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Case No: Case No: QB/2018/0165
On Appeal from Central London County Court
Order of HHJ Freeland QC 8 May 2018
County Court Case No. A767P002

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2018

Before :

MR JUSTICE STEWART

- -

Between :

Harold Gerber	**Claimant**
- and -	
The Commissioner of Police of The Metropolis	**Defendant**

- -
- -

Ms Una Morris and Mr Sebastian Elgueta (instructed by **Tuckers Solicitors**) for the **Claimant/Appellant**
Mr Julian Waters (instructed by **The Directorate of Legal Services for The Commissioner of Police for the Metropolis**) for the **Defendant/Respondent**

Hearing dates: 10-11, 19 December 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE STEWART

Mr Justice Stewart:

1. This is an Appeal against an Order of Judge Freeland QC sitting at the County Court at Central London on 8 May 2018. Permission to Appeal was granted after a hearing before Mr Justice Lane on 7 September 2018.

2. The relevant paragraphs of Judge Freeland's QC Order are:

> "2. The Claimant's claims be dismissed and accordingly Judgment be entered for the Defendant.
>
> 3. The Claimant do pay the Defendant's costs of the action, such Order not to be enforced without leave of the court….."

3. The claim by Mr Gerber arose from an incident at about 11am on 15 November 2011. His claim was for assault and false imprisonment. The Claimant is a black man. On the day he was wearing black trousers, a black jacket, a shirt and tie and a black baseball cap. He boarded a train at Norwood Junction. He was sitting in the aisle seat of a bank of two seats. Shortly afterwards two policemen boarded the train. One of the policemen, PS Hurren, approached the Claimant with his gun fixed upon him. He was told to put his hands up. Another officer approached holding a taser. This was Constable Scoulding. He pressed the taser into the Claimant's chest.

4. I will now summarise the pleaded Defence: At about 10:40 am that day, railway staff at Norwood Junction station saw a man on a platform waving a gun and shouting out what they thought to be religious phrases. They contacted the Police. The incident was classified as a "rail emergency" and a firearms operation. The station was immediately closed and passengers evacuated. The man with the gun boarded a train occupied by passengers. The train was held at the platform. PS Hurren[1], Constable Scoulding and Constable Greaves made their way to the scene. En route a description of the suspect was sent. This was of a black male wearing a black jacket and a black "Stetson" hat and with a silver revolver handgun. PS Hurren asked for confirmation regarding the hat and was told that the Computer Aided Despatch ("CAD") recorded a black hat, no mention of a Stetson. The officers arrived and were briefed outside the station. The three police officers were led by another police officer to platform 3 where the train was held. PS Hurren led Constable Scoulding onto the train. PS Hurren "had his…firearm in the aim position with the safety off scanning and looking for the suspect." PS Hurren then entered the next carriage and within a few steps saw a black male wearing a black hat and a black coat. It was pleaded that this man made eye contact with PS Hurren and upon doing so reached down to his right hand side. PS Hurren told him to stay still and show the officer his hands. He pointed his firearm at the man from a distance of about 2-3 metres yelling: "Stay still, don't move". PS Hurren was aware of Constable Scoulding coming to his right and saw the red laser dot from his taser appear on the man's chest. PS Hurren continued to point his firearm at the man and told him to put his hands on his head. The man, the Claimant, did not comply with that request and PS Hurren shouted at him again. The man avoided eye contact and said that he had not got a gun and did not deal with guns. The Claimant then brought his hands up and they were grabbed by Constable Scoulding. Constable Scoulding moved forward placing the taser on the Claimant's chest to try and ensure

[1] Although referred to in the Defence as PC Hurren, he was in fact Police Sergeant (PS) Hurren

that the Claimant complied with the officers' requests. PS Hurren then became aware of a disturbance to his right-hand side across and in close proximity to the Claimant. There was another black male also wearing a black coat and a hat. PS Hurren saw a silver imitation handgun on a small table next to him. Constable Scoulding heard Constable Greaves interact with the other man and immediately removed the taser and aimed it at the black male across the carriage. That man had a silver gun on the table to his left. The man said it was a toy. It was thought that this other man remained a threat and could have been a danger to himself, officers and members of the public. The Claimant was then hurried out of the way.

5. That is the pleaded outline of what happened.

6. I have read a transcript of the approved Judgment of Judge Freeland QC. This is dated 8 May 2018. The trial had commenced on 30 April 2018 before a Judge and jury. The evidence concluded on the fourth day of the trial. The Judge heard legal argument on the morning on the fifth day of the trial and, at the conclusion of the legal argument, ruled that there were no disputed issues of fact upon which he required the assistance of the jury in order to determine the law and the legal causes of action. He further ruled that the Defendant had discharged the burden of proof in relation to the use of force and the short period of detention all of which amounted to less than 30 seconds. As he pointed out, the burden of proof was upon the Defendant in relation to both causes of action, namely the assault/battery and false imprisonment.

7. The Judge referred to the man who eventually was detained and arrested and who had the toy gun as "JL". JL was shown on the CCTV stills as wearing a broad brimmed hat and red tie. The Claimant was wearing a black baseball cap, a short black jacket and a scarf around his neck. At one point after his release the CCTV shows him wearing a shirt and what appears to be a tie.

8. The Judge recorded that the Defendant acknowledged that the Claimant was not the suspect in the result, and that a mistake as to identity was made. The Claimant is an entirely innocent man and underwent a horrible experience.

9. At the outset of the trial the Defendant had submitted that it was unnecessary for a jury to be sworn. The Judge ruled against the Defendant. He did this because: "it was necessary for the facts to be ascertained before making any rulings at all about what question or questions I should leave to the jury……" He also made it plain to counsel that he would return to the subject of the jury questionnaire on liability at the conclusion of all the evidence. He said he would only leave a question or questions for the consideration of the jury if he came to the conclusion that the answer to such questions would necessarily inform his conclusions on the law, on one or more of the Claimant's causes of action.

10. The Claimant's evidence was essentially unchallenged, he being a wholly innocent member of the public who was caught up in a situation not of his own making. When he had entered the carriage, he saw a gentleman alongside, just behind him, who was singing. He was a black man, plainly a reference to JL. In cross examination he denied saying to the police that he did not deal in guns. Neither counsel submitted that that was a factual dispute relevant for the jury to consider.

11. The Judge then reviewed the evidence of some background witnesses before coming to that of PS Hurren. The description he received prior to arriving at Norwood station was of a black man, black hat, black jacket or coat, shirt, tie, silver handgun. He remembered hearing coming over one of the radios a Stetson hat and he thought that was strange. He said he sought clarification and they came back to him with black hat, no mention of Stetson. This was not challenged in cross examination by Ms Morris on behalf of the Claimant. When they entered the second carriage, PS Hurren said that almost immediately somebody who matched the description of the man on the platform was there, namely black man, a black hat, a shirt and tie and a black jacket.

12. Judge Freeland QC then reviewed the cross examination of PS Hurren. He said he considered this with considerable and anxious care. This in particular is about the topic of the shirt and the tie. The officer accepted that the shirt and tie were not mentioned in the Evidence and Actions Book (EAB) or in his witness statement of 15 November 2011. It was mentioned in a statement he made 18 months later without the notes. PS Hurren maintained in evidence that he did see the shirt and the tie. PS Hurren said that the Claimant was stopped because of the detail of description and his demeanour, the black hat, the black jacket and his ethnicity. He said that the shirt and tie were visible at the time but the Claimant's demeanour was an important part of his dynamic risk assessment. PS Hurren agreed that racial bias could not form reasonable grounds for suspicion. Ms Morris put it to PS Hurren that his state of mind was affected by racial bias but the Judge said: "that was as an assertion without any material served to justify that and he denied it and said he would not act in a way of racial bias at all".

