-old schoolboy] came out of Tooting Bec station alone. He walked towards a bus stop and about five boys walked out of an adjoining fish and chip shop, looked at the victim, stopped walking, and waited for the victim who carried on walking.
>
> 4.2. The five boys then stopped the victim and asked if he had a mobile telephone or some money. The victim said he did not, and was then asked which school he attended. He responded that he attended the London Oratory and he was then asked for his mobile telephone and money.
> 4.3. Whilst that was happening about five or six more males ran to join the group. They had run across the road from an opposite bus stop. The eleven or twelve males all surrounded the victim and when he did not hand over his telephone and money his drink was taken from his blazer pocket and a packet of crisps was snatched from his hands.
> 4.4. A number of the males, including the Appellant [B], went into his pockets and took his wallet from his inside pocket, his watch from an outside pocket and his travel card. A five pound note was removed from the wallet; the wallet was then thrown to the ground.
> 4.5. The victim did not feel 'particularly threatened' or 'scared' and he was not physically assaulted. He was 'a bit shocked'.
> 4.6. Police officers were in a police car nearby; P.C. Lange saw the victim being pulled and pushed around by the group of males.
> 4.7. P.C. Lange also saw one youth going through the victim's trouser pockets and another pulling at his arm.
> 4.8. [B] held the victim's arms whilst he went through the victim's pockets.
> 4.9. [R] was directly in front of the victim. He was seen by P.C. Lange and identified by his clothing.
> 4.10. As the police officers got out of their vehicle the group all scattered and after a short footchase the appellants were arrested.
> 4.11. The victim's watch was found in [R's] pocket."

4.At the trial there was a submission of no case to answer. The District Judge rejected that submission. No evidence was then called by B and R. The District Judge convicted both defendants. As she summarised her conclusion, she had been satisfied that both appellants were involved in the incident. They were involved in a joint enterprise. B's participation involved searching the victim's pockets and R's included his proximity to the victim whilst the searching for and the taking of the property took place. The District Judge went on to say this:

> "I found that the surrounding of a lone individual by a group of approximately ten or eleven males amounted to an implied threat of force which sought to put the victim in fear in order to steal property and the searching of the pockets whilst the victim was being pulled and pushed did indeed amount to an actual use of force."

5.The two questions posed for the opinion of this court are these:

> "(1) Where on a charge of robbery a victim gives evidence that he did not feel threatened or put in fear and that the only touching was his pockets being searched, is a tribunal entitled to make a finding (a) that there is a case to answer and (b) of guilt.
>
> (2) Did I err as to the law relating to robbery by directing myself that there was an implied threat of force and that such a threat was sufficient to reject a submission of no case to answer and to subsequently make a finding of guilt."

6.Section 8(1) of the Theft Act 1968 provides as follows:

> "A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or *seeks to put* any person in fear of being then and there subjected to force." (italicisation added)

7.I take as my starting point some basic principles, in the light of the way certainly Mr Conlon for R has sought to put the matter.

(1) The procedure of appeal by way of case stated is available and only available for appeals on points of law or appeals where it is said that the decision complained of was made in excess of jurisdiction.
(2) The procedure is not available where the complaint raises no more than a question of fact. Where the true complaint concerns a question of fact the aggrieved party's remedy lies in an appeal to the crown court, not an appeal by way of case stated.
(3) The procedure of appeal by way of case stated is available in respect of a perverse conclusion of fact, in the sense that it is one to which no reasonable tribunal could have come. For that to be the case, the

finding must be totally unsupported by the evidence, it must be plainly and incontrovertibly wrong. By contrast, a finding which is simply against the weight of the evidence discloses an issue of fact not law, and cannot be challenged by way of case stated.

(4) On appeal by way of case stated the court is confined to the facts set out in the case. As my Lady put it in argument, those represent the four corners of the appeal.

Against that background I turn to the appellants' submissions.

8.For the appellant R, Mr Conlon essentially sought to reargue the facts before the District Judge. He submitted that this was no more than a distraction theft, and that R's role in the matter disclosed no more than perhaps a joint enterprise of theft but not of robbery. W's evidence did not support the District Judge's conclusion. That in essence was Mr Conlon's submission. This was, he said, a case of theft but not one of robbery.

