



Neutral Citation Number: [2021] EWHC 2122 (Admin)

Case No: CO/4395/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2021

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION

and

MR JUSTICE SAINI

Between :

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

- and -

HASSAN AHMED

Respondent

- and -

THAMES MAGISTRATES' COURT

**Interested
Party**

Louis Mably QC (instructed by Crown Prosecution Service) for the Appellant
Tom Parker (instructed by TV Edwards Solicitors) for the Respondent
The Interested Party was not represented and did not appear

Hearing dates: 8 July 2021

Dame Victoria Sharp P.:

Introduction

1. This is the judgment of the court.
2. The appellant, the Director of Public Prosecutions, appeals by way of case stated against a decision of the justices sitting in the Thames Magistrates Court on 10 August 2020. The justices tried Hassan Ahmed, the respondent, on two charges of assaulting an emergency worker acting in the exercise of her functions, contrary to section 39 of the Criminal Justice Act 1988 (the CJA 1988) and section 1 of the Assaults on Emergency Workers (Offences) Act 2018 (the 2018 Act). The relevant emergency workers were two police officers who were called to attend a report of anti-social behaviour by the respondent.
3. The justices dismissed the charges against the respondent on the ground that there was no case to answer. The justices stated a case dated 17 November 2020. Paragraph 9 of the Statement of Case sets out two questions for the opinion of the Divisional Court: (i) were we correct in finding that there was no case to answer, having concluded that the officers were not acting in the execution of their duty; and (ii) were we correct in finding “functions” of a police officer to mean “duties of a police officer”?

The Facts

4. The facts found, as recorded in the Statement of Case, were as follows.
5. On 19 June 2020, PC Bordun and PC Quinn attended 52 Mortimer Road, London N1 following reports of anti-social behaviour. The respondent was found lying in the communal hallway, clearly very drunk. The respondent subsequently fell down the communal stairs and rolled out onto the front porch, at the front of the property. Whilst the respondent was on the floor, the two officers tried to keep him still by holding him down to the floor whilst waiting for an ambulance. The respondent was restrained by officers, whilst on the floor, by twisting his arm behind his back and pushing his head down on the floor. Whilst being restrained, the respondent resisted by spitting on the left leg of PC Quinn and he kicked and punched both officers. He was subsequently arrested for assault.
6. The justices heard live evidence from PC Quinn and PC Bordun. The officers each confirmed that they had no intention of arresting the respondent whilst he was being restrained on the floor. PC Quinn gave evidence that they restrained the respondent whilst waiting for an ambulance to arrive and because they were concerned that he could fall down a gap near the property and injure himself, but accepted in cross-examination that no mention was made of this gap in his written statement. PC Bordun gave evidence that the respondent posed an imminent danger to himself due to his intoxicated state. She thought he may run into the road. PC Bordun stated that she believed his life was in danger and restrained him in the belief that it would protect his life. Her main concern was his wellbeing and safety, she wanted to make sure he was safe and well and get him any medical attention he may need. Both officers were clear that they restrained the respondent to protect him from harming himself and to await

the arrival of an ambulance. The justices also viewed the video of the incident captured on the body worn camera of PC Bordun, which had been exhibited to her witness statement.