13. The Judge then reviewed the evidence of Constable Greaves and another officer. Constable Greaves, who was the driver en route to the station, supported the evidence that, prior to the arrival at the scene, PS Hurren had questioned the matter of the cowboy hat and it was clarified that there was no cowboy hat. There was no challenge or cross examination upon that detail. Constable Greaves said that, when in the carriage, had she seen both men (Mr Gerber and JL) she would have said that both matched the description of the man with the gun, black hat, coat, seating in the second carriage of a train on this particular platform at this railway station.

14. Finally, the Judge reviewed the evidence of Constable Scoulding, he being the officer who pressed the taser into the Claimant's chest. In evidence in chief, Constable Scoulding was asked to give a description of the man who had the gun based upon the information he had. He described the male as follows:

> "black male, black cap (subsequently he said hat), black jacket, second carriage of the train as I entered. I believe black hat was in the description."

15. When Constable Scoulding went into the carriage with PS Hurren both men had a carbine, a pistol and a taser. He said:

> "I saw Mr Gerber and thought that was the man I was looking for, black male, black cap, long sleeved black coat. I'm looking at him as a threat. His hands were then raised."

16. He then confirmed his training about the taser, said his intention was to get Mr Gerber secured. He said that Mr Gerber needed to be handcuffed and searched for a weapon.

The Judge, in paragraph 33 of his judgment, recorded the detail of what Constable Scoulding said he did with the taser in relation to Mr Gerber.

17. The Judge also recorded that there was no challenge to the methodology that Constable Scoulding used as a result of his training, nor to the technique (known as the angled drive stun) that he used in the circumstances that he faced. Among the cross examination to which the Judge referred, Constable Scoulding was asked about his EAB and his notes. The information he was working from, he said, was "black male, black hat, black coat, sat on train, second carriage." He said that the Claimant fitted that description. He was then asked in some detail about his use of the taser and the surrounding circumstances. The Judge dealt with this in paragraph 35 of his judgment.

18. After the evidence both counsel made submissions on what questions if any should be left to the jury. Ms Morris proposed the following jury questionnaire:

(1) Has the Defendant proved on the balance of probabilities that PS Hurren saw Mr Gerber's shirt before deciding to point his gun at Mr. Gerber?

(2) Has the Defendant proved on the balance of probabilities that PS Hurren saw Mr Gerber's tie before deciding to point his gun at Mr Gerber?

(3) Has the Defendant proved on the balance of probabilities that PS Hurren's decision to point his gun at Mr Gerber was not influenced by racial bias?

(4) Has the Defendant proved on the balance of probabilities that Constable Scoulding did not receive information as follows:

(a) That the suspect was wearing a Stetson;

(b) That the suspect was wearing a shirt;

(c) That the suspect was wearing a tie?

(5) Has the Defendant proved on the balance of probabilities that Constable Scoulding's decision to aim his taser at Mr Gerber was not influenced by racial bias?

(6) Has the Defendant proved on the balance of probabilities that Constable Scoulding used no more than reasonable, necessary and proportionate force in pressing his taser into Mr Gerber's chest?

Questions 1 and 2: the argument and the Judge's decision

19. The Judge records that Ms Morris submitted that the test was objective reasonable grounds for suspicion and she submitted that if, on the evidence, the jury were to conclude that PS Hurren did not see the shirt and/or the tie, that is of relevance to the determination of absence of reasonable grounds for suspicion based upon the information that PS Hurren had, and accordingly, the Judge should leave those questions to the jury.

20. The Judge summarised the Defendant's submission on questions 1 and 2 as follows:

"50. Second, questions 1 and 2 are simply, on analysis, not relevant or necessary to determine objective reasonableness. In the first place, it is accepted that Mr Gerber was in fact wearing a shirt and tie and he seemed to be wearing a shirt and tie when he stands up, and that is viewed with complete clarity on the CCTV material, thus it would of itself be absurd to leave any such question when, on the Claimant's own case, he was wearing a shirt and tie and was seen to be objectively to be wearing a shirt and tie. But, even if Sergeant Hurren did not see it – and the Claimant in this regard seems to rely, submitted Mr Waters, on the image of scarf around the Claimant's neck at page 27 of the jury bundle – at most, an honest mistake has been made by Sergeant Hurren and there is ample other evidence of objective reasonableness, and so to leave the question to the jury is superfluous, unnecessary and therefore not a question or questions that the jury should consider at all. There was ample evidence of objective reasonableness deriving from the detailed description and the demeanour and the location of the suspect. Thus, there is the objective evidence beyond any challenge or dispute that Sergeant Hurren was looking for a black man in a black coat, wearing a black hat, and that detail corresponded to the Claimant. There is the objective unchallenged evidence that the officer did not, as it were, alight only immediately upon the Claimant because there was at least one, if not two, other black males on the train who did not fit the description but then there is the demeanour described by Mr Waters as vital because the Claimant stood out not merely because of the detailed description but because his demeanour was different to other passengers, and that was not challenged. It was different because he looked suspicious; he looked guilty. It was the way he looked at the officer and it must be remembered, submitted Mr Waters, that this was an emergency situation where there was a real and imminent risk to life and limb, and the officer did not have the advantage, in the objective circumstance that prevailed, of taking much time to assess; he had to use his judgment honestly and, submitted Mr Waters, reasonably, and that he did because it was not just the demeanour and looking different to other passengers but, in addition, there is the unchallenged objective evidence which can be seen on the CCTV of the Claimant actually leaning or reaching to the right, regarded by Sergeant Hurren as reaching for a gun, and that is a critical piece of additional information and evidence and so, Mr Waters submitted, questions 1 and 2 are utterly otiose. "

51. The reasonableness objectively must be justified, submitted Mr Waters, by virtue of the strands of ascertained, objective evidence to which I have referred, in sum, the remainder of the detailed description, the demeanour, the location of where the was and the act of reaching or leaning to his right. So, Mr Waters, submitted that, if I were to leave questions 1 and 2 to the jury, in

> the final analysis, the answer to that question or those questions could not possibly inform any ruling of law that I have to make on objective reasonableness. So, he submitted therefore, on analysis, those questions should not be left and were determinative of nothing."

21. In paragraph 64 of his Judgment, the Judge said that questions 1 and 2 initially caused him some hesitation, in particular because of the absence of any reference to shirt and tie in Sergeant Hurren's EAB or in his witness statement, and it only subsequently emerging a number of months later in a further witness statement. The Judge continued:

> "I am fully satisfied that such a question is not relevant to, and cannot in any way be determinative of, objective reasonable suspicion for the reasons I have given, for the officer said in evidence he saw the shirt and the tie. Mr Gerber was wearing a shirt and a tie. That can clearly be seen on the CCTV and so I agree with Mr Waters that it would seem absurd to leave such a question. But of much greater importance than that is that, even if Sergeant Hurren did not see it at the time, at most, he made an honest mistake and that could not conceivably make his use of force objectively unreasonable. So, the answer must be that the questions should not be left and, in the end, I am quite clear about that. This was a carefully planned police operation given the shortness of time. There was to be a pincer movement. There was, as I have said, a detailed description of the black male, black coat, black hat, and the rationale for the use of force involving the demeanour, the look of suspicion and the leaning and movement to the right. In my judgment, Sergeant Hurren, on the uncontradicted and unchallenged evidence, had an honest and reasonable suspicion, he made a reasonable dynamic risk assessment on the information even without a shirt and tie and, with his vision and hearing tunnelled and focused, in my judgment, it must be reasonable in all the circumstances. So, I would regard any question on the shirt and the tie to be superfluous to the justification for his use of force, which was, on analysis, reasonable in all of the circumstances. Thus, I decline that to leave any such question."