9.For the appellant B, Mr Baldwin's submission was that the charge was put as one not involving actual force. It was not formally put as one of joint enterprise, though he fairly and realistically accepted that nothing turned on that. He relied on the evidence, as he put it, of W not being frightened and said that on that basis there was authority or law which suggested that the District Judge had erred in law in coming to her conclusions.

10.We did not find it necessary to call on Mr Murray for the Crown, though from his skeleton argument it was plain that he relied on the construction of section 8 of the statute, which I have already set out. As he put it in his skeleton argument, matters of fact, however eloquently packaged, should not be turned into suggested questions of law on an appeal by way of case stated.

11.With respect to the submissions of Mr Conlon and Mr Baldwin, these appeals are devoid of substance. As to the suggested unreasonable findings of fact, which loomed large certainly in Mr Conlon's skeleton argument and formed the subtext of his submissions before the court today, however eloquently packaged (as Mr Murray put it), they are no more than questions of fact which are sought to be presented as questions of law. For the avoidance of doubt, there is no suggestion in the case stated that the conclusion of the District Judge was perverse and nor could there properly have been any such suggestion.

12.As a matter of common sense, on the facts of the case, W was subjected to some force and the threat of force by an intimidating group of boys. The intent was to steal his possessions or some of them. He did not stand there, allowing his pockets to be searched with his arms held, simply as an act of generosity. There was furthermore ample evidence from the police officers who observed the incident to justify these conclusions. The precise semantic description of the incident by W does not require any contrary conclusion. In any event it is worth underlining that W himself, if one is to take his evidence literally, said on the findings in the case that he had been threatened, albeit not particularly threatened, and he was a bit shocked. The highest this attack on the case can be put is that on the weight of W's evidence the District Judge might have come to a different conclusion. Manifestly, once one sets it out that way a question of fact not law is disclosed. As to R, the presence of where he was in context was more than sufficient to justify the District Judge's conclusion that he was participating in what she concluded was a robbery. For my part, on the facts in the case any contrary conclusion would have offended against common sense. For completeness, the same must be said of B's role in the events which happened, having regard to the findings in the case.

13.Again for completeness, the District Judge's findings of fact were not contradictory. The incident involved both a surrounding of W, so giving rise to an implied threat of force, and some very limited force in the pulling and pushing. So even assuming that the arguments as to unreasonable findings of fact were open to the appellants on the case as stated, which they are not, those arguments go nowhere.

14.Turning finally to the questions as stated in the case, helpful guidance is contained in Archbold, paragraph 21-101:

> "It must be proved that the defendant used force on any person or put or sought to put any person in fear of being then and there subjected to force. In *R v Dawson and James*, 64 Cr App R 170 (a case of jostling the victim so as to cause him to lose his balance), the Court of Appeal said that in directing a jury where the charge is robbery the judge should direct his attention to the words of the statute. Whether the defendant used force on any person in order to steal is an issue that should be left to the jury.
>
> Where threats are used they must amount to threats of *then and there* subjecting the victim or some other person to force. ... If the defendant by his words or conduct has sought to make the victim or some other person apprehend that he would be subjected to force, it is not necessary that he actually be afraid that the force will be used. ..."

15.On a true analysis:

(1) Here the questions in the case are questions of fact. The question of whether in a particular case sufficient force was used to warrant a conviction for robbery must be one for the tribunal of fact. Arguments as to fine distinctions of fact should not be elevated into points of law.

(2) If and in so far as any true questions of law are disclosed, the appellants' attack on the District Judge's decision on question (1) is, with respect, misplaced. The fact that the victim did not feel threatened or put in fear in no way requires the conclusion that the assailant did not seek to put him in fear. Were it otherwise, the bravery of the victim would determine the guilt of the assailant. That cannot be right. The fact that in Grant v CPS, unreported, decision of 10th February 2000, the victim was in fear does not mean that a conviction cannot stand if the fortitude of the victim in any particular case was such

that he was not. With great respect, to the extent that the passage in Smith and Hogan 2005 edition, page 712, suggests otherwise, I am unable to agree. That passage is based on the authority of Grant to which I have just referred. Certainly, that observation inSmith and Hogan finds no support whatever in Archbold — see the passage already cited. It is to be recollected that the question is one of statutory construction. Applying the wording of the statute and in cases where property is in fact stolen, it is the intention of the perpetrator rather than the fortitude of the victim which is the touchstone of whether the offence is robbery or theft. The answer to question (1)(a) and (b) is "yes".