The justices' decision

7. At the trial before the Magistrates, the respondent argued at the close of the prosecution case, that the appellant's evidence on whether the officers were acting in the execution of their duty was insufficient for any reasonable court properly to convict in that: (a) at no point before the respondent's arrest for assault on a police officer did either officer arrest or purport to arrest the respondent; (b) PC Bordun said in her evidence that she was restraining the respondent on the floor "Whilst we were waiting for an ambulance" and that is not a lawful use of force; (c) the restraint used went beyond a trivial or acceptable use of force – the respondent had his arms twisted behind his back and his face pushed against the ground; (d) the use of force was therefore unlawful and took the officers outside the exercise of their functions; and (e) the alleged assaults by beating happened after the application of unlawful force, and therefore whilst the officers were no longer acting in the exercise of their functions.
8. The appellant however contended that there was a case to answer and the officers were merely trying to assist the respondent by preventing him from harming himself or others; the court should find that the officers were acting in execution of their duty; the court can treat the 'duties' of a police officer as being distinct from the 'functions' of a police officer and if the court found the officers were not acting in the execution of their duties, it was open to the court to find the officers were acting in the execution of their functions as police officers.
9. The justices held: (a) that the officers were not executing their duty, and were therefore not exercising their functions as police officers; (b) that there was no distinction between the "duties" and "functions" of a police officer. "Consequently" they found there was no case to answer and they dismissed both charges. The justices did not therefore independently address the question as to whether on the facts the officers were at the material time exercising their "functions" within the 2018 Act, presumably because of their finding that words "duty" and "function" were synonymous.
10. The justices' conclusion that there was no distinction between the duty of a police officer (for the purposes of section 89(1) of the Police Act 1996 (the 1996 Act) and the functions of a police officer (for the purposes of section 1(1) of the 2018 Act) was erroneous: see *Campbell v DPP* [2020] EWHC 3868 (Admin), a decision of the Divisional Court (Popplewell LJ and William Davis J) handed down on 18 November 2020, after therefore, the justices' decision in this case. Mr Tom Parker for the respondent rightly concedes in those circumstances, that the justices' decision in this case was based on an error of law.
11. However Mr Parker seeks nevertheless to distinguish *Campbell* on the facts. He argues that even if the justices were in error in making no distinction between the "duty" and "function" questions, their decision can be upheld on the facts as found, because, albeit he expressly accepts that the officers acted throughout in good faith and without any malice, what the the officers did during the incident was outside the exercise of their

functions. For his part, Mr. Louis Mably QC for the appellant says that in attending this specific incident and seeking to control the respondent to ensure he did not harm himself until emergency services arrived, the officers were performing everyday police functions. These acts fall within the broad activities of a constable as described in *Campbell* at [17]: see further, para 18 below. He accepts that the nature and degree of the restraint applied can, in principle, be relevant to a factual assessment of whether an officer was carrying out a function, but he submits that on the facts, no reasonable Bench of Magistrates could find anything other than that the officers were performing the normal and daily activities of a police constable and we can therefore determine the “functions” issue in favour of the prosecution now.

12. It follows that though the Statement of Case does not include any question for this Court as to whether the relevant officers were exercising “functions” within the 2018 Act at the time the respondent was restrained, and nor did the Magistrates apply their minds to that issue, the parties each invited us to decide it, though to opposite effect.

Legal framework

13. Common assault is committed where a person does an act by which he intentionally or recklessly causes another to apprehend the immediate application of unlawful force. Battery is committed where a person intentionally or recklessly applies unlawful force to another. Section 39(1) of the CJA 1988 provides that the offences of common assault and battery are summary offences, punishable with six months’ imprisonment.
14. Section 39(2) of the CJA 1988 provides that subsection (1) is subject to section 1 of the 2018 Act. Section 1 of the 2018 Act came into force on 18 November 2018. It applies where an offence of common assault or battery is committed against “...an emergency worker acting in the exercise of functions as such a worker.” In such a case, section 1 provides that common assault and battery are either-way offences, punishable with 12 months’ imprisonment. These are therefore an aggravated form of the common assault and battery offences, where the maximum sentence is 12 months, rather than 6 months, where the offences are committed against emergency workers as defined.
15. Sections 1 and 3 of the 2018 Act provide as follows:

“1(1) This section applies to an offence of common assault, or battery, that is committed against an emergency worker acting in the exercise of functions as such a worker. (2) A person guilty of an offence to which this section applies is liable— (a) on summary conviction, to imprisonment for a term not exceeding [six] months, or to a fine, or to both; (b) on conviction on indictment, to imprisonment for a term not exceeding 12 months, or to a fine, or to both. (3) For the purposes of subsection (1), the circumstances in which an offence is to be taken as committed against a person acting in the exercise of functions as an emergency worker include circumstances where the offence takes place at a time when the person is not at work but is carrying out functions which, if done in work time, would have been in the exercise of functions as an emergency worker....