Questions 3 and 5: the argument and the Judge's decision

22. Ms Morris submitted to the Judge that these questions were central to the Claimant's case. She accepted that it was not an Equality Act case and that racial bias influence was not pleaded. The relevance for which Ms Morris contended was that the question of racial bias influence was a state of mind question that required an answer from the jury in respect of both officers. It was therefore a factual dispute: the jury should assess the officers' state of mind in deciding who to detain. She submitted that both PS Hurren and Constable Scoulding were influenced by racial bias and that could not form a basis of reasonable grounds for suspicion.

23. The Defendant's submission was that there was no factual issue on racial bias beyond an assertion of counsel, and it would be wrong for any such question to be left to the

jury. There was, according to the Defendant, not a shred of actual evidence of racial bias on the facts of the case which could properly be considered by the jury.

24. The Judge noted that the questions had not been pleaded, but said even if they had been pleaded he would not have permitted leaving any such question. He said:

> "65…. In my judgment, there was a mere accusation without any evidential foundation from Ms Morris in cross examination, an allegation of racial bias with a dictionary definition from Ms Morris, but that is not evidence and I agree with Mr Waters that there is no cogent positive evidence of racial bias in this case. The officers' unchallenged evidence was that they were looking for a black male. There is no evidence of racial bias, nor any such evidence which it would be permissible for the jury to consider."

Question 4: the argument and the Judge's decision

25. Ms Morris had submitted the questions in question 4 were essential questions of fact, viewed through the eyes of Constable Scoulding, for the jury. Mr. Waters submitted that question 4 was confusing rather than clarifying and that it entirely missed the point. As to the Stetson in (a), this was expressly disavowed by PS Hurren and by Constable Greaves. There was no challenge to that, so it would be wrong to leave the question of the Stetson to the jury to consider in the case of the officer (Constable Scoulding) who moved in behind and applied the less lethal force, namely the taser. Similarly, Mr. Waters submitted that it would wrong to leave the question of a shirt and tie in respect of Constable Scoulding to the jury, because he had said he was not aware of the shirt and tie as part of the description in the fast moving fast developing dynamic situation. There was no question of Constable Scoulding's honesty being impugned on that point. Therefore it would be superfluous and wrong to leave the question to the jury, as it would not inform any ruling of law which the Judge had to make as to the justification objectively of the force used by Constable Scoulding.

26. The Judge dealt with question 4 as follows:

> "66…… the whole of question 4 is irrelevant and not determinative of any cause of action. In the first place, Sergeant Hurren expressly disavowed the Stetson for the reasons given and he said it was a misrepresentation of the evidence. Constable Scoulding did not himself rely upon the shirt and the tie and it would be quite wrong, in my judgment, to capture his unchallenged evidence in the form of a question which is not in any way determinative of any cause of action. "

Question 6: the argument and the Judge's decision

27. Ms Morris submitted that the reasonable use of force was a question of mixed law and fact and therefore pre-eminently a question for the jury. She referred to the case of Pollard v The Chief Constable of West Yorkshire Police [1999] PIQR 219 and in particular the Judgment of Henry LJ at 227 and 228. She thus submitted that it was for the jury to determine whether it was necessary, proportionate and reasonable to press

the taser into the Claimant's chest. She referred also to McPherson v The Chief Constable of Nottinghamshire Police [2016] EWCA Civ 6. She submitted that the assessment of the reasonableness of the force used by Constable Scoulding involved mixed law and fact, and that the Judge could only reach a conclusion as to the law once he had the answer on the fact from the jury.

28. The Defendant's submission was that there was no proper question to be left to the jury. It was said that this was not a Pollard type of case at all. Reference was made to the Judgment of Hallett LJ in McPherson and it was submitted that the only conceivable answer to the question of reasonableness of the force used by Constable Scoulding on the uncontroversial facts, and on the established, undisputed facts, were that the force must have been reasonable and proportionate and not excessive. This was because the unchallenged evidence of the officer was that he was working in a tight situation where there was constriction of space, this was less lethal use of force than the firearm and Constable Scoulding was observing the methodology of his training. The method that he used was entirely in accordance with his training. Therefore, on the facts of the case which were not and could not be challenged or disputed by the Claimant, it was submitted that the only conclusion that could be reached by the court was that force was reasonable and proportionate. Therefore, the question should not be left to the jury.

29. The Judge dealt with question 6 in paragraph 67 of his Judgment (he there mistakenly referred to it as question 5). He said he had reached a clear conclusion that this was not a Pollard case. His reasoning needs to be set out in full. It was this:

> "Any answer on the undisputed evidence is that Constable Scoulding used no more than reasonable, necessary and proportionate force in pressing his taser into Mr Gerber's chest. First, see the CCTV. Second, he explained his reasons why to prevent disruption of the barbs in this confined space within the carriage and the greater danger to other passengers and the risk to them, and that was not challenged in cross examination. In any event, third, there is no challenge to the proposition, and nor could there be, that Constable Scoulding used less lethal force to protect the suspect. There was no issue raised as to training. The taser was deployed in accordance with the training. There was no issue that the angled drive stun was what Constable Scoulding was trained and required to do in the situation and in the circumstances that faced him in the heat of the moment. Constable Scoulding, in my judgment, honestly and reasonably believed that Mr Gerber had a gun and therefore there was the need to protect Mr Gerber and all of the other passengers. This use of force cannot possibly be said to be disproportionate or excessive. All the evidence adduced plainly makes it clear that there is no dispute and I reach the clear conclusion that there was honest and reasonable use of force. There was honest suspicion that Mr Gerber had a gun. Sergeant Hurren believed honestly and reasonably that Mr Gerber was reaching for the gun. It is untenable to suggest that the force used by Constable Scoulding, which must have been reasonable, should not have been applied to contain the situation, i.e. the threat that was faced at the time.

> Fourth, in the situation faced by Constable Scoulding, the possibility of the taser and the contact with the chest was reasonable and there was no other action which he could properly or reasonably have taken. Finally, what he did was an essential part of his training. He was trained to use the angled drive stun. It was reasonable for him so to do and, in the circumstances, I simply could not search for a question that could properly be left to the jury when in the circumstances of this case, the only answer to the use of the force in all of the circumstances would be that the force used was reasonable."

Grounds of Appeal

30. There are two grounds of Appeal namely:

> "The learned Judged erred in law and/or there was a serious procedural or other irregularity in the following respects:
>
> 1. In deciding that there were no disputed issues of fact that the jury was required to determine and in discharging the jury without them having returned a verdict.
>
> 2. In dismissing the Claimant's claim in favour of the Defendant in the circumstances."