(3) A threat of force can be express, that is stated in so many words, or implied, that is implied from other words or conduct or both. Here, on the facts set out in the case, there was every reason to conclude that there was an implied threat of force. The answer to question (2) is "no".

16.It follows that in my judgment the District Judge was entitled to conclude that there had been robbery here and that both appellants were guilty of it. That it may have been at the bottom end of the scale was a matter reflected in the sentences passed.

17.These appeals must be dismissed.

18.LADY JUSTICE SMITH: I agree.

19.Are there any consequential orders?

20.MR MURRAY: Yes. Your Ladyship, in the preliminary application under section 28A to remit the case stated heard by Owen J on 23rd October, he indicated that the costs of that hearing should be the respondents in any event. He said that having considered the submissions in relation to the point — there was an application to put a further question.

21.LADY JUSTICE SMITH: Yes.

22.MR MURRAY: The sum sought by the CPS is £1,500.

23.LADY JUSTICE SMITH: Do you make any application in respect of today?

24.MR BALDWIN: I make no further application in respect of today. It is simply the application is made because that hearing the application to remit was, in the view of the Director, one that was not necessary.

25.LADY JUSTICE SMITH: Yes.

26.What is the position of the appellants?

27.MR CONLON: We are of course legally aided.

28.LADY JUSTICE SMITH: You are publicly funded. So it is robbing Peter to pay Paul.

29.MR CONLON: I am sorry.

30.LADY JUSTICE SMITH: Robbing Peter to pay Paul.

31.MR CONLON: It seems to be robbery is the topic of the day.

32.LADY JUSTICE SMITH: No threat of force involved though.

33.MR CONLON: You beat me to it.

34.MR BALDWIN: Maybe an implied threat. (The Bench conferred)

35.MR JUSTICE GROSS: Mr Murray, can you help us. What is the test? As my Lady has said, what it involves is transferring public funds from the legal aid fund, or whatever it is now called, to the CPS.

36.MR MURRAY: Indeed, it --

37.MR JUSTICE GROSS: Is that something we ought to be doing?

38.MR MURRAY: There is not a statutory test. I suspect the reason that Owen J awarded costs on that occasion was his discontent with application. He used the description of one of the submissions as frankly absurd and the other was a transparent attempt to reopen the facts.

39.LADY JUSTICE SMITH: I quite understand what was behind him wishing to do so. You say the costs are £1,500. It does not seem to me that we are in any position to make an order that £1,500 is a reasonable amount, are we; unless that is agreed?

40.MR MURRAY: Under the Civil Procedure Rules, your Ladyship has power to make a summary assessment of costs.

41.LADY JUSTICE SMITH: Certainly we do. In my experience it is not done simply on the basis of counsel announcing what the costs are. That announcement has to be accompanied by a written breakdown which has been served on the other

side in advance, so that they are in a position to deal with it if they do not accept it.

42.MR BALDWIN: Absolutely.

43.LADY JUSTICE SMITH: So I do not see that we could possibly at the moment do a summary assessment of costs. That is the first problem. I suppose we could make an order to go for assessment if not agreed, hoping that public money, more public money, will not be wasted on a detailed assessment. It is going to have to be, if any order is made it is an order against the legal aid fund. What do we call it nowadays?

44.MR MURRAY: The Legal Services Commission.

45.LADY JUSTICE SMITH: Against the Legal Services Commission.

46.MR MURRAY: Given that my Lady is quite rightly considering referring it for detailed assessment, if I may I shall take the executive decision of withdrawing my application, because I can just see that further public money would be wasted.

47.LADY JUSTICE SMITH: It would, would it not?

48.MR MURRAY: The respondent merely sought by applying for costs to limit such applications.

49.LADY JUSTICE SMITH: I am sure both of us are very sympathetic to that aim, and it may be that in an appropriate case where you have an appellant who is in a position to be punished personally, as it were, by making a wholly unmeritorious application which has simply increased the costs, then it is an appropriate thing to do. But, query, is it an appropriate thing to do to transfer money from one pot to another, if it is going to cost money to do the transference.

50.MR MURRAY: Well, exactly ma'am.

51.LADY JUSTICE SMITH: Thank you very much.