3 (1) In sections 1 and 2, ‘emergency worker’ means— (a) a constable; (b) a person (other than a constable) who has the powers of a constable or is otherwise employed for police purposes or is engaged to provide services for police purposes; (c) a National Crime Agency officer; (d) a prison officer; (e) a person (other than a prison officer) employed or engaged to carry out functions in a custodial institution of a corresponding kind to those carried out by a prison officer; (f) a prisoner custody officer, so far as relating to the exercise of escort functions; Assaults on Constables and Emergency Workers, (g) a custody officer, so far as relating to the exercise of escort functions; (h) a person employed for the purposes of providing, or engaged to provide, fire services or fire and rescue services; (i) a person employed for the purposes of providing, or engaged to provide, search services or rescue services (or both); (j) a person employed for the purposes of providing, or engaged to provide— (i) NHS health services, or (ii) services in the support of the provision of NHS health services, and whose general activities in doing so involve face to face interaction with individuals receiving the services or with other members of the public. (2) It is immaterial for the purposes of subsection (1) whether the employment or engagement is paid or unpaid.

16. Section 89(1) of the 1996 Act provides that any person who assaults a constable “in the execution of his duty” is guilty of a summary offence, punishable with a maximum term of six months’ imprisonment. It is well-established that an unlawful act by a constable is not an act done “in the execution of his duty” for the purposes of section 89(1): see for example, *Wood (Fraser) v DPP* [2008] EWHC 1056 (Admin).
17. The question of whether an application of force is unlawful and constitutes an assault will depend on all the circumstances. Not all unwanted touching, including where a constable puts his hands on a person without any intention of arresting him, constitutes an assault. It is not unlawful for example 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: *Pegram v DPP* [2019] EWHC 2673 (Admin); *Mepstead v DPP* [1995] Crim LR 111. See further *Collins v Wilcock* (1984) 1 W.L.R. 1172 at 1177 and *R (on the application of Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55. We make this point, which might seem an obvious one, because it appears that the Magistrates may have been under the misapprehension that an officer can only put his hands on a person lawfully, if he has an intention of arresting him, and that without an intention to arrest, such an officer could not be acting in the execution of his duty or lawfully.
18. If the application of force by the constable is unlawful, there are a number of consequences.
 - i) First, as already indicated, the application of force by the constable is not performed in the execution of his “duty”, and therefore physical resistance to it cannot amount to an offence contrary to section 89(1) of the 1996 Act;

- ii) Secondly, the application of force by a person against the constable in response to the unlawful act could nonetheless amount to the simple offence of assault. This is because a requirement that the constable is executing his duty is not an ingredient of the simple offence;
 - iii) Thirdly, however, if the constable's application of force is unlawful, a person is entitled to use force in reasonable self-defence in order to resist, and reasonable self-defence is a defence to a charge of assault. Whether the force used in response amounts to reasonable self-defence will depend on the circumstances.
19. In *Campbell* the Divisional Court held that the expression "in the execution of functions" in section 1 of the 2018 Act is not to be construed in the same way as the expression "in the execution of his duty" in section 89(1) of the 1996 Act, and imports no requirement that the emergency worker be acting lawfully: see in particular [17]-[21] where Poplewell LJ identifies five reasons for this conclusion.

"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.

20. The facts in *Campbell* were these. An officer encountered Ms Campbell who was intoxicated, and attempted to place handcuffs on her wrists. Thereafter, Ms Campbell scratched one officer and kicked two more. She was charged with being drunk and disorderly and with assaulting an emergency worker x 3. It was submitted to the justices on her behalf that before the officer attempted 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. It was argued that, for the purposes of the 2018 Act as for the offence in section 89(1) of the 1996 Act, the constable must be acting lawfully; the arrest and attempt to apply handcuffs was unlawful, as were the subsequent actions of the other officers at the police station. Accordingly, the offence under the 2018 Act was not made out.

21. Popplewell LJ rejected that argument, and upheld the justices' decision that a constable could be exercising the functions of a constable for the purposes of section 1(1) of the 2018 Act *even if* she was not acting in the execution of her duty within the meaning of section 89(1) of the 1996 Act. The question of the lawfulness of the officer's initial action pre-arrest, was therefore irrelevant. In relation to the meaning of the term "functions" in section 1(1) of the 2018, as Popplewell LJ explained at [17] 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".

