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



No. CO/4274/2019
[2020] EWHC 3868
(Admin)

Royal Courts of Justice

Wednesday, 18 November 2020

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE WILLIAM DAVIS

B E T W E E N :

TONIQUE CAMPBELL

Applicant

- and -

CROWN PROSECUTION SERVICE

Respondent

MR J. DAVIS (instructed by Hollingsworth Edwards Solicitors) appeared on behalf of the Applicant.

MR L. MABLY QC (instructed by the CPS) appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE POPPLEWELL:

1 This is an appeal by way of case stated pursuant to s.111 of the Magistrates' Courts Act 1980, and s.28A of the Senior Courts Act 1981, against the decision of the Justices sitting at Westminster Magistrates' Court on 20 May 2019. The appellant was convicted of three offences of assaulting an emergency worker, contrary to s.39 of the Criminal Justice Act 1988 and s.1 of the Assaults on Emergency Workers (Offences) Act 2018 ("the 2018 Act"). On the same occasion she was convicted of an offence of being drunk and disorderly, contrary to s.91(1) of the Criminal Justice Act 1967. There is no appeal against the drunk and disorderly conviction.

2 The issue of law raised is whether a police constable must be acting lawfully in order to be "acting in the exercise of functions" as an emergency worker within the meaning of s.1(1) of the 2018 Act.

The facts

3 About 4 o'clock in the morning on Sunday 3 March 2019 police officers attended Wardour Street in Chinatown. They encountered the appellant who was intoxicated. PC Regan attempted to place handcuffs on her wrists. A struggle ensued during which the appellant scratched PC Regan's thumb causing it to bleed. The appellant was taken to West End Central Police Station. On the ramp on the way to the custody suite another police officer, PC Young, was kicked by the appellant. The appellant was thereafter detained in a cell. Later on, the appellant was taken into the cell corridor by PC Regan in order to wash her hands. When PC Regan sought to take her from the sink area back to her cell, the appellant kicked PC Regan's leg.

4 The appellant was charged with being drunk and disorderly in relation to her conduct in Wardour Street, and with three offences of assaulting an emergency worker. The three assault offences related to: (1) the scratching of PC Regan's thumb during the struggle to apply handcuffs; (2) the kick to PC Young on arrival at the police station; and (3) the kick to PC Regan in the sink area of the cell corridor.

5 PCs Young and Regan gave evidence at trial, the appellant also gave evidence.

6 The Justices found the following facts, which are set out in para.16 of the case stated:

- (1) The appellant had been both drunk and disorderly in Wardour Street. There was clear evidence that she was swaying and propping herself up against the cars. At one point she fell over. She also swore at the officers and continued to do so despite being told to go home.
- (2) The appellant had been arrested during the events which unfolded in Wardour Street.
- (3) The appellant had assaulted PC Regan, an emergency worker acting in this capacity, causing an injury to her arm during the struggle which ensued when PC Regan tried to handcuff her.
- (4) The appellant had assaulted PC Young, an emergency worker acting in this capacity, by kicking him when walking up a ramp at the police station.
- (5) The appellant assaulted PC Regan, an emergency worker acting in this capacity by kicking her whilst being led away from the sink area.

(6) At all times PC Regan and PC Young were each exercising the functions of an emergency worker.

(7) The appellant's actions were intentional throughout.

7 The appellant submitted to the Justices that the test as to whether a constable was acting in the exercise of functions as a constable for the purposes of the 2018 Act was the same as whether a constable was acting in the execution of his duty for the purposes of the offence in s.89(1) of the Police Act 1996, of assaulting a constable in the execution of his duty, namely, that the constable must be acting lawfully. The submission was that prior to PC Regan attempting to apply handcuffs she had, at an earlier stage, placed her hands on the appellant without intending to arrest her, and that this application of force was unlawful. Accordingly, it was submitted, the arrest and attempt to apply handcuffs was unlawful, as were the subsequent actions of PC Young and PC Regan at the police station. At no time therefore, it was argued, were the constables acting in the exercise of functions as constables for the purposes of s.1(1) of the 2018 Act.

8 The Justices held that a constable could be exercising the functions of a constable for the purposes of s.1(1) of the 2018 Act even if she was not acting in the execution of her duty within the meaning of s.89(1) of the Police Act 1996. The question of the lawfulness of PC Regan's initial pre-arrest action was therefore irrelevant. Whether those actions or the arrest were lawful or unlawful, PC Regan, and subsequently PC Young, were, at the time they were assaulted, exercising the functions of a constable. Having reached this conclusion the Justices did not address the question of whether the arrest was lawful or unlawful.

