



Neutral Citation Number: [2019] EWHC 1485 (QB)

Case No: QB 2018/0283

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 June 2019

Before :

MR JUSTICE JEREMY BAKER

Between:

Richard Kenyon

**Claimant/
Respondent**

- and -

The Chief Constable of Hertfordshire

**Defendant/
Appellant**

Angela Patrick (instructed by **DPP Law**) for the **Claimant/Respondent**
Julian Waters (instructed by **DAC Beachcroft**) for the **Defendant/Appellant**

Hearing date: 10 May 2019

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.

.....
MR JUSTICE JEREMY BAKER

Mr Justice Jeremy Baker:

1. This appeal concerns the determination by HHJ Walden-Smith that on 9 May 2014 one of the appellant’s police officers unlawfully assaulted the respondent in the course of effecting his lawful arrest.
2. In particular it concerns section 329 of the Criminal Justice Act 2003, the relevant parts of which, for the purposes of this appeal, provide as follows,

“Civil proceedings for trespass to the person brought by offender

(1) This section applies where—

- (a) person (“the claimant”) claims that another person (“the defendant”) did an act amounting to trespass to the claimant’s person, and
- (b) the claimant has been convicted in the United Kingdom of an imprisonable offence committed on the same occasion as that on which the act is alleged to have been done.

(2) Civil proceedings relating to the claim may be brought only with the permission of the court.

.....

(4) If the court gives permission and the proceedings are brought, it is a defence for the defendant to prove both—

- (a) that the condition in subsection (5) is met, and
- (b) that, in all the circumstances, his act was not grossly disproportionate.

(5) The condition referred to in subsection (3)(a) and (4)(a) is that the defendant did the act only because—

- (a) he believed that the claimant—
 - (i) was about to commit an offence,
 - (ii) was in the course of committing an offence, or
 - (iii) had committed an offence immediately beforehand; and
- (b) he believed that the act was necessary to—
 - (i) defend himself or another person,

- (ii) protect or recover property,
 - (iv) prevent the commission or continuation of an offence, or
 - (v) apprehend, or secure the conviction, of the claimant after he had committed an offence;
- or was necessary to assist in achieving any of those things.

(6) Subsection (4) is without prejudice to any other defence.

.....

(8) In this section—

(a) the reference to trespass to the person is a reference to—
(i) assault,

(ii) battery, or

(iii) false imprisonment;

(b) references to a defendant's belief are to his honest belief, whether or not the belief was also reasonable;

(c) "court" means the High Court and

(d) "imprisonable offence" means an offence which, in the case of a person aged 18 or over, is punishable by imprisonment."

Circumstances of the incident

3. The relevant facts as found by the judge in the course of her judgment, which was delivered on 30 August 2018, can be summarised shortly.
4. On the 9 May 2014 the respondent was a man without previous convictions. However, there was an outstanding arrest warrant against him in respect of an offence of making false representations for obtaining benefit contrary to section 112 of the Social Security Administration Act 1982.
5. On 9 May 2014 the respondent was driving a motor vehicle in Letchworth town centre. Two police officers on foot patrol saw the respondent and realising that there was an outstanding warrant for his arrest PC Day followed the vehicle on foot whilst PC Musto followed in a police vehicle. The officers believed that the respondent was seeking to evade arrest and contacted other police officers. PC Stacey and PC Brightman who were in another police vehicle responded by driving across the oncoming path of the respondent's vehicle causing him to come to a halt at a roundabout.