Statutory provisions

31. The provisions which the Judge set out in paragraph 10 of his Judgment, and which had been referred to in submissions were:

i) Section 47(3) of the Firearms Act 1968: "if a Constable has reasonable grounds to suspect a person of having a firearm with him in a public place….. the Constable may search that person and may detain him for the purpose of doing so."

ii) Section 117 of the Police and Criminal Evidence Act 1984: "where any provision of this Act –

(a) Confers a power on a Constable…. the officer may use reasonable force, if necessary, in the exercise of the power".

iii) Section 3 Criminal Law Act 1967:

"Use of force in making arrest etc.

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

Legal outline

32. In relation to the claim for false imprisonment it is common ground between the parties that the Defendant had to prove:

    i) That there were reasonable grounds to suspect the appellant of the matters in question. This has been referred to as the objective test

    ii) That the officers honestly believed that those grounds existed. This has been referred to as the subjective test.

33. It was also common ground that, as regards the claim in assault/battery, the Defendant had to prove that the force used was reasonable in all the circumstances.

34. This Appeal concerns the application of the functions of Judge and jury. In Balchin v Chief Constable of Hampshire Constabulary [2001] EWCA Civ 538, the Claimant brought a case for false imprisonment. At paragraph 3 Henry LJ said:

> "3. We get from that Authority the following:
>
> a. The burden of proof is on the police to justify the arrest
>
> b. To do so, they must satisfy the Judge that a reasonable man, assumed to know the law and possessed of the information that the arresting officer had, would believe that there was a reasonable or probable cause for the arrest
>
> c. While the above question is a question of law for the Judge, it is a question he can only answer on agreed facts or uncontradicted evidence or, where the evidence is conflicting, by the jury's explicit finding of fact;
>
> d. It is for the Judge to decide what finding of fact is "relevant or requisite", and whether the evidence on a relevant matter does raise and issue of fact to go to the jury. "

35. Similarly, in Banjo the Chief Constable of Greater Manchester Police [1997] EWCA Civ 1951 Lord Woolf said:

> "The question….. as to whether or not there are reasonable grounds for suspicion will depend upon the evidence which is before the fact finding tribunal. A Judge can only rule, as a matter of law, that the officers had, or did not have, reasonable grounds for suspicion when the factual evidence, including that which is and is not in dispute, establishes that to be the position."

36. In the defamation case of McPhilemy v Times Newspapers Limited (3) [2001] EMLR34 Simon Brown LJ said at paragraph 34:

> "….. it will often be unwise for a trial Judge to withdraw issues from the jury and by the same token unwise for counsel to invite them to do so. Only when it is plain that one verdict alone would be rational and any other perverse should the issue be withdrawn.

> The risk of a successful Appeal and the disproportionate expense of a re-trial is otherwise too great."

37. In McPherson there was an issue as to the use of excessive force by a police officer in his deployment of CS spray. Hallett LJ said at paragraph 14:

> "14. Whether or not a police officer assaults a citizen using excessive force may well be a question of mixed law and fact and may, where the only issue to be tried is one of assault, be a question for the Judge. But, if a jury has been empanelled…. the factual issues as opposed to clear matters of law, should be left to the jury to decide."

38. Later, at paragraphs 17 and 18, in dealing with the action for assault, the learned Lady Justice said that it was not entirely clear whether the Judge had withdrawn the issue of reasonableness as a matter of law for him to determine in every case, or because no reasonable jury could reach a conclusion on the evidence taking the appellant's case at its highest, or a mixture of both. She continued:

> "If he withdrew the issue of reasonableness on the basis that there (were) no factual findings for the jury to make and taking the appellant's case at its highest, the only finding open to the jury was that the use of the spray was reasonable, in my view, he was entitled to do."

39. On that basis the court said that it was not necessary to decide whether the issue of reasonableness was for the jury or for the Judge on those facts. However she continued, saying that she would: "unhesitatingly reach the same conclusions as the judge…..in the light of the jury's findings on the other issues, the finding that the use of the spray was lawful was inevitable".

40. Against that backdrop, it is salutary to return to what Diplock LJ in Dallison v Caffery [1965] 1 QB 348 . This was an action for false imprisonment and malicious prosecution. At page 372 he said:

> "It is for the Judge to decide what facts given in evidence are relevant to the question of whether the Defendant acted reasonably. It is thus for him to decide, in the event of a conflict of evidence, what finding of fact is relevant and requisite to enable him to decide that question. But a jury is entitled to base findings of fact only on the evidence called before it and, as in any other jury trial, it is for the Judge in an action for false imprisonment or malicious prosecution to decide whether the evidence on a relevant matter does raise any issue of fact fit to be left to a jury. If there is no real conflict of evidence, there is no issue of fact calling for determination by the jury. This applies not only to issues of facts as to what happened, on which the Judge has to base his determination whether the Defendant acted reasonably, but also to the issue of fact whether the Defendant acted honestly, which, if there is sufficient evidence to raise this issue, is one for the jury. For the reasons already

> indicated, however, where is there reasonable and probable cause for an arrest or prosecution, the Judge should not leave this issue to the jury except in the highly unlikely event that there is cogent positive evidence that, despite the actual existence of reasonable and probable cause, the Defendant himself did not believe that it existed: see *Glinski v McIver."*

Other reasoning of the Judge

41. In paragraphs 57 – 63 of his judgment, the Judge made a number of points. I repeat some important ones.

42. First, the Judge emphasised that if there was any disputed issue of fact upon which he required the jury's assistance in order to determine the law, i.e. whether the Claimant had succeeded in any or all of his causes of action and whether the Defendant had discharged her burden of proof on balance of probability, he would unhesitatingly have left that question or those questions for the consideration of the jury. However, he could not and must not leave questions which are irrelevant, unnecessary and/or superfluous and which did not assist him.

43. Secondly, the Judge reminded himself that it was for the Defendant to justify any interference with the person, and all use of force, and the use of a gun by pointing it at Mr Gerber, and the deployment of the taser in the way that it was by Constable Scoulding, must be considered separately and independently. Therefore, albeit the detention of the Claimant was less than 30 seconds, it was important to the Claimant.

44. Thirdly, this was an urgent and a dangerous situation which the officers were confronting. Time was of the essence because there was a real and imminent danger to life and or limb. Notwithstanding that, the officers must at all times act lawfully.

45. Next, following a careful review of all the evidence and the submissions the judge reached what he described as "the following clear conclusions":

> "(1) PS Hurren and Constable Scoulding honestly believed that the Claimant was the suspect with the gun. There was no challenge to that conclusion and nor on the evidence could there have been. The evidence was, in my judgment, all one way. There is no, nor was there any, cogent evidence whatsoever that the officers did not honestly believe that Mr Gerber was the suspect. The evidence all points to establishing that honest belief based on the information they received, their attendance at the scene, the briefing that took place, the detailed description of the suspect, PS Hurren's detailed description of the Claimant's demeanour and his actions. Thus, I am bound to conclude that there was honest belief on the part of the officers that Mr Gerber was the suspect. Indeed, within less than 30 seconds or so of the identification of the Claimant as the suspect, the mistake itself was recognised and Mr Gerber was released.
>
> (2) In my judgment, Sergeant Hurren and Constable Scoulding, on all of the evidence, had objective reasonable grounds to suspect that the Claimant was

the man with the gun. The description given of the suspect on which the officers relied, namely black man, black, hat, black coat, shirt and tie in the case of PS Hurren (to which I shall refer below), sitting in the second carriage on this particular demarcated train at platform 3 London-bound from Norwood Junction, cannot on the evidence be gainsaid. On all of the evidence that this was an accurate description and a detailed one and it was reasonable for the officers to rely upon it.