Discussion

22. The decision of the justices to dismiss the charges in the present case was based on a finding that there was no distinction between duty (section 89(1) of the 1996 Act) and functions (section 1(1) of the 2018 Act). The justices concluded that their finding that the officers were not acting in execution of their duty, meant that the officers were not exercising their functions, and therefore an essential ingredient of the offence in section 1(1) of the 2018 Act could not be established. That the Magistrates' decision was wrong in law is conceded. In our view, there is no material factual difference between this case and *Campbell* and we do not accept Mr Parker's argument to the contrary.
23. We were invited by both parties to provide general guidance on the scope of the term "functions" within section 1(1) of the 2018 Act. Two matters are clear. First, whether an emergency worker was exercising a function at the time of an alleged assault is a fact-specific and objective question. Secondly, there are limits to the concept of function, so that not everything done by an emergency worker when apparently going about his or her day to day business, can properly be so described. We agree with Mr Mably QC that, to take an extreme case, if a police constable for example, committed a sexual assault in the course of an arrest, the constable would not be carrying out his or her functions.
24. Nonetheless, without intending to provide comprehensive guidance, in our view, proportionate and good faith actions by the police to assist those who appear to be in distress, or to be at risk of causing harm to themselves or others, would in principle likely be within the concept of police "functions", whether or not some form of touching or handling of a person takes place in the course of such conduct. It is counterintuitive to our minds that where the police in any given case are trying to protect an individual from harm to themselves or others, because for example, the individual is intoxicated or under the influence of drugs or highly vulnerable or distressed, or teetering on the edge of a railway platform or at risk of staggering into a road, some reasonable preventative physical intervention cannot take place without it being characterised as unlawful, or in excess of police functions for that matter, unless the police have when so intervening, an intention to arrest. As explained in *Campbell*, section 1 is intended, in the context of the work of the police, to capture the broad everyday activities of police officers for the purposes of considering whether an assault upon them takes its

statutorily aggravated form or not. Justices and juries can be expected to approach that question, with, we apprehend, a degree of commonsense.

25. Against that background, it is necessary to approach sometimes unfocused submissions that a police officer has acted unlawfully and therefore outside her formal functions with some caution. That is for the following reasons which are often overlooked:
- i) Police officers have the same powers and rights as an ordinary citizen, so they may, as a matter of vices, do anything that a natural person could do without the use of coercive powers. It is true that police officers have particular duties and obligations, and have powers additional to those of members of the public and specific to their office that "authorise" the police to do things that would otherwise be unlawful. However, it is important not to lose sight of the fact that these duties and powers do not constrain or restrict the powers and rights police officers have as ordinary citizens.
 - ii) The police, like any other public body, are subject to the constraints of public law: they must therefore act reasonably, in good faith and in accordance with any other public law duties. What they do not have to do however is to find some specific police power to enable them to do something ordinary citizens can do.
 - iii) Accordingly, it is wrong to proceed on the basis that unless there is some defined common law or statutory power being exercised by the constable at the material time she will be acting unlawfully and not be fulfilling a function within the 2018 Act.
 - iv) When considering the broad functions of a constable, and although arising in a different context, some assistance can be obtained from the discussion of "police purposes" in *Centre for Advice on Individual Rights in Europe v Secretary of State for the Home Department and others* [2018] EWCA Civ 2847 at [46]-[48]. As explained in that case, the purpose of the police service is to uphold the law fairly and firmly; to prevent crime; to pursue and bring to justice those who break the law; to keep the Queen's Peace; to protect, help and reassure the community; and to be seen to do all this with integrity, common sense and sound judgment.

Conclusion

26. Our answers to the two questions posed by the justices in the Case are therefore as follows:
- i) Were we correct in finding that there was no case to answer, having concluded that the officers were not acting in the execution of their duty? No.
 - ii) Were we correct in finding "functions" of a police officer to mean "duties of a police officer"? No.
27. The justices' approach in this case was fundamentally flawed, and their findings on the facts and the issues argued before them were limited. In the circumstances, we allow the appeal but decline the invitation of the parties to decide the functions issue for

ourselves. We direct that the case now be remitted to be re-heard by a different Bench of Magistrates.