Neutral Citation Number: [2020] EWHC 2472 (QB)

Case No: E64YJ153
Appeal Ref: 98/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HIGH COURT APPEAL CENTRE LIVERPOOL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/09/2020

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

Ms Cheryl Pile	**Claimant**
- and -	
Chief Constable of Merseyside Police	**Defendant**

- -
- -

Henry Gow (instructed by **James Murray Solicitors**) for the **Appellant**
Michael Armstrong (instructed by **Merseyside Police**)
for the **Respondent**

Hearing date: 13 July 2020

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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.
Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be at 10:30 on Friday 18 September 2020.

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. Cheryl Pile brings this appeal to establish the liberty of inebriated English subjects to be allowed to lie undisturbed overnight in their own vomit soaked clothing. Of course, such a right, although perhaps of dubious practical utility, will generally extend to all adults of sound mind who are intoxicated at home. Ms Pile, however, was not at home. She was at a police station in Liverpool having been arrested for the offence of being drunk and disorderly. She had emptied the contents of her stomach all over herself and was too insensible with drink to have much idea of either where she was or what she was doing there. Rather than leave the vulnerable claimant to marinade overnight in her own bodily fluids, four female police officers removed her outer clothing and provided her with a clean dry outfit to wear. The claimant was so drunk that she later had no recollection of these events.

2. It is against this colourful background that she brought a claim against the police in trespass to the person and assault alleging that they should have left her squalidly and unhygienically soaking in vomit. Fortunately, because this appeal will be dismissed, the challenge of assessing damages for this lost opportunity will remain unmet.

3. She also alleges that the circumstances in which these events took place amounted to an unlawful invasion of her right to privacy under Article 8 of the European Convention on Human Rights.

4. Her claims came before Recorder Hudson in Chester last November. The hearing lasted three days at the conclusion of which the Recorder found for the defendant Chief Constable on all issues.

5. Ms Pile now appeals against the Recorder's decision to this Court with the permission of the single judge. For ease and continuity of reference, I will refer to her henceforth in this judgment as the claimant.

BACKGROUND

6. On 22 April 2017, the claimant got into a taxi in an advanced state of intoxication. Her condition was such that she has no, or virtually no, recollection of what happened afterwards.

7. The relevant events can, however, be pieced together from evidence from other sources. The unfortunate taxi driver rang 999 after the claimant had started abusing him and "kicking off". She had been physically sick all over herself and the back of the taxi. The police officers who arrived in response to the call described the claimant as being covered in vomit.

Indeed, on the following morning, the claimant herself asked the police to dispose of her trousers because of the foetid state they were in. One officer said that the vomit was in her hair and had gone all down her front. There can be little doubt from the evidence that the claimant's clothes were filthy and unhygienic when she arrived at the police station.

8. The claimant's behaviour at the police station continued to be challenging. I have seen the CCTV footage of the claimant's arrival. As the Recorder accurately observed, the officers accompanying her were clearly sympathetic and trying to help her. Her befuddled attempts to give her details, including her own name, reveal that she was incoherent with drink.

9. On her way to the cells, as the Recorder found, she started to flail her arms with the clear intention of striking at the officers accompanying her. The cell to which she was taken was monitored by a CCTV camera. Some legitimate criticism could, and indeed was, levelled at the decision of one Inspector Fairhurst not to require initially that she should be detained in an unmonitored cell but any such criticism was overtaken by events with the claimant's aggressive display in the corridor on the way to the cells. By that stage, it was obviously in the claimant's own best interests, and those of the officers responsible for her detention, that she should be monitored from the outset.

10. Once in the cell, the officers tried to replace the claimant's wet and soiled clothes with clean ones. They were wearing protective gloves and managed to put her dirty clothes in a plastic bag. The claimant, however, continued to struggle and they left the cell. After that, Inspector Fairhurst looked into the cell through the hatch to check on the claimant. His intention was to ensure her continued safety. He had not known that she was still in her underwear. The Recorder found that all those involved in the detention of Ms Pile on the night in question were concerned with her welfare and the protection of her dignity. The officers had used no more force than was strictly necessary to remove the claimant's clothes and she was too drunk to understand what was going on. Furthermore, Inspector Fairhurst had no darker voyeuristic purpose when he was checking up on her.

11. The CCTV monitoring in the cell fed back to the custody suite. In the event, it was fortunate for the claimant that she was kept under observation because, soon after she had been left alone, she lost her balance, fell over and banged her head on the cell floor. She was taken to hospital and treated for her injuries. I note, in passing, that she brought a claim in negligence against the defendant in respect of these injuries but that claim was rejected by the Recorder at first instance and this finding remained wisely unchallenged on this appeal.

