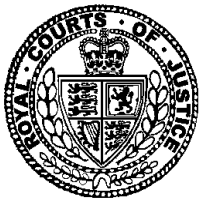

Neutral Citation Number: [2023] EWHC 1046 (Admin)

Case No: CO/3606/2022

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

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

Date: 04/05/2023

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

KEVIN MARLAND	**Appellant**
- and -	
DIRECTOR OF PUBLIC PROSECUTIONS	**Respondent**

- -
- -

David Gardner (instructed by **Allen Hoole Solicitors**) for the **Appellant**
Ben Lloyd (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 1 March 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 4 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn DBE :

Introduction

1. The appellant appeals by way of case stated from the decision of Bristol Magistrates' Court on 7 February 2022 to convict him of an offence of assault. On 16 September 2022, the Magistrates' Court stated a case for the opinion of the High Court under s.111 of the Magistrates' Courts Act 1980 which now falls for determination, pursuant to s.28A of the Senior Courts Act 1981.

2. The appellant first appeared in Swindon Magistrates' Court on 11 November 2021 to answer two charges, namely:
    a. on 30 August 2021, "*assault by beating*" upon Melanie Clarke; and
    b. on 30 August 2021, "*assault by beating*" upon Rose Griffin.

    Not guilty pleas were entered to both charges and the matters were listed for trial at Bristol Magistrates' Court on 7 February 2022.

3. On 7 February 2022, the trial was effective. Ms Clarke, who at the time was the appellant's partner with whom he was living, "*made a statement withdrawing her support of a prosecution and did not give evidence at the trial*" (Case Stated, §3). Ms Griffin, a passer-by who did not know the appellant, gave evidence, as did the appellant (Case Stated, §3). The appellant was acquitted of the alleged assault upon Ms Griffin and convicted of assault upon Ms Clarke. He was given a conditional discharge.

4. This appeal relates only to the decision to convict the appellant of the assault upon Ms Clarke. The Justices pose the following questions for the opinion of the High Court:-

> "Were we able to convict the appellant of battery:
>
> (i) On the basis of his evidence and explanation that he grabbed Ms Clarke's shoulders in order to guide her to his car because he was concerned that she was walking down a busy road at dusk whilst intoxicated?
>
> (ii) Having considered and rejected in the absence of any evidence that the conduct of the appellant fell outside that of implied consent in daily life, or within the context of his relationship with Ms Clarke?"

The Grounds of Appeal

5. The appellant contends that the questions raised in the Case Stated should be answered in the negative for the following reasons:
    a. The magistrates have failed to properly consider and apply the doctrine of implied consent;
    b. The determination that the facts as found by the magistrates did not satisfy the doctrine of implied consent is *Wednesbury* unreasonable; and/or
    c. The magistrates have failed to properly consider whether the prosecution have proven the necessary intent.

The Case Stated

6. The Case Stated records:

"2. … The disputed issues of fact noted on the Preparation for Effective Trial form in respect of charge 1 were:

> 'did the appellant grab Ms Clarke's neck and push her to the floor or raise his fists?'

He accepted, due to her intoxication, he took hold of her shoulders to guide her to the car.

3. On 7th February 2022 we tried the charges and heard evidence that

The incident took place on the 30th August 2021 at approximately 8.30pm. The time of the event was accepted but the evidence given about the location differed slightly.

We heard evidence from Ms Griffin to say she saw them close together and there was 'a lot of grabbing' and that Ms Clarke was 'forcefully pushed to the floor'. She described seeing the appellant empty Ms Clarke's handbag and run off.

The appellant in his evidence accepted Ms Clarke had left the pub after he had made a sarcastic comment to her. In his evidence the appellant stated that Ms Clarke had 'sent text messages criticising him for leaving her to walk home alone'[.] When he arrived in the pub car park Ms Clarke had disappeared and he could not see her. He went home and drove back and saw Ms Clarke in his headlights and pulled over. The appellant accepted he was frustrated but was not angry and wanted to make sure she was safe. In evidence the appellant said it was pitch black, she was extremely intoxicated and he wanted to 'reason with her to get her home'. He stated 'I grabbed her by both shoulders and took her to the car six feet away[.] She didn't want to go, I let go and she fell on her bottom. I grabbed her when she didn't want to be grabbed. I've assaulted her but with a reasonable excuse."

Ms Clarke made a statement withdrawing her support of a prosecution and did not give evidence at the trial.