The Case Stated

9 At the request of the appellant the Justices stated a case on 27 August 2019. The three questions drafted for the opinion of the court are as follows:

1. Were we right to conclude that a defendant can be convicted of assaulting an emergency worker contrary to section 1 of the [2018 Act] even where the officer may not have been acting in the execution of his duty?
2. Were we right to conclude, on the facts of this case, that even if PC Regan was acting unlawfully when she took hold of Ms Campbell to handcuff her, this would not prevent us finding her guilty of the subsequent assaults at the police station?
3. Were we right to conclude that the case law pertaining to assault police officer in execution of his duty contrary to section 89 of the Police Act 1996 did not apply to offences brought under section 1 of [the 2018 Act]?

The Law

10 The 2018 Act does not create a new and free-standing offence. Common assault and battery are offences under section 39(1) of the Criminal Justice Act 1988, and are summary only offences punishable with six months' imprisonment. Common assault is committed when a person does an act by which he intentionally or recklessly causes another to apprehend the immediate application of unlawful force. Battery is committed when a person intentionally or recklessly applies unlawful force to another. Section 1(1) of the 2018 Act, an Act which came into force on 18 November 2018, provides that where the offence of common assault or battery occurs in circumstances where it is committed against an emergency worker acting in the exercise of functions as such a worker, the offence is triable either way and

carries an increased maximum term of imprisonment of 12 months. Emergency workers are defined in s.3 to include police constables as well as, amongst others, prison officers, firefighters and health workers.

- 11 There remains the separate offence under s.89(1) of the Police Act 1996 which provides that any person who assaults a constable in the execution of his duty is guilty of a summary offence punishable with six months imprisonment.

- 12 It is well established that an unlawful act by a constable is not an act "in the execution of his duty" for the purposes of s.89 of the 1996 Act. So, where a constable assaults a person by putting his hands on the person without any intention of arresting him, physical resistance by the person against the constable does not amount to an offence under s.89(1): see *Wood (Fraser) v Director of Public Prosecutions* [2008] EWHC 1056 (Admin). Where a constable puts his hands on a person without any intention of arresting him, the question of whether that application of force is unlawful, i.e. constitutes an assault, will depend on the circumstances. Not all unwanted touching constitutes an assault. For example, it is not unlawful for a constable to apply force to another in order to attract his attention, to warn him he may be about to commit an offence or to prevent a breach of the peace: see *Pegram v Director of Public Prosecutions* [2019] EWHC 2673 (Admin) and the cases there cited, including the seminal judgment of Robert Goff LJ in *Collins v Wilcock* [1984] 1 WLR 1172, (1984) 79 Cr App R 229.

- 13 Although the application of force by a person in response to an unlawful act cannot amount to an offence contrary to s.89(1), it can amount to the simple offence of common assault or battery contrary to s.39 of the 1998 Act. This is because a requirement that the constable is executing his duty is not an ingredient of the simple offence of assault and battery.

14 If the constable's application of force is unlawful, a person is entitled to use reasonable force in self-defence in order to resist, and the use of such reasonable force in self-defence amounts to a defence to a charge of simple assault or battery under s.39 of the 1998 Act. Whether violence aimed at the constable is a reasonable use of force in any given case will depend on the circumstances.

15 Moreover, whilst the application of unlawful force by a constable cannot itself be characterised as being part of the execution of his duty he may, nevertheless, go on to perform a subsequent act which is lawful and is performed in the execution of his duty. The subsequent acts of a constable are not necessarily rendered unlawful by an initial unlawful assault, and will not be so rendered if the subsequent act itself has a lawful basis. Any contention that the initial assault taints all of the constable's subsequent acts, or makes a person immune and unarrestable, is to misunderstand the scope of *Wood*, as was explained in *Metcalf v Director of Public Prosecutions* [2015] EWHC 1091 (Admin), (2015) 2 Cr App R 25. In *Metcalf* the appellant had been charged with wilful obstruction of a police constable in the execution of his duty contrary to s.89(2) of the 1996 Act. The Magistrates had found that there was an unlawful push by the police constable at a time when he had not formed any intention to arrest the appellant. The Justices' findings were that, prior to the push, the appellant was wilfully obstructing the constable in the execution of his duty, and that he did so again afterwards. In dismissing the appeal, Burnett LJ, as he then was, said at para. 14:

