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IN THE HIGH COURT OF JUSTICE

CO/2255/2018

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

[2018] EWHC 3044 (Admin)

Royal Courts of Justice

Tuesday, 9 October 2018

Before:

LORD JUSTICE HOLROYDE

MRS JUSTICE WHIPPLE

B E T W E E N :

DHENRAJ HURDOWER — Appellant

- and -

DIRECTOR OF PUBLIC PROSECUTION — Respondent

MS K. PARKER (instructed by Shepherd Harris & Co Solicitors) appeared on behalf of the Appellant.

MR L. CHINWEZE (instructed by the Crown Prosecution Service) appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE HOLROYDE:

1 This is an appeal by way of case stated against the decision of lay justices sitting at Highbury Corner Magistrates' Court on 30 November 2017 finding the appellant guilty of an offence of assault by beating, contrary to s.39 of the Criminal Justice Act 1988. I would wish at the outset to record the court's gratitude to both counsel for the admirably succinct and focused way in which they have presented their respective submissions.

2 The case stated shows that the appellant was accused of striking the complainant, his daughter Sheena Hurdower, on the back of the head following a confrontation involving them and Ms Hurdower's boyfriend Nebir Satti. The justices heard evidence at trial from the three persons I have mentioned and also from Mr Mohammed Faizal Sooka, an eye witness called by the defence. The case stated records:

> "Both the complainant and Mr Satti gave evidence that the Appellant had struck the complainant to the back of her heard, using unlawful force. ... Both the Appellant and Mr Sooka denied that the Appellant struck the complainant. Both gave evidence that the Appellant had placed his hand on the back of the complainant's neck in a protective manner in order to move her back towards the house (the altercation took place immediately outside the Appellant's property)."

3 The case stated goes on at paras.6-11 to record the justices' findings of fact in the following terms:

> "6. Having heard the evidence, we were satisfied that the Appellant did lay his hands on the complainant against her will. We did not believe that this action was protective.
>
> 7. In particular, we found that the complainant gave a consistent account and did not deviate under cross-examination. By way of a numerical scale provided to us as a template for our written reasons, we assessed her evidence as a '1' meaning 'clear and consistent'.
>
> 8. We found that Nebir Satti's evidence appeared over-exaggerated. We assessed his evidence as a '5' meaning 'does not assist'.
>
> 9. We found that the Appellant's evidence was consistent but that he downplayed his part. We assessed his evidence as a '1' meaning 'clear and consistent'.
>
> 10. We accepted the evidence of Mr Faizal but it did not stand up to cross-examination. We assessed his evidence as a '3' meaning 'accepted notwithstanding inconsistencies'."

4 The terms in which those findings are recorded are for the most part the same as handwritten notes entered onto a form or template by the justices during their deliberations. One difference is that in relation to Mr Sooka the handwritten note says that his evidence did not all stand up to cross-examination.

5 The form or template used by the justices comprises four pages. On the first page the justices recorded that presence and contact were admitted and that the matter in issue was "There was not unlawful contact".

6 The second page was divided into three columns, headed respectively Name of Witness, Assessment and Because. An asterisk beside the heading to the second column linked to a footnote which reads as follows:

> "1 = clear and consistent; 2 = inconsistent; 3 = accepted notwithstanding inconsistencies; 4 = implausible; 5 = does not assist; 6 = not credible."

7 The third page provided space in which to record the assessment of any other evidence and findings of fact on matters in issue. This page has been left blank. The fourth page begins with a box which continues the section for recording findings of fact on matters of issue. Here, the justices had made the following note:

> "We are satisfied from all parties that the defendant did lay his hand on Sheena against her will. We do not believe the action was protective. This therefore counts as unlawful contact."

8 The concluding part of the form is headed Verdict. Here, the justices had struck through the reference to a not guilty verdict, leaving these printed words:

> "Guilty. Given what is agreed by parties and our findings on matters in issue so that we are sure, we are satisfied on each essential element of the offence and find you guilty."

9 The case stated ends by posing the following question for the opinion of this court:

> "Given our assessment of the Appellant and the defence witness, was it open to us to convict the Appellant of this offence?"

10 The completed form to which I have referred was provided to Ms Parker (then - as now - appearing on behalf of the appellant) at the conclusion of the trial in response to her request for the justices' written reasons. She tells us, and of course we readily accept, that in expressing their reasons orally the justices had read from that document. It forms the foundation of this appeal. Ms Parker submits on behalf of the appellant that the form shows that the defence case was accepted and that the justices cannot have been satisfied to the criminal standard of the matters which the prosecution had to prove. She argues that the entries made using the numerical scale in the template indicate that the appellant's evidence was assessed as a 1, which, in the absence of any number correlating to a positive assessment of credibility, was the best finding which could be reached. If the justices had not found the appellant's evidence credible, they could have assessed it as a 4, 5, or 6.