6. PC Stacey alighted the police vehicle, approached the locked driver's door of the respondent's vehicle and sought to gain the respondent's attention who ignored him. At one stage PC Stacey struck the driver's window with a police issue baton without breaking the window. The respondent continued to ignore PC Stacey and instead sought to manoeuvre his vehicle. However, there was another vehicle ahead of him which was driven by a Mr Dent and he collided with it.
7. PC Stacey approached the respondent's vehicle again and this time used his baton to break the rear window allowing him to gain entry into the vehicle and unlock the driver's door. PC Stacey then got out of the vehicle and he and PC Brightman opened the driver's door and requested the respondent to alight the vehicle which he declined to do. Some of these events had been observed by PC Musto who had arrived by this time and he used his baton to break open the front passenger window and deploy his police issue PAVA spray upon the respondent.
8. Despite this the respondent continued to ignore the various police officers who were in attendance and remained seated in the driver's seat of his vehicle. PCs Stacey and Brightman then got hold of the respondent's arms and sought to pull him out of the vehicle whilst the respondent continued to be obstructive. It was at this point that PC Musto intervened. Initially he jabbed the respondent twice in the chest with his baton which did not have any effect on him. PC Musto then struck the respondent twice on his right shin and the respondent, PCs Stacey and Brightman subsequently fell to the ground with the respondent on top of PC Stacey. Whilst in this position, PC Musto struck a third blow with his baton to the respondent's right shin.
9. Subsequent to his arrest the respondent appeared at the local Magistrates' Court on 30 May 2014 when he pleaded guilty to the section 112 offence, together with careless driving and obstructing a police officer in the execution of his duty arising out of the circumstances of his arrest on 9 May 2014.
10. As a result of being struck with the baton by PC Musto, the respondent suffered personal injury including a fracture of the right proximal tibia.

The respondent's claim

11. The respondent commenced an action against the appellant for damages for personal injuries arising from the assault. The action was defended by the appellant on the basis that PC Musto's actions were justified and in doing so the appellant relied upon section 117 of the Police and Criminal Evidence Act 1984, section 3 of the Criminal Law Act 1967 and section 329 of the Criminal Justice Act 2003.
12. The action commenced against the appellant was pleaded in a rather scatter-gun approach by the respondent. It alleged that no less than eight different aspects of the police officers' conduct amounted to an unlawful assault upon the respondent. In the event the judge rejected all but one of those allegations and no appeal arises from her determination in relation to the other seven aspects of the police officers' conduct.
13. The one aspect of the police officers' conduct which the judge determined amounted to an unlawful assault upon the respondent was the three baton strikes made by PC Musto. It is in relation to that finding that this appeal arises.

Grounds of appeal

14. In order to understand the nature and scope of this appeal it is necessary to set out the history of the proceedings.
15. Following the trial of the action, the judge reserved her judgment which was delivered orally on 30 August 2018. Immediately thereafter and at the same hearing the appellant applied for permission to appeal. The judge heard oral submissions from the appellant and the respondent who sought to oppose the application. The judge granted permission to appeal at the hearing which was again delivered orally. Unfortunately during the latter part of the hearing the recording device malfunctioned such that although there is a full transcript of the main judgment, there is no transcript of the judge's determination of the application for permission to appeal.
16. As a result, the parties sought to agree the grounds upon which permission to appeal had been granted by the judge and this was encapsulated in an order of the court dated 5 October 2018 in the following terms:

“Permission to appeal is granted to the Defendant limited to the law in respect of honest belief, the absence of any intention to cause harm and the interpretation of ‘grossly disproportionate’ for the purposes of s.329(5) Criminal Justice Act 2003.”

17. In a written application dated 4 October 2018 the appellant sought further permission to appeal. The application set out the grounds of appeal in the following terms:

“Grounds for appeal for which permission given by the Trial Judge

1. The learned judge erred in law by failing to take into account PC Musto's honest belief that the baton strikes were necessary when deciding whether his act was grossly disproportionate.
2. The learned judge erred in law by failing to take into account the fact that PC Musto did not intend to injure the Claimant when applying the baton when deciding whether his act was grossly disproportionate.

Grounds for appeal for which permission is sought

3. The learned judge erred in law when deciding whether PC Musto's use of the baton was grossly disproportionate by applying too low a test for the meaning of ‘grossly disproportionate.’
18. The skeleton argument in support of the application stated that the appellant wished to argue that,

“6....on a proper interpretation of ‘grossly disproportionate’, the findings of fact by the judge, do not pass that high threshold, i.e. that the judge adopted, as a mixed question of fact and law, too low a threshold.

...