We found the following facts:

a) The appellant and Ms Clarke were in a relationship and at the time of the incident were living together.

b) The appellant and Ms Griffin, the witness, were not known to each other.

c) The witness may have been mistaken by what she thought she saw. The light conditions had to be considered and the witness was driving at 30mph when she says she saw the incident. The

> Bench could not be certain exactly what she could have seen from where she was driving.
>
> d) By his own admission in evidence the appellant accepted that he grabbed Ms Clarke by both shoulders, knowing she did not consent to this, and took her to the car, knowing she did not want to go. He let go of her and she fell to the floor. His actions caused her to fall to the floor.
>
> …
>
> 5. The court was not referred to any authorities.
>
> OPINION
>
> We were of the opinion that:
>
> The Appellant intentionally applied unlawful force to Ms Clarke causing her to fall. The Appellant knew she did not consent to this contact and it was not reasonable under the circumstances." (Emphasis added.)

The law

7. Battery (sometimes referred to as 'assault by beating') is defined as "*an act by which the defendant, intentionally or recklessly, applies unlawful force to the complainant*": *R v Williams* (1984) 78 Cr.App.R 276 at 279; *Blackstone's Criminal Practice 2023* ('*Blackstone*'), B2.9 and B2.12.

8. The term 'force' encompasses "*the least touching of another*"; "*any touching of another person, however slight, may amount to a battery*": *Collins v Wilcock* [1984] 1 W.L.R. 1172, Robert Goff LJ at 1177C. The breadth of the principle reflects the fundamental nature of the interest protected, namely, that "*every person's body is inviolate*"; and the "*effect is that everybody is protected not only against physical injury but against any form of physical molestation*": *Collins v Wilcock,* 1177C-D. (In *Cole v Turner* (1704) 6 Mod 149 Hold CJ had limited his reference to "*the least touching of another*" by the words "*in anger*", but Robert Goff LJ observed in *Collins v Wilcock* at 1177H: *"*although in the past it has sometimes been stated that a battery is only committed where the action is 'angry, revengeful, rude, or insolent' (see *Hawkins, Pleas of the Crown,* 8th ed. (1824), vol. 1, c. 15, section 2), we think that nowadays it is more realistic, and indeed more accurate, to state the broad underlying principle, subject to the broad exception.")

9. To constitute a battery, the force must be 'unlawful'. It will be unlawful if the accused has no lawful excuse: *R v Brown* [1994] 1 AC 212, 231B. The use of force may be justified on the basis of, amongst other grounds, actual or implied consent, self-defence or defence of another: *Blackstone,* B2.13.

10. In *Collins v Wilcock,* having stated the broad principle that any touching of another may amount to a battery, Robert Goff LJ continued at 1177E-1178D:

> "But so widely drawn a principle must inevitably be subject to exceptions. For example, children may be subjected to reasonable punishment; people may be subjected to the lawful exercise of the power of arrest; and reasonable force may be used in self-defence or for prevention of crime. But, apart from these special instances where the control or constraint is lawful, a broader exception has been created to allow for the exigencies of everyday life. Generally speaking, consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station, or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is, within reason, slapped: see *Tuberville v Savage* (1669) 1 Mod 3. Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life. …
>
> Among such forms of conduct, long held to be acceptable, is touching a person for the purpose of engaging his attention, though of course using no greater degree of physical contact than is reasonably necessary in the circumstances for that purpose. … But a distinction is drawn between a touch to draw a man's attention, which is generally acceptable, and a physical restraint, which is not. … Furthermore, persistent touching to gain attention in the face of obvious disregard may transcend the norms of acceptable behaviour, and so be outside the exception. We do not say that more than one touch is never permitted; for example, the lost or distressed may surely be permitted a second touch, or possibly even more, on a reluctant or impervious sleeve or shoulder, as may a person who is acting reasonably in the exercise of a duty. In each case the test must be whether the physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct; and the answer to that question will depend upon the facts of the particular case." (Emphasis added.)

11. Discussing the steps a police officer may take in contexts where they only have the same rights as ordinary members of the public, Robert Goff LJ observed at 1178F-H:

> "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. … But if, taking into account the nature of his duty, his use of physical contact in the face of non-cooperation 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." (Emphasis added.)

12. The authors of *Blackstone* note at B2.14:

> "Where consent is in issue, the burden of disproving it is on the prosecution (Donovan [1934] 2 KB 498). The two principal questions that may arise in this context are: (1) Did the complainant in fact consent (expressly or by implication) to what was done; and (2) if so, do public policy considerations invalidate that consent?
>
> Whether consent was given is usually a simple question of fact, but we are all 'deemed' to consent to various harmless or unavoidable contacts with our fellow citizens which for that reason cannot be unlawful (*Wilson v Pringle* [1986] 2 All ER 440)." (Emphasis added.)