11 Ms Parker further submits that it would be illogical to treat the 1 accorded to the complainant's evidence as meaning consistently truthful but the 1 accorded to the appellant's evidence as meaning consistently untruthful. She further argues that the reference in the third column to the appellant having downplayed his part, did not necessarily relate to the central issue of whether the contact with the complainant was unlawful. She suggests it might, for example, have related to some other aspect of the incident, which went on over several minutes. Ms Parker accordingly submits that, having found the evidence of the appellant to be credible, it was not open to the justices to convict him and their decision must be an error of law. As to Mr Sooka, Ms Parker submits that the assessment as a 3 shows that his evidence was accepted. His evidence, however, was wholly incompatible

with the prosecution case. The verdict, she submits, was therefore illogical and must reflect a misapplication of the law.

12 For the respondent, Mr Chinweze submits that the justices did not unequivocally accept the evidence of either the appellant or Mr Sooka, that they reached a reasonable decision on the evidence, and that there is no ground for overturning their verdict. He submits that the assessments noted in column 2 of the template have to be read together with the reasons given for those assessments in column 3. Although the complainant and the appellant were each accorded the same assessment of 1, it was only the evidence of the former which was accepted unequivocally by the justices. Mr Chinweze emphasises that unlike both the appellant and Mr Sooka, the complainant had neither downplayed her role, nor had she been exposed in cross-examination. There was thus, he submits, a clear basis for the conviction.

13 Mr Chinweze reminds us, by reference to the cases of *Oladimeji v DPP* [2006] EWHC 1199 (Admin) and *Retrobars Wales Ltd v Bridgend County Borough Council* [2012] EWHC 3834 (Admin) of the principles that credibility is a matter for the trial court and that it will be rare for this court, which has neither seen nor heard a witness, to interfere on appeal with the findings of the trial court. Further, findings of fact will only amount to an error of law if no reasonable bench of justices could have reached them. In the present case, submits Mr Chinweze, it cannot be said that the justices reached findings which were not reasonably open to them.

14 In her oral submissions replying to those arguments, Ms Parker emphasised that she was not seeking to persuade this court to interfere with the findings of the justices: rather, she submits, this is a case in which the justices' findings show that the burden of proof cannot have been discharged by the prosecution to the criminal standard.

15 The offence of assault by beating requires proof that the accused intentionally or recklessly inflicted unlawful force upon the complainant. In the present case, the issue between prosecution and defence had helpfully been narrowed. The fact that the appellant's hand had made contact with the complainant was admitted. The issue was whether that was an unlawful application of force.

16 As page 4 of the form shows, the justices were satisfied that the use of unlawful force had been proved to the criminal standard. They were sure that the appellant had laid his land on the complainant against her will and they rejected the evidence that he was acting in a protective manner. There was a clear evidential foundation for that finding. On the face of it, therefore, the justices were entitled to reach their verdict of guilty. I therefore turn to consider Ms Parker's submissions relating to the notes made on the form.

17 I cannot accept the submission that those notes show that the justices were not entitled to reach their verdict or that their decision was wrong in law. Although the appellant's evidence was assessed as clear and consistent, the justices found that he downplayed his part in the incident. In the context of the definition of the issue recorded earlier in the form, that finding must be read as a finding relating to the issue of whether unlawful force was used. It is a finding which, in my view, is entirely consistent with the justices' rejection of the appellant's assertion that he had merely placed his hand on his daughter in a protective manner. The note relating to Mr Sooka, and the assessment that his evidence was accepted notwithstanding inconsistencies, must be read in the context of the further finding that Mr Sooka's evidence did not, or did not all, stand up to cross-examination. Although the note in this regard is not worded as clearly as one would wish, it is, in my view, nonetheless clear that not all of Mr Sooka's evidence was accepted, because it did not stand up to cross-examination.

18 I therefore accept Mr Chinweze's submissions and conclude that the justices were entitled to convict the appellant on the basis of their findings of fact. I would therefore answer the certified question in the affirmative and dismiss this appeal.

19 I wish in conclusion to make some observations about the form or template which has featured so prominently in this appeal. The form itself has no title and gives no indication either of its purpose or status or of the authority by which it was provided to, and used by, the justices. Neither counsel had ever previously encountered a similar form. Mr Chinweze had helpfully taken it upon himself in his preparation for this hearing to make enquiries of the relevant magistrates' court to try to find out more about the form, but unfortunately his enquiry had not been answered. On the very limited information available to us, it seems that the form was an internal document provided to the justices as a template on which they could note their assessment of evidence as they were deliberating upon their verdict.

20 In a summary trial, it falls to the justices to assess the credibility - using that term to include the honesty, accuracy and reliability - of the witnesses. They will be familiar with identifying evidence which they can accept as truthful, accurate and reliable. Where they do not accept what a witness says, they will be familiar with distinguishing between evidence which is deliberately untruthful and evidence which is given honestly and in good faith but is mistaken. They will be familiar with finding that a witness is truthful about one matter but untruthful about another, or is honest in all of his or her evidence but accurate and reliable in only part of it.