(3) In my judgment, the appearance of Mr Gerber matched the description. It was very unfortunate for him that JL also matched the description and that he was also on the train but a few feet away within the same carriage.

(4) In my judgment, the Claimant's demeanour and his actions were also of relevance. They were relevant and they informed the objective reasonableness of PS Hurren's actions. On seeing the Claimant's expression, PS Hurren interpreted his facial expression as suspicious, a guilty look, and the Claimant immediately moved to his right. That was relevant. That can be seen on the footage. He could have been reaching for a gun. That adds to the objective reasonableness of the suspicion of the officers.

(5) An objective reasonable response from PS Hurren was a response to the emergency of the moment. He had to make a critical evaluation of the danger without the luxury of time. In my judgment, having considered all of the evidence, it cannot be said that his judgment was unreasonable and, to that extent, I declined to leave a question to the jury on that question.

(6) Of relevance to the care taken by Sergeant Hurren is that he did make an enquiry about the brimmed or Stetson hat worn by the suspect but the CAD records at 323, 10:52, "Black hat" and that was confirmed by Constable Greaves.

(7) Therefore, in my judgment, the information relied upon by Sergeant Hurren and Constable Scoulding, including the Claimant's detailed description, the facial expression, his demeanour and the movement to his right, demonstrated reasonable grounds to suspect. The objective reasonable suspicion was, in my judgment, satisfied on the undisputed evidence without the need for any question to be posed to the jury.

(8) The force used by the officers is clearly captured from the two angles of the CCTV. In my judgment, upon analysis, there is no factual dispute for the jury on reasonable use of force. In this case, the only answer to that question on reasonableness must be that the force used both by Sergeant Hurren and Constable Scoulding was reasonable, proportionate, necessary and accordingly justified and lawful. Of course, I have had in mind the case of *Pollard* and the observations made by Henry LJ in that case, but that was a very different case. In this case, in my judgment, the answer to the question can only be that the force used was reasonable. I accept, as I have made clear, that there will be other cases where the force used involves mixed law and fact and requires a question for the jury. On the unchallenged evidence of this case, this case is

not one of those examples. If there was a question of mixed fact and law on the use of force used such as required an answer from the jury, I repeat that I would have formulated that question. But, having carefully considered the matter, I have reached the clear conclusion that there is no such question."

Undisputed evidence

46. I went through a number of matters with counsel to check what was undisputed. I reproduce those matters here:

(i) As the Judge had said, there was no challenge to the conclusion that PS Hurren and Constable Scoulding honestly believed that the Claimant was the suspect with the gun.

(ii) The whole episode, which lasted no more than 30 seconds, was captured on two CCTV cameras. There was no dispute about the force used and the manner in which it was applied. [This was subject to the point raised in Question 6].

(iii) The "drive stun" manoeuvre is an approved technique designed for use in confined spaces to ensure that (a) the suspect is tasered, and (b) no one else is hit by a barb (including another officer with his finger on a trigger).

(iv) The pleaded grounds to suspect on which the Commissioner relied did not include the wearing of a shirt and tie. This assertion first appeared in PS Hurren's interview as part of the complaints process. It also appeared in a later witness statement.

(v) The pleaded grounds were not disputed as a matter of fact by the Claimant. These were:
   (a) PS Hurren's information was black man, black hat, black coat sitting in the second carriage.[2]
   (b) Constable Scoulding's information was black man, black hat, black coat. There was a challenge as to whether it was a hat or a cap.[3]
   (c) The Claimant matched the description of a black man, black hat, black coat sitting in the second carriage.
   (d) There were other black men on the train who were not suspected by PS Hurren[4]
   (e) The suspicion was based on the agreed facts that the Claimant was a black man, wearing a black hat, black jacket/coat and sitting in the second carriage.[5]

(vi) The Claimant's initial demeanour was honestly interpreted by PS Hurren as suspicious[6]

[2] I shall refer later to other information that the man was wearing a Stetson hat and the tie and shirt were brightly coloured.
[3] There was also an issue, which formed part of question 4, in relation to whether Constable Scoulding had other information.
[4] This is correct. However, there is no evidence that they were seen/registered by PS Hurren before he became involved with the Claimant.
[5] There was a dispute, which formed the basis of questions 1 and 2, as to whether the suspicion was also based on seeing the shirt and tie.
[6] This is not disputed. However, it is said that the honest interpretation of the demeanour was affected by sub-conscious racial bias. This was the basis of question 3, and, in relation to Constable Scoulding, question 5.

(vii) The Claimant moved himself and his arm(s) to his right and that was interpreted by PS Hurren as reaching for a gun.[7]

Appeal – preliminary

47. The skeleton arguments were commendably short. It takes time for an Appeal Judge in a case such as this, which depends upon evaluating points of evidence and nuances of interpretation, properly to appreciate the evidence which has been the subject of a few days' hearing. For that reason, Ms Morris helpfully took me to a great deal of evidence so as to give me as clear a picture as possible. I also watched, with counsel, the CCTV footage of the events critical to Mr Gerber's claim. I have subsequently looked again at the footage when preparing this judgment. A full day was taken exploring the evidence and submissions relied on by the Claimant. During the appeal I asked a number questions of both sides in order that I understood, and tested as fully as possible, the rival submissions. My reasons, which follow, are a synthesis of the central points as I see them.

Appeal Discussion – Questions 1 and 2

48. PS Hurren said in evidence that he suspected the Claimant because he was a black man, wearing a black hat, a black jacket, who made eye contact with him and looked guilty. On seeing PS Hurren enter the carriage he reached down and to his right, looking down in that direction. The Claimant's central point was that PS Hurren further said that he saw that the Claimant was wearing a shirt and tie. This latter matter was the subject of properly based questioning.

49. Mr Gerber was wearing a shirt and tie, but he was also wearing a scarf. At a later stage in the CCTV footage, as Mr Gerber is leaving the carriage having been released, his shirt and (probably) tie can be seen. If relevant, the question of whether PS Hurren saw the shirt and tie before the alleged assault and detention of the Claimant by pointing his gun at him, would be a matter for the jury.

50. PS Hurren agreed that it was not enough to suspect Mr Gerber on the basis that he was a black man wearing a black hat and jacket. He said he stopped him because of the detailed description and "his demeanour on being confronted by or being in the presence of police officers". The detailed description included the shirt and tie. As to demeanour, PS Hurren said that Mr Gerber had a guilty look, difficult to describe, but he had seen hundreds of suspects whom he had subsequently found to have committed offences. Mr Gerber had that look: "it was wide eyes, but instead of the shock he almost got nervous panic that other people had had. The man's face set, his jaw set; he maintained eye contact with me and he looked at me and the other thing is when he didn't lose eye contact".[8]

51. It was not put to PS Hurren that he pointed the gun at Mr Gerber before he saw the guilty look/demeanour. However, as to Mr Gerber moving to his right, this may have

[7] Alternative explanations as to what the Claimant may have been doing were explored, but PS Hurren's subjective interpretation was not challenged. This was also subject to an issue about timing referred to elsewhere in this judgment.

[8] See also PS Hurren's evidence relevant to demeanour in chief: Appeal Bundle A220

been after the pointing of the gun. If so, and if prior reasonable grounds to suspect were absent, PS Hurren may have committed a momentary assault and false imprisonment.