15. In granting permission to appeal the judge acknowledged that, when assessing the proportionality of the baton strikes she did not take into account PC Musto's honest belief that they were necessary nor that PC Musto had no intention to cause the injury. That is an error of law."

19. This application for further permission to appeal was determined on the papers by Warby J who refused further permission to appeal on 17 January 2019. In his written reasons Warby J observed that,

"The question of law, which the trial judge has given permission to pursue by way of appeal, is separate and distinct from the question of how to apply the correct principle to the facts. The appeal court may conclude that the judge was right in her approach, in which case the pursuit of the present appeal would prove a waste of resources. If the court concludes that the judge was wrong, the proper and proportionate course is to remit the case to the court of first instance for a fresh decision, applying the law as declared by the appeal court."

20. The appellant sought oral renewal of his application for further permission to appeal which was determined and refused by HHJ Freeman, sitting as a Deputy High Court Judge, at a hearing on 15 February 2019.

21. On 4 March 2019, solicitors instructed on behalf of the respondent emailed HHJ Walden-Smith informing her that an issue had arisen between the parties as to the reasons for which she granted permission and asked whether, in order to narrow the issue between the parties, the judge would provide a copy of her notes relating to her determination of the original application for permission to appeal.

22. On 11 March 2019, HHJ Walden-Smith emailed the solicitors pointing out that such notes are not disclosable. However, she proceeded to make the following observation that,

"...if it assists the parties to narrow the issues, my recollection is that the application for permission to appeal made by Mr Waters was expressly limited to one point of law namely whether, in considering section 329 of the CJA 2003, the finding that PC Mustoe was not acting with male fides meant that it did not matter whether the act itself, the three baton strikes, was grossly disproportionate.

If there is an issue between the parties with respect to the extent to which permission to appeal were granted then I am content to see the parties' alternative positions and clarify the position to them."

23. On 29 March 2019, solicitors instructed on behalf of the respondent wrote to HHJ Walden-Smith and after referring to [15] of the appellant's skeleton argument in relation to the application for further permission to appeal, as set out above, stated,

"It is the Respondent's view that the Defendant's recall in this regard is factually incorrect i.e. we do not accept that you conceded that no consideration was given to the honest belief

held by PC Musto or to his intent in your assessment that the three baton strikes applied by him were grossly disproportionate. We believe that any such concession would be inconsistent with your judgment in the case; and is not reflected in our counsel's notes."

24. In a written note dated 29 March 2019, HHJ Walden-Smith responded as follows,

"6. With respect to the narrow issue in paragraph 15 I have neither a recollection nor a note of acknowledging that, when assessing proportionality, I did not take into account PC Musto's honest belief or his intent. I find it somewhat surprising that it is suggested that I did make such a comment or acknowledgement as that runs counter to the judgment I gave. The factual assertion in paragraph 15 of the Appellant's skeleton argument does not accord with my recollection."

Hearing of the appeal

25. At the commencement of the hearing of the appeal I explained to counsel my view that the ground upon which permission to appeal had been granted by the trial judge, as set out in the order dated 5 October 2018, lacked clarity.
26. Mr Waters on behalf of the appellant acknowledged that having failed to obtain further permission to appeal in relation to ground 3 set out in his Grounds of Appeal dated 4 October 2018, he was unable to argue that the judge had applied too low a test for the meaning of "grossly disproportionate" when considering section 329 of the Criminal Justice Act 2003 and asserted that the first two grounds set out in that document reflected the permission which the trial judge had granted.
27. Although initially Ms Patrick on behalf of the respondent appeared to acknowledge that the first two grounds set out in the appellant's Grounds of Appeal reflected the permission which the trial judge had granted, she then referred me to the history of the proceedings and in particular the written note by the trial judge, dated 29 March 2019, in which HHJ Walden-Smith observed that the assertion, that she had taken into account neither PC Musto's honest belief that the baton strikes were necessary nor his lack of intention to cause injury when assessing the issue of proportionality under section 329 of the Criminal Justice Act 2003, was contrary to her recollection.
28. It seems to me that this latter stance gives rise to a degree of circularity and the question of why, if this was the position and the appellant conceded that neither the trial judge nor the single judge had granted permission to argue ground 3, permission to appeal had been granted in the first place. These being the circumstances in which this appeal arises, it is necessary to examine the transcript of the judgment itself.