"In my judgment it matters not whether the push was lawful or unlawful in determining the answer to the question whether the appellant was wilfully obstructing P.C. Upshon in the execution of his duty. The push clearly had no bearing on the question whether the appellant's conduct before that time amounted to wilful obstruction. On the findings of the magistrates it did. I am unable to see how an unlawful push could retrospectively render conduct lawful, which was otherwise criminal. But equally, if the push were unlawful it does not follow that P.C. Upshon was any the less acting in the course of the execution of his duty thereafter in dealing with the arrested man in the car. Even on that hypothesis, a person who has been assaulted by a police officer is not liberated from the application of the criminal law

prohibiting wilful obstruction of a constable (including that constable) in the execution of his duty. The assault itself could not be characterised as being part of the execution of the officer's duty. That is why *Fraser Wood* was entitled to resist when he was restrained . . ."

Analysis

- 16 In my view it is clear that the expression "in the execution of his functions" in s.1 of the 2018 Act is not to be construed in the same way as the expression "in the execution of his duty" in s.89(1) of the 1996 Act, and imports no requirement that the emergency worker be acting lawfully. My reasons are as follows.
- 17 First, the language of s.1(1) of the 2018 Act makes no reference to duty or lawfulness, but only to carrying out functions. "Function" is a word which connotes an activity and a role in which the activity is undertaken. "Duty", on the other hand, is a word connoting responsibility or obligation. It would be impossible to describe a police officer as acting in the execution of her duty when acting unlawfully because her duty is to act lawfully. It would, however, be a perfectly natural use of language to describe her as exercising the function of a police officer when conducting police activity, even if in doing so she mistakenly exceeds the special powers granted to her in that capacity. The appellant's argument seeks to construe s.1(1) as if it said: "An offence of common assault or battery that is committed against an emergency worker lawfully acting in the exercise of functions as such a worker . . ." That is not what the statute says, and the use of the word "functions" suggests that that is not what it means. The plain wording of the section indicates that it applies in a broad manner to the activities of a constable, which is not the same as the narrower concept of the lawful exercise of a constable's duty.
- 18 Secondly, the section provides protection to police officers which is additional to that in s.89 of the 1996 Act. Both offences remain on the statute book as alternatives. Had it been intended to replicate the circumstances in which police officers enjoyed the protection

afforded by the 1996 Act, that is to say only when acting in the execution of their duty, the legislative technique would not have been to include them as emergency workers in the 2018 Act so as to create additional penalties to a s.39 offence committed against them but would have been simply to amend the 1996 Act to provide for a 12 month maximum sentence for that existing offence, and to make it triable either way.

- 19 Thirdly, s.1(1) of the 2018 Act must be construed consistently in its application to all emergency workers who come within its scope, including, for example, fire fighters, prison officers and health workers, who carry out a very wide range of different functions; many will exercise their functions without doing so in execution of a duty. Many will do so in circumstances where physical handling is a part of their function. The concept of the lawfulness of such handling is inapposite to all those circumstances by contrast with the particular functions of police officers where powers of arrest or detention are carefully circumscribed by statute.
- 20 Fourthly, s.1(3) of the 2018 Act makes clear that a person can be exercising the functions of an emergency worker when not at work and when outside court time, providing that the activity would be the exercise of such functions if done in work time. That means that a person can be performing the functions of an emergency worker when not carrying out any duty as such. So, for example, the nurse who stops at a road traffic accident to assist falls within the section, yet he cannot be said to be acting in execution of any duty.
- 21 Fifthly, it seems to me that the obvious purpose of the 2018 Act is better served by the construction adopted by the Justices in this case. When introducing the Bill the Minister said:

". . . an assault on any individual or citizen in our society is a terrible thing, but an assault on an emergency worker is an assault on us all. These people are our constituted representatives. They protect society and deliver services on our behalf, therefore, an attack on them is an attack on us and on the state, and it should be punished more severely than an attack simply on an individual victim."