52. It is to be recalled that the subjective question of PS Hurren's grounds for suspicion was not in issue. Nor was it suggested that the jury be asked any question of reasonableness in relation to PS Hurren's actions. The judge regarded any question of the shirt and tie to be superfluous to the justification of PS Hurren's use of force which was, he said, reasonable in all the circumstances.

53. The Claimant submitted that, as PS Hurren had relied on seeing Mr Gerber's shirt and tie, the judge was not entitled to ignore that evidence.

54. My response to this is:

(i) PS Hurren was not asked whether, absent seeing the shirt and tie, he would have considered that he had reasonable grounds to suspect Mr Gerber.

(ii) In any event, PS Hurren is not the arbiter of what would be reasonable grounds. The Judge is that arbiter. I repeat this passage from Dallison v Caffery:

"It is for the Judge to decide what facts given in evidence are relevant to the question of whether the Defendant acted reasonably. It is thus for him to decide, in the event of a conflict of evidence, what finding of fact is relevant and requisite to enable him to decide that question"

(iii) The Judge decided that whether PS Hurren saw Mr Gerber's shirt and tie was not relevant and requisite to enable him to decide that question.

(iv) In doing so, he relied on the evidence not only of the fact that Mr Gerber was a black man wearing a black coat and black hat, but also on the evidence of Mr Gerber's demeanour, the look of suspicion and, though this may have been momentarily later, the leaning to the right.

(v) The Judge was entitled to come to this conclusion. This is subject to whether the Judge was right not to leave Question 3 to the jury. To this I now turn.

Appeal Discussion – Questions 3 and 5

55. The Claimant's submission is that there was evidence of subconscious racial bias on behalf of PS Hurren and Constable Scoulding. It is accepted that there was no direct evidence of such bias. What is said is that there was sufficient evidence for a jury properly to draw an inference of subconscious racial bias.

56. Dealing first with PS Hurren, the case is put in this way: when PS Hurren entered the 2nd carriage, he detained the first black male he saw, without giving due consideration to what was around him. He stopped scanning the carriage and became fixed on Mr Gerber. If he had continued to carry out a dynamic risk assessment he would have seen JL. It was the Claimant's case that the interpretation of the Claimant's expression as guilty, was a matter relevant to racial bias.

57. In evidence in chief PS Hurren described how he started walking in the train. He kept his gun "up in the aim but slightly down. We call it off-aim; it allows us to keep both

eyes open; it allows us to scan everything to keep my vision as wide as possible because one of the things I know from previous operations and subsequent ones and from training that in stressful situations when you are frightened you have something called…it's tunnel vision……So I've gone in the train and I've both eyes open, I've got my gun slightly down and I'm looking for him; I'm looking for anybody who matches that description and I will assess that person straightaway".

58. In cross examination it was put to PS Hurren that he did not do his scanning when he entered the 2nd carriage. He rejected that. I have looked a number of times at the CCTV on that point. Just looking at that, it is not possible to say for sure whether PS Hurren did or did not scan as he entered the carriage. As to why he did not see JL, PS Hurren's answer was: "I'm not saying I didn't see him; I'm saying that if I did see him I had either for some reason didn't register what it was or I'd already seen Mr Gerber or saw Mr Gerber at the same time, but my – I think the phrase used – dynamic risk assessment was I've seen Mr Gerber and then everything gets tunnelled on him, I'm afraid." There was further cross examination using the CCTV. PS Hurren confirmed that he scanned as he entered the carriage. He accepted that by the time Mr Gerber dipped to his right, he was already "tunnelled and focused on" Mr Gerber.

59. Later the point about racial bias was put to PS Hurren. He agreed that if his mind had been affected by racial bias informing grounds for suspicion, that would be unreasonable. Among other evidence was this:

"Q. What I'm going to suggest is that if you had a similar description…if you had a white person, white jacket, white hat that wouldn't be enough; you wouldn't hone in on somebody who had just that, you would need more information?

A. It would depend, I think. I would hope for more information, but if there was so few people on the train matching that description and that person did something else to arouse my suspicion, then it would be a contributing factor but I would certainly never act on bias alone or even bias at all; it's just not right."

60. The Claimant submitted that PS Hurren formed his suspicion affected by racial bias and that, had he not been so affected, he would have seen JL who has wearing a hat more similar to a Stetson and a brightly coloured shirt and tie.

61. These are my conclusions on this point:

(i) As a matter of fact, Mr Gerber was wearing a black baseball type cap. JL was wearing a broad brimmed hat, more like a Fedora.

(ii) It is not clear from the CCTV whether PS Hurren scanned as he entered the carriage. It was not asked that that specific question be left to the jury. It is said that if he did not scan that was relevant to racial bias.

(iii) When PS Hurren entered the carriage he very quickly saw Mr Gerber.

(iv) Mr Gerber fitted the description PS Hurren had been given in that he was a black man wearing a black coat and black hat. [It is to be recalled that PS Hurren had originally been given a description of a Stetson, but had questioned that and the clarification was that the suspect was wearing a black hat. He accepted in cross

examination that he had not put the description of a black Stetson entirely from his mind when he arrived at the scene].

(v) Assuming the Claimant's case at its highest, PS Hurren could not see that Mr Gerber was wearing a shirt and tie at that point.

(vi) Nevertheless, there was nothing inconsistent in the description from which PS Hurren was working and the way in which Mr Gerber presented when PS Hurren first saw him.

(vii) Not only that, there was the undisputed evidence that PS Hurren, when he saw Mr Gerber, honestly interpreted his demeanour as suspicious, as set out above.

(viii) There was therefore: (a) ample basis for PS Hurren at that moment reasonably to suspect Mr Gerber, and (b) no arguable basis for a submission that his judgment was in any way affected by racial bias.

(ix) Almost immediately after Mr Gerber dipped to his right, thereby providing further confirmation of suspicion from PS Hurren's honest and reasonable perspective.

(x) The fact that PS Hurren did not register JL wearing a brightly coloured shirt and tie and a Fedora type hat is nothing to the point. He may have made a mistake, but this was not a case brought in negligence, so this matter needs no further exploration. Not registering JL is no basis for a question to the jury about subconscious racial bias.

(xi) Ms Morris suggested that what happened to Mr Gerber would not have happened to a white person. I shall consider this by reversing the position. If: (a) PS Hurren had been told that the suspect was a white person wearing a black hat, black coat and a shirt and tie, (b) PS Hurren entered the carriage and saw a white person wearing a black hat and black coat, but could not at that point see whether he was wearing a shirt and tie, (c) the white person had a guilty demeanour (and almost immediately dipped to his right), (d) there was another white person on the other side of the carriage who fitted the description given, but who PS Hurren did not register, (e) they were the only two white people in the potential field of vision; the other visible passengers being black – then the facts would be indistinguishable. There is no proper evidential basis upon which to contend that it would not have happened to a white person on those facts.

62. In those circumstances the Judge was entitled to rule that: "There is no evidence of racial bias, nor any such evidence which it would be permissible for a jury to consider."

63. It was suggested that PS Hurren's honest interpretation of Mr Gerber's demeanour as suspicious may have been affected by racial bias. He was asked by Ms Morris whether the hundreds of other suspects he had previously seen with a guilty look were black. His answer was: "I wouldn't have thought so, I don't know. No, not all of them." She asked whether most of them were. He replied: "I couldn't tell you. I'm really sorry, I don't know. That's not ….I was going to say that I think – this is quite rude – worthy of an answer. That is not this case at all."