The Judgment

29. Towards the beginning of her judgment the trial judge noted that in addition to section 117 of the Police and Criminal Evidence Act 1984 and section 3 of the Criminal Law Act 1967, the appellant also sought to rely upon section 329 of the Criminal Justice Act 2003. She set out this latter provision and referred to *Adorian v The Commissioner of Police of the Metropolis* [2009] 1 WLR 1859, acknowledging that

this section provides a potential defence not only to civilians but also to police officers.

30. Having then reviewed the evidence which she had heard in the trial and made certain findings of fact, the judge stated that,

“56. The issue, and the central issue, that remains for the court is whether the strikes to the leg with the baton were grossly disproportionate so as not to be covered by section 329 of the Criminal Justice Act.

57. In this case, I am satisfied that the requirements of section 329(5)(a) are established in that the Claimant, Mr Kenyon, was committing an offence in that he was obstructing police officers, an offence to which he pleaded guilty. The issue for me is whether the use of the baton to strike on those three occasions was grossly disproportionate, it being PC Mustoe’s case that he considered it necessary in order to defend himself, another officer, or a member of the public.

58. When considering section 329(5) of the Criminal Justice Act, I am again viewing the matter in all the circumstances of the case.”

31. The judge referred to section 117 of the Police and Criminal Evidence Act 1984 and section 3 of the Criminal Law Act 1967, observing that the appellant had not argued with any great vigour that the baton strikes amounted to the exercise of reasonable force by PC Musto. She stated that the appellant’s approach had been correct because,

“59.....On the evidence I have heard and seen, the force used in striking Mr Kenyon’s leg was not covered by either of those sections.”

32. In reaching that conclusion the judge stated that she was not satisfied that at the material time there was any genuine ongoing concern that the respondent would use his motor vehicle as some sort of lethal weapon, nor that he would use a Maglite torch present in the vehicle as a weapon, nor that the respondent was kicking out at the officers.

33. Having made those and some other relevant findings the judge stated that in relation to the first two strikes with the baton PC Musto,

“75....used the baton when it was unnecessary to do so. The use of the baton was grossly disproportionate act, given the entire situation.”

Moreover, in relation to the third strike with the baton she stated that,

“82. The third strike cannot, in my judgment, be seen to be a proportionate use of force and is, in my judgment, grossly disproportionate.”

34. By way of conclusion the judge stated that,

“88. Consequently, and in conclusion, I find that the actions of the police officers in this incident to be reasonable and a reasonable use of force, save for the three baton strikes: the two strikes to the shin, when Mr Kenyon is with the two officers in the doorway of the car; and then the third strike, when Mr Kenyon was down on the ground. Those strikes, I find each of them to be unnecessary, unreasonable and grossly disproportionate.”

Analysis

35. In this case there is no dispute between the parties as to the proper approach which it was necessary for the trial judge to have taken in relation to section 329 of the Criminal Justice Act 2003:
- i. First of all it is agreed that the section applied to the respondent’s claim and provided the appellant with a potential defence to the action.
 - ii. Secondly, that in order to succeed, the appellant bore the burden of proving that when PC Musto struck the respondent with his baton,
 - (a) it was more likely than not, that he only did so because he held an honest belief that,
 - (i) the respondent was about to commit an offence/was in the course of committing an offence/or had committed an offence immediately beforehand **and**
 - (ii) it was necessary to strike the respondent with the baton in order to defend himself or another person/protect or recover property/prevent the commission or continuation of an offence/or apprehend, or secure the conviction of the respondent after he had committed an offence or that it was necessary to assist in achieving any of those things
 - (b) that in all the circumstances, striking the respondent with the baton was not grossly disproportionate.
 - iii. Thirdly, that although under (ii)(a) the trial judge was required to consider PC Musto’s subjective belief in those matters, under (ii)(b) of the issue of the proportionality of PC Musto’s actions required an objective assessment.
 - iv. Fourthly, that in relation to that objective assessment the trial judge was required to take into account all of the relevant circumstances, including not only her findings under (ii)(a) but also in the present case and to the extent that the trial judge considered it relevant, (a matter which was disputed by the parties) whether PC Musto intended to cause injury to the respondent.