12. After her hospital visit, the claimant was returned to the police station and released. She agreed to pay a £60 fixed penalty for being drunk and disorderly and thereby avoided prosecution.

MATTERS OF FACT

13. Before turning to the legal arguments arising on this appeal, I make it clear that there is no basis in my view upon which the Recorder's detailed findings of fact can properly be challenged. As the Court of Appeal recently observed in ***Kalma v African Minerals*** [2020] EWCA Civ 144:

> "The Supreme Court has regularly explained that, unless a critical finding of fact has no basis in the evidence, or is based on a demonstrable misunderstanding of relevant evidence, or a failure to consider such evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified… This applies equally to findings of primary fact and any inferences to be drawn from them…"

14. In this case, I am entirely satisfied that the Recorder's findings both of primary fact and the inferences to be drawn from them are unassailable and I will proceed on that basis. In this respect, ground three of the appeal was always doomed to failure because it sought to challenge the Recorder's clear finding that it was necessary for the purposes of hygiene to remove the claimant's clothing. The complaint that the officers should have "monitored the [claimant] until such time as the [claimant] could safely remove her own clothes" is risible.

FORENSIC AFTERTHOUGHTS

15. During the course of oral argument, Mr Gow on behalf of the claimant made several good-humoured attempts to smuggle into the appeal a number of points which had either not made below or had not been included in his grounds of appeal or skeleton argument. It is to his credit that he rapidly abandoned these points when challenged by the Court but less so that they he had made them in the first place.

THE FIRST GROUND OF APPEAL

16. The claimant contends that the police have no power to change the clothing of a detainee incapacitated by drink however contaminated such clothing may be by bodily fluids. This prohibition, it is said, applies: (i) even in circumstances in which to leave the detainee in her own clothes would give rise to a hygiene risk both to her and to those required to come into contact with her; and (ii) notwithstanding the degrading condition in which she would otherwise be left to spend the rest of the night wallowing in her own vomit or worse. Accordingly, it is argued, despite the fact that

the claimant raised no objection to the removal of her clothes and that the officers were acting her own best interests using no more force then necessary, she was the victim of a trespass to her person.

17. In support of this brave proposition, the claimant relies upon section 54 of the Police and Criminal Evidence Act 1984 ("PACE") which provides, in so far as is relevant:

> "**Searches of detained persons.**
>
> (1) The custody officer at a police station shall ascertain . . . everything which a person has with him when he is—
>
> (a) brought to the station after being arrested elsewhere...
>
> (3) Subject to subsection (4) below, a custody officer may seize and retain any such thing or cause any such thing to be seized and retained…
>
> (4) Clothes and personal effects may only be seized if the custody officer—
>
> (a) believes that the person from whom they are seized may use them—
>
> (i) to cause physical injury to himself or any other person;
>
> (ii) to damage property;
>
> (iii) to interfere with evidence; or
>
> (iv) to assist him to escape; or
>
> (b) has reasonable grounds for believing that they may be evidence relating to an offence.
>
> (5) Where anything is seized, the person from whom it is seized shall be told the reason for the seizure unless he is-
>
> (a) violent or likely to become violent; or
>
> (b) incapable of understanding what is said to him.
>
> (6) …a person may be searched if the custody officer considers it necessary to enable him to carry out his duty under subsection (1) above and to the extent that the custody officer considers necessary for that purpose.
>
> (6A) A person who is in custody at a police station or is in police detention otherwise than at a police station may at any time be searched in order to ascertain whether he has

with him anything which he could use for any of the purposes specified in subsection (4)(a) above.

(6B) Subject to subsection (6C) below, a constable may seize and retain, or cause to be seized and retained, anything found on such a search.

(6C) A constable may only seize clothes and personal effects in the circumstances specified in subsection (4) above."

18. The claimant argues that since none of the factors listed in subsection 4 applied in her case then, by the operation of (6C), no power of seizure arose and so the removal of her clothing was automatically unlawful.

19. In my view, this represents a fundamental misreading of the scope of subsection 6C.

20. Prior to the enactment of PACE, police powers of search were governed by the common law as had been developed in a series of decisions over many years. The cumulative effect of such decisions was helpfully reviewed by the Divisional Court in ***Lindley v Rutter*** [1981] Q.B. 128. The Court cited with approval Halsbury's Laws of England, 4th ed., vol. 11 (1976), para. 121:

> "**Search of persons arrested.** There is no general common law right to search a person who has been arrested, but such a person may be searched if there are reasonable grounds for believing (1) that he has on his person any weapon with which he might do himself or others an injury or any implement with which he might effect an escape, or (2) that he has in his possession evidence which is material to the offence with which he is charged."