13. The mental element that must be proved to convict a person of battery was addressed by Lord Lane CJ in *R v Williams* (1984) 78 Cr.App.R 276 at 280-281:

> "The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more.
>
> What then is the situation if the defendant is labouring under a mistake of fact as to the circumstances? What if he believes, but believes mistakenly, that the victim is consenting, or that it is necessary to defend himself, or that a crime is being committed which he intends to prevent? He must then be judged against the mistaken facts as he believes them to be. If judged against those facts or circumstances the prosecution fail to establish his guilt, then he is entitled to be acquitted.
>
> …
>
> The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant."

14. Battery is a summary offence: s.39 Criminal Justice Act 1988. It is for the prosecution to prove, to the criminal standard, all elements of the offence: *Woolmington v Director of Public Prosecutions* [1935] A.C. 462.

Ground 1: Did the magistrates fail properly to consider and apply the doctrine of implied consent?

15. The appellant submits that it was not open to the magistrates to convict the appellant because they failed to consider the doctrine of implied consent. In particular, they failed to address the question whether the prosecution had proven that the conduct of the appellant, in the circumstances, was not in conformity with generally acceptable standards of conduct.

16. They referred to no authorities, and none were cited to them. The appellant submits that it is apparent from their reasons that they did not have the principles of *Collins v Wilcock* or *McMillan v Crown Prosecution Service* [2008] EWHC 1457 (Admin) in mind. Counsel for the appellant, David Gardner, submits that this case is similar to *McMillan,* in which a police officer took the arm of a drunken and abusive woman to steady her as she came down some steps, and in order that further enquiries be made. Maurice Kay LJ concluded in *McMillan*, at [13]:

> "In my judgment, in acting as he did, the officer who had had in mind the steepness of the steps in the garden and had wanted 'to steady her for her own safety' can properly be said to have acted in conformity with 'generally acceptable standards of conduct'."

17. Mr Gardner submits that the appellant took hold of Ms Clarke's shoulders due to her intoxication, to protect her from harm. This was in a context where she had earlier expressed a wish for him to support her to return home, and he was attempting to facilitate her safe return home. He submits that applying *Collins v Wilcock* and *McMillan*, if the magistrates had properly applied their minds to the question whether his actions were in conformity with generally acceptable standards of conduct, the inevitable conclusion would have been that the force applied was lawful.

18. The appellant acknowledges that the duty on magistrates to give reasons is limited, but such reasons must be adequate and they can be expected to give fuller reasons in the Case Stated: *R(McGowan) v Brent Justices* [20021] EWHC Admin 814. In this case, the reasons do not address the principles set out in *Collins v Wilcock* or *McMillan*, or consider whether the doctrine of implied consent applied. They were, therefore, inadequate.

19. Although he accepts that the magistrates found that the appellant knew Ms Clarke did not consent, Mr Gardner submits that actual non-consent does not automatically negate the application of the doctrine of implied consent. He gave an example of stopping a person from jumping off a tall building, even when aware they did not wish to be stopped. Mr Gardner contends that although that is a more extreme example, it shows that the court has to be satisfied that implied consent did not exist even if actual non-consent has been proven.

20. In my judgment, this ground of appeal should be dismissed for the reasons given by the respondent, with which I agree. Although the magistrates did not expressly refer to the law relating to consent, it is clear that they fairly and squarely confronted the issue of consent. They concluded that the appellant "*grabbed*" Ms Clarke by both shoulders (a term indicating he grasped her roughly), knowing she did not consent to this, and took her towards his car, knowing she did not want to go there. He let go of her and she fell to the floor. His intentional application of unlawful force caused Ms Clarke to fall. The appellant knew she did not consent to this physical contact and the magistrates found it was not reasonable under the circumstances.

21. These were issues of fact and those conclusions were unarguably open to the magistrates on the evidence. This was not a case in which he was labouring under any mistake as to the facts. It is always possible to assert that the reasons should have been fuller, but here the reasons given were adequate. On those findings, in circumstances where the victim admittedly did not consent, and the appellant admittedly knew that was the case, no issue of implied consent arose.

22. I agree with the submission of Counsel for the respondent, Ben Lloyd, that it would be contrary to public policy to hold that it is acceptable for a man, knowing that a woman did not consent to being touched, to say that he knew she was not consenting but he did what he did because he thought it was in her best interests in the circumstances; so using the doctrine of implied consent to override her actual non-consent. I would add, that is not the law. There may be cases, as Mr Lloyd accepted, such as the example given by Mr Gardner of stopping someone jumping from a high building, where a person could override another's lack of consent, although in that kind of case it is more likely the accused would assert he was acting in defence of another. That was not a defence for which there was any evidence; this was not a case where the appellant was, for example, seeking to steer Ms Clarke out of the line of oncoming traffic.