It is, therefore, the status of being an emergency worker which attracts the added protection provided the worker is acting in that role, not whether some duty is being performed at the time. So, for example, a consultant surgeon carrying out an operation is intended to have the benefit of the protection whether or not there may be some defect in the procedure which he has undertaken in obtaining the consent of the patient. So, too, a paramedic who attends an accident should attract the protection of the section without any question as to the niceties of a judgment as to whether consent is or is not being given to physical handling.

22 On behalf of the appellant, Mr Davis submitted that this construction would, in practical terms, lead to a decline in rigor of police constables' compliance with certain divisions of the Police and Criminal Evidence Act 1984, and its attendant codes, the Misuse of Drugs Act 1971, and other statutes, all of which circumscribe police powers of arrest, detention and search, rendering them, in his submission, in practical terms, nugatory. I see no such danger. A defendant is protected by the fact that if the officer is acting unlawfully she may resist arrest using reasonable force and, if she does so, will not be guilty of the offence. Moreover, there are many incentives to encourage police officers to abide by their statutory and professional responsibilities in relation to search, seizure, arrest and detention, irrespective of this legislation.

23 Mr Davis further submitted that this construction would also result in what might be described as "cross-prosecutions" whereby a defendant might be successfully prosecuted for an assault on an emergency worker acting in the exercise of her emergency function, and at the same time be the legitimate complainant in a successful prosecution alleging assault by

beating against that emergency worker, in each case arising out of the same sequence of events. It was also suggested that it would produce a strange asymmetry between the criminal law and the civil law on police powers, whereby the same convicted defendant in the hypothetical criminal case could be a successful claimant in a civil dispute against the emergency worker in question.

24 This submission ignores the fact that if the emergency worker is acting in the execution of their functions but unlawfully, the offence can only be committed if an assault or battery takes place. This will only occur if the defendant is not acting in lawful self-defence. If the police officer is acting unlawfully, the individual may be able to establish self-defence, in which case there will be no conviction to provide any inconsistency with a cross-prosecution or civil claim. If, on the other hand, the offence is committed against a police officer acting unlawfully in circumstances where self-defence does not arise, then the simple offence will be committed under s.39, and the aggravated offence will be committed under s.1 of the 2018 Act. In those circumstances it is difficult to see what civil claim could be made good against the police on the basis that the police officer was acting unlawfully, which would give rise to any inconsistency.

25 Mr Davis went on to submit that this construction is inconsistent with the requirement of lawfulness enshrined in Article 5 of the European Convention on Human Rights, and contrary to the interpretative obligation under s.3 of the Human Rights Act 1988. I see no inconsistency. If an offence is committed independently of the unlawfulness of any detention there is no breach of either provision. A person who uses unreasonable force to injure a police officer who is seeking to arrest him does not have his human rights breached, if he is prosecuted or imprisoned for it, merely because the arrest was not lawful.

26 Accordingly, the answer to all three questions in the case stated is "yes".

27 Although that is sufficient to dispose of the appeal, I should also make clear that I accept the alternative submissions made by Mr Mably QC, on behalf of the CPS, that the issue of law I have addressed makes no difference to the outcome on the facts of this case. The offences would have been committed even had the principles been those applicable to the offence of assaulting a police officer in the execution of his duty contrary to s.89 of the 1996 Act. The Justices found that the appellant had been arrested during the events which unfolded in Wardour Street. That must have been a lawful arrest by reason of the Justices' finding that the appellant had been drunk and disorderly, and the conviction on that charge. Section 24 of the Police and Criminal Evidence Act 1984 empowers a constable to arrest a person who is in the act of committing, or about to commit, an offence, or whom he has reasonable grounds for suspecting to be committing, or about to commit, an offence. The first assault occurred following PC Regan's attempt to handcuff the appellant. The inevitable inference from the Justices' finding was that this was part of the arrest and therefore that the first assault occurred in the course of a lawful arrest. Similarly, the second and third assaults occurred following a lawful arrest and detention. Accordingly, it was irrelevant whether there had been any prior unlawful act in touching the appellant prior to the events of the arrest. Such an unlawful act, if there was one, could not render unlawful that which the officers did subsequently, which was, itself, lawful. As the principles set out in *Metcalf v Department of Public Prosecutions* make clear, an unlawful act by a police officer does not immunise a defendant against responsibility for assaulting a police officer when the latter is subsequently acting lawfully.

28 Accordingly, I would dismiss the appeal

MR JUSTICE WILLIAM DAVIS: I agree.

CERTIFICATE

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