21 If the form is used only as an aide-memoire for the later giving of reasons, and if the six categories identified in the footnote on page 2 are treated as no more than a convenient shorthand for findings which may often be made about witnesses, I can see that it may serve a limited purpose. With all respect to the author of the form however, it cannot be regarded as a document recording a comprehensive analysis of the evidence, and I am afraid I regard it as being at best unhelpful and at worst capable of giving rise to misunderstanding. An immediate indication of that capacity for causing misunderstanding is given by the footnote on page 2 which lists the six assessments of evidence which may be entered in column 2. It seems to me that there is a risk that justices may be tempted to regard these six categories as embracing all possible findings and to feel that they must reduce their assessment of each witness to one of the six. But plainly the six categories are far from all-embracing. As Ms Parker has rightly pointed out, and to my mind remarkably, none of the six categories enables the justices to record any positive assessment of credibility, though category 6 allows for the contrary finding.

22 The presence or absence of clarity and consistency, the virtues mentioned in categories 1 and 2, may of course be a very important feature of a witness's evidence, and may be a very significant factor in the assessment of the witness's credibility. But they are not the same thing as credibility, and to record an assessment of a witness as clear and consistent says nothing about the justices' assessment of credibility. The witness may have been clear and consistent but dishonest or mistaken. Equally, the witness may have been unclear and inconsistent in relation to one matter, without losing all credibility about every other aspect of his or her evidence.

23 As the arguments in this appeal show, categories 3 and 5 can at best be no more than a very brief shorthand statement of an overall conclusion and if put forward as a reason for a finding of fact, may give rise to argument. Category 4 strikes me as an ambivalent term to use in a document of this nature, and it is difficult to see what it adds to category 6.

24 A further problem with the categories listed in the footnote is apparent from the differing terms in which they have been referred to in this case. In the case stated, the justices speak of a numerical scale. Ms Parker, in her written submissions, referred to it as a "score" (that word appearing in inverted commas) on a scale. Mr Chinweze, in his skeleton argument, referred to it as a numerical score. These differing terms show, to my mind, that there is uncertainty as to the status of the categories and, worryingly, they hint at their providing some sort of arithmetical basis for assessing evidence.

25 Without going into further analysis of the form, it seems to me that if used in future as a written statement of the reasons for a verdict, it is capable of giving rise to further issues and challenges. I would therefore urge the justices' clerk to give urgent consideration to whether the form should be amended, or whether provision should be made as to its use or non-use as a written statement of reasons.

MRS JUSTICE WHIPPLE:

26 I agree.

LORD JUSTICE HOLROYDE: Thank you both very much. Mr Chinweze?

MR CHINWEZE: Yes, thank you, my Lord and my Lady. There is the matter of costs. I don't know if the court has seen a schedule provided by the Crown.

LORD JUSTICE HOLROYDE: We have seen a schedule which----

MR CHINWEZE: With an appendix.

LORD JUSTICE HOLROYDE: Yes. I will just remind myself. It covers your work over four hours.

MR CHINWEZE: Yes. Incorporated within the hourly rate, and this is where the case of *Eshiski*(?) I can't quite pronounce, comes in. That hourly rate includes the administrative support and overheads, as you would have in a private firm; I put it that way.

LORD JUSTICE HOLROYDE: Yes.

MR CHINWEZE: I provided my learned friend with a copy of it on 2 October; that (inaudible) cost of the Crown solicitor.

LORD JUSTICE HOLROYDE: And that is the limit of the claim?

MR CHINWEZE: Yes, yes, indeed.

LORD JUSTICE HOLROYDE: It doesn't actually include anything for your attendance here today.

MR CHINWEZE: It does not and that perhaps is -- that is an oversight on my part. I don't seek to claim it.

LORD JUSTICE HOLROYDE: No. Well, that is a very proper approach, thank you.

Ms Parker, is there anything you want to say about the costs?

MS PARKER: Simply to say this, my Lord, that in light of the court's finding that forms of this nature may naturally give rise to some confusion, I would invite the court to consider reducing that sum. That is as far as I seek to challenge it.

LORD JUSTICE HOLROYDE: Yes. Thank you. (Pause).

We are against you, Ms Parker, on this. The point you make would have greater force if the only remedy open to the appellant was to come to this court. But there was, of course, another avenue of appeal available to you. We therefore make this order: that the appeal is dismissed; the appellant to pay the respondent's costs in the sum of £916.

Anything else, Ms Parker; Mr Chinweze?

MR CHINWEZE: No, my Lord.

MS PARKER: No, thank you, my Lord.

LORD JUSTICE HOLROYDE: May I repeat our grateful thanks to you both. We both felt, if I may say so, that your respective presentations of the case on each side were a model of their kind.

MR CHINWEZE: Thank you.

MS PARKER: Thank you.

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This transcript has been approved by the Judge.