23. I agree with Mr Lloyd that the facts of *McMillan* do not assist the appellant as each case is fact specific. In that case the magistrates accepted the officer's evidence that "*he took firm hold of the appellant's arm, <u>not against her will</u>*" (my emphasis) and "*escorted her as there were steps in the garden which were steep, and he wanted to steady her for her own safety*" ([4]).

24. On the basis of the facts as found by the magistrates, in my judgment, the appellant's conduct was not the kind to which a person might be *deemed* to consent. This was not a touch to attract her attention, an inadvertent nudge on busy public transport, or some other trivial form of contact. The appellant grabbed Ms Clarke and physically moved her towards his car against her will. In doing so, he used a form of physical restraint, albeit short-lived. It was not for the appellant to override Ms Clarke's wish not to be grabbed in that way. As the court observed in *Collins v Wilcock*, "*a distinction is drawn between a touch to draw a man's attention, which is generally acceptable, and a physical restraint, which is not*".

Ground 2: Was it *Wednesbury* unreasonable to conclude that the doctrine of implied consent did not apply?

25. The appellant submits it was irrational to reach any other conclusion than that the doctrine of implied consent applied, therefore the magistrates were not entitled to convict him.

26. Mr Gardner contends that common sense dictates that the appellant's actions, in the circumstances and context described in the Case Stated, meet the test of what is to be regarded as generally acceptable conduct. He submits that it would be a concerning result if those who seek to assist friends and loved ones who are heavily intoxicated by guiding them with the use of force, against their will (as expressed in their intoxicated state), to attempt to ensure their safety, are found to be committing a criminal offence.

He submits that common sense compels the answer that in such circumstances they would not be guilty of battery.

27. For the reasons that I have given in respect of Ground 1, on the facts of this case, in circumstances where the victim did not consent to the appellant's use of force, and the appellant knew she did not consent, no issue of implied or deemed consent arose.

28. Further, I agree with the respondent that the magistrates made findings of fact that were open to them and on those factual findings it was rational for them to convict the appellant.

Ground 3: Did the prosecution fail to prove intent to apply unlawful force?

29. The appellant points out that the first requirement in relation to any offence is to have regard to the definition of the offence and whether intent is required in the commission of the offence: *Director of Public Prosecutions v Morgan* [1976] A.C. 182. The intent necessary to establish this offence is the intent to apply unlawful force to the victim: *R v Williams*. Thus, if a person believes mistakenly that a person is consenting, he must be judged against the circumstances as he believed them to be.

30. The appellant submits the same must be true not just of actual consent but also implied consent or defence of another. On the facts, the appellant submits that the magistrates failed to consider whether it was proven that he had the necessary intent to commit the office. Specifically, the appellant contends that it is apparent from the Case Stated and the Justices' contemporaneous notes that they did not consider whether the appellant believed he was acting within the doctrine of implied consent or whether he believed he was acting in defence of another.

31. If he believed either, then he should have been found not guilty of the offence irrespective of the reasonableness of that belief. The appellant submits that it is clear from his recorded evidence that "*I've assaulted her but with a reasonable excuse*" that he believed that he was acting with implied consent and in defence of Ms Clarke. Therefore, Mr Gardner contends, it was not open to the magistrates to come to the conclusion they did.

32. In his oral submissions, Mr Gardner acknowledged that the magistrates expressed "*opinion*" in the Case Stated would suggest that they did consider the issue of intention, but they only applied their minds to his intent to touch Ms Clarke, and actual consent, failing to consider the issue of implied consent. He submits that the effect of *Collins v Wilcock* is that it is possible at one and the same time for a person to know that they do not have actual consent to touching another while believing they have implied consent.

33. Mr Lloyd submits that the short answer to this point is that the magistrates made express findings that the appellant "*intentionally applied unlawful force*" and that the appellant "*knew she did not consent to this contact*" and "*it was not reasonable under the circumstances*". These findings were not just that he had intent to do the physical act of grabbing and moving the appellant: the finding of intention was linked to the knowledge of lack of consent and the finding that his conduct was not reasonable. I agree. In my judgment, the contention that the prosecution failed to prove intent to use unlawful force is misconceived in light of the magistrates' express conclusion that he intentionally applied unlawful force, knowing the victim did not consent.

Conclusion

34. The appeal is dismissed on all three grounds. The answer to the Case Stated is that the magistrates were entitled, on the evidence and their findings (which were open to them), to convict the appellant of battery.