64. As the judge said, there was no evidential foundation for an allegation of racial bias. The Appeal must therefore fail on Question 3.

65. Turning briefly to Constable Scoulding, and Question 5, the appeal must fail on this question. This is because the Appellant's case was simply that: "The same points as discussed in respect of Question 3 above apply equally to this Question. The same evidential foundation was laid with Constable Scoulding, with the slight difference being that it was put that the was also influenced by PS Hurren's actions".

66. Ms Morris relied on these paragraphs in Paul v Chief Constable of Humberside [2004] EWCA Civ 308:

> "35. Mr O'Connor suggested that because there was still a live question before the judge (not pursued on the appeal) as to whether the police had reasonable grounds to suspect Mr Paul of murder, the judge lost sight of the equally live issue (which was a matter for the jury and not for him) as to whether the discretion to arrest was exercised in good faith. He said that this was particularly worrying because the critical evidence in these cases always comes from the arresting officer himself (Siddique v Swain [1979] RTR 454, 457; Chapman v DPP (1989) 89 Cr App R 190, 196-7), and there was not even a witness statement from D/C Wade in evidence before the jury.
>
> 36. I do not find this an easy point to determine, particularly as the point, though clearly taken in Mr Simblet's argument before the trial, was not revisited in his final submissions. If the judge had made a considered ruling that there was no evidence to go to the jury on the question of the police's good faith, then it would probably have been impossible for this court to interfere since he saw and heard the witnesses. But he did not take this course, and he wrongly excluded the possibility that it would have been open to the police to have interviewed Mr Paul under caution without first arresting him."

67. This citation does not assist Mr Gerber's case. Judge Freeland QC did make a considered ruling that there was no evidence to go to the jury on the question of racial bias. That considered ruling was not in error.

Appeal Discussion – Question 4

68. In the vehicle on the way to the scene Constable Scoulding was the navigator. His evidence was that PS Hurren collated the information that came into the vehicle and gave it to him when they reached the rendezvous point. Although he was in the vehicle when the information came through, he said he did not recall what it was and his primary objective was navigating. He was concentrating on a paper map with blue lights, sirens blaring and the vehicle travelling at varying speeds. He said he had no awareness of the description of the suspect when he was in the vehicle on the way to the scene. He had no awareness of a description given of a Stetson hat or a brightly coloured shirt and tie. Question 4 sought a ruling from the jury that he did have such awareness prior to entering the train.

69. The Judge said that PS Hurren had expressly disavowed the Stetson. The Appellant criticises this on the basis that PS Hurren had given evidence that this was still in his mind at the material time. I have briefly reviewed this evidence above. The answer given by PS Hurren to the question whether he could put the information about the Stetson entirely from his mind, when the CAD said just black hat was: "Not entirely. I think I can because I can rely on my colleague; I have to, and in the kind of work we do I have to rely on my colleague. If he says there's no mention of it, then I've misheard

it or it hasn't been in relation to our subject. I'm sorry; I can put it to the back of my mind rather than clearing it completely.."

70. What is said by the Appellant is encapsulated in the skeleton argument in this way:

"42. The factual dispute was whether Constable Scoulding had only the information he claimed to have had or whether he had in fact more information. If Constable Scoulding had more information, it could not have been reasonable to have acted as he did towards the Appellant simply on the basis that he was a black man, in a black hat and a black coat or jacket. Again, this question ought to have been left to the jury to establish whether what the officer said provided him with reasonable grounds to detain was in fact the basis upon which he was detained."

71. My decision on Question 4 is:

(i) There was a factual issue raised. That would be for the jury to determine if relevant.

(ii) The Judge found that the question was irrelevant. I agree with him.

(iii) The Appellant's submission that it could not have been reasonable for Constable Scoulding to have acted as he did simply on the basis that Mr Gerber was a black man, in a black hat and a black coat or jacket, omits important matters.

(iii) Constable Scoulding followed PS Hurren into the carriage. In chief Constable Scoulding said that, from what PS Hurren said, he thought that PS Hurren had identified the subject of the description they had. Constable Scoulding then tried frantically to look over PS Hurren's shoulder to identify that person for himself, too. He then saw Mr Gerber. He himself thought that was the person they were looking for, because he was a black male wearing a black cap and he had a long-sleeved black coat.

(iv) In other words, Constable Scoulding's identification follows that of PS Hurren. Now, of course, if the man had not matched the description Constable Scoulding had been given, e.g Mr Gerber had been wearing a white coat, then it may not have been reasonable to rely on the description Constable Scoulding says he had, in addition to PS Hurren's actions. But that was not the case. As far as the description which Constable Scoulding said he had, Mr Gerber matched it.

(v) Assume now: (1) that the jury had been asked Question 4 parts (b) and (c) and had returned the answer that the Defendant had not proved that Constable Scoulding did not receive information that the suspect was wearing "a shirt" and "a tie". Assume also: (2) that the Appellant is correct that his scarf covered his shirt and tie so it could not be seen till later; alternatively assume: (3) that Constable Scoulding could see the shirt and tie. What difference could that have made? On assumptions (1) and (2), is it suggested that Constable Scoulding should have deferred any action on his part till he checked under Mr Gerber's scarf to see if he was wearing a shirt and tie – this in circumstances where PS Hurren is honestly and reasonably pointing a firearm at Mr Gerber? On assumptions (1) and (3), would Constable Scoulding not have then had, in this regard, an even fuller matching description than he claimed he had? This would have been the case if he did check for shirt and tie before pressing the taser to Mr Gerber's chest.

(vi) These questions have only to be asked to expose the irrelevance of the shirt and tie question, as the Judge found.

(vii) As to the Stetson, it had been 'disavowed' in the sense that it had not been confirmed on questioning. I have already recorded PS Hurren's evidence as to his state of mind on the Stetson. Had Constable Scoulding received the same information as PS Hurren, we can follow a similar format to that in (v) above. Assume that the jury had been asked Question 4 part (a), and had returned the answer that the Defendant had not proved that Constable Scoulding did not receive information that the suspect was wearing "a Stetson". That would have had to be qualified by the evidence that the Stetson had not been confirmed on enquiry by PS Hurren. In that case, Constable Scoulding would have been in the position that he had been told that Stetson had not been confirmed and what had been confirmed was a black hat. Mr Gerber was wearing a black hat. It cannot possibly have changed the outcome if Constable Scoulding had received the same information as PS Hurren about the Stetson.

72. The Appellant argued that there was some significance in a passage of cross examination. This was about the fact that Constable Scoulding had said in his witness statement that when he saw Mr Gerber the "description was very similar to that given". Later in the statement, when dealing with JL and, having seen the silver handgun near to him, Constable Scoulding wrote: "I now formed the opinion that (JL) was the identical male for which the information was given." I can see no significance in that statement, nor in the cross examination passage which refers to it. Nor is there any significance in the fact that Constable Greaves, who entered the 2nd carriage from the opposite direction once PS Hurren and Constable Scoulding were with the Claimant, saw JL wearing a black coat, black hat, pink/purple tie, shirt, black shoes and with a silver gun (obviously a toy) on top of a black case resting on the window table to his left.

Appeal Discussion – Question 6

73. The basis of the appeal on Question 6 is that whether Constable Scoulding used reasonable force was a question of fact which should have decided by the jury.