36. It is clear from reading the transcript of the judgment in this case that the trial judge had given careful consideration to the extensive evidence which she had both heard from the witnesses and been able to see from the CCTV footage which covered much of what had taken place during course of the incident on 9 May 2014. It is also clear that she set out the relevant statutory provisions which applied to this case and made a number of findings of fact which were relevant to her consideration of the appellant's potential liability to the respondent.
37. Understandably, those findings of fact are not challenged in this appeal and nor is it likely they could be; the trial judge having heard and seen the evidence, she provided a careful analysis of it with cogent reasons for reaching those findings. Moreover, there is no challenge to her determination that neither section 117 of the Police and Criminal Evidence Act 1984 nor section 3 of the Criminal Law Act 1967 afforded the appellant with a defence to his liability for PC Musto's use of his baton with which to strike the respondent.
38. However, without I trust taking an overly semantic approach to the matter, (see: *McClure v The Commissioner of Police for the Metropolis* [2012] EWCA Civ 12 at [71]), it is with respect more difficult to discern the necessary findings of fact which the judge reached in relation to the issues which arose for determination under section 329(5) (a) and (b) of the Criminal Justice Act 2003.
39. On one view having identified in [56] of the transcript of the judgment that the "central issue" was one of proportionality, it is tempting to imply that the judge must have found in favour of the appellant in relation to both of those issues. Indeed, had she gone on to give specific consideration to these issues when determining the issue of proportionality under section 329(4)(b) of the Criminal Justice Act 2003, then this would have facilitated this court's ability to take such a view.
40. However, although there is nothing in the judgment to suggest that when making the necessary determination under section 329(4)(b), the judge did not take into account any findings which she may have made under section 329(5) (a) and (b), neither is there any express reference to such findings, nor indeed is there any express reference to the issue as to whether or not PC Musto intended to injure the respondent.
41. It is correct that at [57] of the transcript of the judgment the judge states in terms that she was satisfied that the requirements of section 329(5)(a) had been established. However, not only is this finding not expressed in the terms of the necessary statutory language of PC Musto only having used his baton because of his honest belief that the respondent was in the course of committing an offence, but there is no reference to the judge having been satisfied that PC Musto only struck the respondent because he honestly believed that it was necessary to do so for one or more of the statutory reasons set out in section 329(5)(b).
42. As I have already observed, it is tempting to imply from the judge's identification of proportionality as the central issue in the case, that she must have reached findings in favour of the appellant in relation to both section 329(5) (a) and (b). Indeed, there also appears to be some implicit acceptance of this both from the terms of the appellant's first two grounds of appeal and the judge's written note dated 29 March 2019. However, even if this was to be the situation, this still leaves out of the reckoning any express consideration not only of the judge's findings in relation to section 329(5) (a) and (b) when considering the question of proportionality under section 329(4)(b) but

also any express reference to the issue as to whether or not PC Musto intended to injure the respondent.

Conclusion

43. It seems to me that it was these various omissions which are likely to have caused the appellant to have sought permission to appeal from the trial judge. Furthermore, by granting permission to appeal there was clearly some acceptance by the judge that there were arguable grounds of appeal. No doubt had the recording device not malfunctioned during the course of the hearing on 30 August 2018 these matters would have been far easier to discern. However, having identified the lack of express reference to the findings which are identified in the course of this judgment, it seems to me that these are encompassed within the grounds of appeal as set out in the order dated 5 October 2018 and that the appropriate course, as I am invited by the appellant, is to remit this case to the trial judge in order to allow her to reconsider her judgment and make a fresh decision in the light of this one.