74. Before addressing the facts, it is important to re-visit the law. The case of McPherson at [17] posits two possibilities: (i) that the judge withdrew the question of reasonableness as a matter of law for him to determine in every case, and/or (ii) because no reasonable jury could reach a conclusion on the evidence taking the appellant's case at its highest. On the facts the Court said: "If he withdrew the issue of reasonableness on the basis that there (were) no factual findings for the jury to make and taking the appellant's case at its highest, the only finding open to the jury was that the use of the spray was reasonable…he was entitled to do so". The main points made by the appellant in that case are to be found in paragraphs 12 -14 of Hallett LJ's judgment.

75. The Court at [17] therefore found that if the judge decided it on basis (ii) he was entitled to do so. Consequently, at [18], consideration of the legal question in (i) did not arise. Even if the judge had erred, it was then conceded that, the matter in issue being an action for assault - which, standing alone, did not merit jury trial – reasonableness in assault is for the judge to determine. If the Court of Appeal had substituted its own judgment for that of the judge it said it: "would unhesitatingly reach the same conclusions as the judge"

76. It seems to me that the ratio of McPherson is in [17], and [18] is obiter dictum. That said, there is nothing at all controversial about either paragraph.

77. Ms Morris submitted that the question of reasonableness cannot be withdrawn from a jury if there is an evidential foundation that the use of force was excessive, and it is put to the officer that the use of force is excessive. If by there being an evidential foundation that the use of force was excessive, what was meant was that it cannot be said that the only finding properly open to the jury is that the use of force was reasonable, then that is the same test as McPherson [17].

78. Paragraph 67 of the Judge's decision appears to me to be clearly predicated on McPherson [17]. He said, for example:

(i) "Any answer on the undisputed evidence is that Constable Scoulding used no more than reasonable, necessary and proportionate force in pressing his taser into Mr Gerber's chest.."

(ii) "…This use of force cannot possibly be said to be disproportionate or excessive.."

(iii) "…in the situation faced by Constable Scoulding, the possibility of the taser and the contact with the chest was reasonably and there was no other action which he could properly or reasonably have taken.."

(iv) "I simply could not search for a question that could properly be left to the jury when, in the circumstances of this case, the only answer to the use of force in all of the circumstances would be that the force used was reasonable"

I refer to the full extract of paragraph 67 set out previously in this judgement.

79. The question is whether the judge was correct when he decided that the only finding properly open to the jury was that the force used by Constable Scoulding was reasonable, proportionate and necessary.

80. The Judge set out in summary form the undisputed evidence on the use of the taser against Mr Gerber's chest. The following points are relevant:

(i) The Appellant does not suggest that the use of the taser was unreasonable, merely the pressing of it against his chest.

(ii) If a taser is pressed against a person's body and it has to be discharged, it is then necessary to move the taser down to the lowest point in the body to form a circuit and get the maximum neuro-muscular incapacitation. This is what is called the angle drive stun which Constable Scoulding had been trained to use.

(iii) If the taser had not been pressed against the body, then, if discharged, the bottom barb could have gone anywhere because the area in which the officer was working was extremely compact. It could have hit the furniture, another member of the public or even, possibly PS Hurren who was pointing a loaded firearm at Mr Gerber. If this happened, Constable Scoulding said he had not experienced this, but he imagined it would hurt and would cause some form of involuntary function of the body.

81. I asked Ms Morris what was wrong with the judge's analysis that there was no other action that Constable Scoulding could possibly have taken. Her answer was that he did not address the issue of whether Mr Gerber was under control. It is correct that the Judge did not refer expressly to this in paragraph 67 of his judgment. Nevertheless, the Judge had reviewed the evidence on this point in paragraph 35 of the judgment. His reasoning as to the justified use of force in this regard is clear from paragraph 67.

82. The position at the time the taser was pressed into the chest was that Mr Gerber had his hands on his head, Constable Scoulding had his hands on Mr Gerber's hands and PS Hurren was covering Mr Gerber with his gun. It was said that there was nothing in Mr Gerber's then behaviour to suggest that he was not going to be compliant. Constable Scoulding was asked whether Mr Gerber was controlled in that situation. He answered: "Well, I only have one hand on his right hand. So his left hand is still free". In answer to the question: "So when he acts compliantly there isn't any need for additional force to be used, is there?", Constable Scoulding replied: "There is force to be used up until a point where I know that that person is not in possession of a firearm."

83. The first answer to the Appellant's submission is that, as I have recorded, it was not in dispute that the use of the taser was reasonable, just the pressing of it against the chest. Question 6 is expressly predicated on "pressing the taser into Mr Gerber's chest". On that basis, it must be correct on the above, undisputed evidence that it would have been potentially extremely dangerous just to point the taser and not make contact with the chest. Hence the Judge's ruling.

84. Secondly, and in any event, let us postulate the alternatives to pressing the taser against the chest. These have to be considered against the backdrop that Mr Gerber appears compliant, he is covered by PS Hurren's firearm, there is some restraint of his hands on his head. However, there must be some risk, in the circumstances as they appeared to the officers, and reasonably so, that he could use at least his left hand to go for and/or use a firearm. The alternatives are:

    (i) Pointing the taser at Mr Gerber. If it had had to be discharged, this not only risked hurting somebody else, it also carried the risk of hitting and shocking PS Hurren who was pointing a loaded gun at Mr Gerber.

    (ii) Not pointing the taser at all. If Mr Gerber had stopped being compliant, was not fully restrained and went for a gun, he risked being shot by PS Hurren. Pressing the taser against his chest, as the Judge said, was for the use of less lethal force to protect him as suspect. It was also in accordance with his training, about which no issue was raised.

85. It was said that Mr Gerber could not understand why the taser was pressed against his chest. That is unsurprising. From his perspective he was entirely innocent, knew nothing of a gun, had no intention of not being compliant and did not understand why the taser had to be pressed against him instead of merely pointed at him. However, the undisputed evidence in explanation should be illuminating to all in these respects.

86. Finally, the Appellant said that Constable Scoulding's training did not say that in the circumstances in which Constable Scoulding found himself he had to apply the taser to Mr Gerber's chest. That goes without saying. However, the effect of the training was

that in the above circumstances, Constable Scoulding acted entirely reasonably and proportionately, as the Judge correctly found.

87. Therefore the challenge to the Judge's ruling on Question 6 must fail, on the basis that he was entitled to find that the only answer to the use of force would be that the force used was reasonable. This is in accordance with the decision in McPherson at [17].

88. In those circumstances it is unnecessary, as it was for the Court of Appeal in McPherson at [18], to decide the question whether the issue of reasonableness is a matter of law for the judge to determine. This would require a thorough review of the authorities going back to Dallison v Caffery and including the obiter dictum of Henry LJ in Pollard at P221.

89. I was not asked by the Appellant, albeit that it seems to me that this point is a straight assault point, to consider substituting my own judgment as to reasonableness, as the Court of Appeal were invited to do in McPherson at [18]. Had I been so invited, it must follow from what I have said above that I would unhesitatingly reach the same conclusion as did the Judge, for the reasons given above and the reasons which the Judge gave.

Ground 2 of the Appeal

90. It was not argued before me that, if Ground 1 fails in its entirety, there were any separate points in relation to Ground 2 of the Appeal. It had been argued before the Judge as he set out in paragraph 48 of his judgment. He gave his decision in paragraph 68. He was entirely justified in doing so. Therefore, Ground 2, also, must fail.

Conclusion

91. For the reasons given, the Appeal must fail on both Grounds. It will therefore be dismissed.