21. In that case, the Court observed:

> "It is the duty of the courts to be ever zealous to protect the personal freedom, privacy and dignity of all who live in these islands. Any claim to be entitled to take action which infringes these rights is to be examined with very great care. But such rights are not absolute. They have to be weighed against the rights and duties of police officers, acting on behalf of society as a whole. It is the duty of any constable who lawfully has a prisoner in his charge to take all reasonable measures to ensure that the prisoner does not escape or assist others to do so, does not injure himself or others, does not destroy or dispose of evidence and does not commit further crime such as, for example, malicious damage to property. This list is not exhaustive, but it is sufficient for present purposes. What measures are reasonable in the discharge of this duty will

> depend upon the likelihood that the particular prisoner will do any of these things unless prevented. That in turn will involve the constable in considering the known or apparent disposition and sobriety of the prisoner. What can never be justified is the adoption of any particular measures without regard to all the circumstances of the particular case."

22. In 1981, the Philips Royal Commission recommended that police powers of search should be put onto a proper statutory basis and that they should include the power to make a full inventory of items. It was to achieve this that section 54 was introduced.

23. Section 54 is headed "Searches of detained persons". As originally worded, the power to search was limited to that found in (6) which provides for such a power to be exercised if, and to the extent that, the custody officer considers it necessary to discharge his duty to ascertain what the detainee has with him.

24. Subsections 6A to 6C, were later inserted by section 147(b) of the Criminal Justice Act 1988 and provide for a broader power under which a person who is in custody at a police station or is in police detention elsewhere, "may at any time be searched in order to ascertain whether he has with him anything which he could use for any of the purposes specified in subsection (4)(a) above".

25. It is clear in this context that subsection 6C operates to limit the scope of the items which may be seized following a search carried out in pursuance of subsection 6A. It cannot sensibly be interpreted to place a blanket overarching ban on circumstances in which clothes may be retained by police officers not purporting to exercise their section 54 powers. Subsection 6B refers to "anything found on such a search" and 6C can only be sensibly read as a qualification to the extended powers introduced under section 147(b) of the 1988 Act.

26. In this case, it is clear that the removal of the claimant's clothes had nothing whatsoever to do with a search "in order to ascertain whether [she] has with [her] anything which [she] could use for any of the purposes specified in subsection (4)(a)". Accordingly, subsection 6C has no application to the circumstances of this case.

27. It follows that ground one of this appeal must fail.

28. Strictly speaking, it would be unnecessary for me to make any further comment on the tortious claim because the ground of appeal is narrowly drafted on the ground that the Recorder held that the police had no power to remove the claimant's clothing because of the operation of section 54 and I have rejected the claimant's interpretation of this section.

29. Nevertheless, I would make some brief additional observations.

30. Section 39 of PACE, in so far as is material, provides:

> "**Responsibilities in relation to persons detained.**
>
> (1) Subject to subsections (2) and (4) below, it shall be the duty of the custody officer at a police station to ensure—
>
> (a) that all persons in police detention at that station are treated in accordance with this Act and any code of practice issued under it and relating to the treatment of persons in police detention;…"

31. Paragraph 8.5 of the Code of Practice provides:

> "8.5 If it is necessary to remove a detainee's clothes for the purposes of investigation, for hygiene, health reasons or cleaning, removal shall be conducted with proper regard to the dignity, sensitivity and vulnerability of the detainee and replacement clothing of a reasonable standard of comfort and cleanliness shall be provided."

32. I am satisfied, in the circumstances of this case, that it was necessary to remove the claimant's clothing for hygiene and health reasons and that a failure to have done so would have amounted to a breach of the Code and of the duty under section 39 of PACE.

33. This approach is also consistent with the application for Article 3 of the Convention. As the Court observed in ***Watling v The Chief Constable of Suffolk Constabulary*** [2019] EWHC 2342:

> "The first feature of Article 3 relevant to this case is that it imposes a positive general duty (a "systems" duty) to secure the health and well-being of those in detention by means of having proper systems in place to prevent breaches. This general duty requires that legislative and administrative systems are put in place which will make for effective prevention of the risk to the health and well-being of those under the control of public authorities."

34. In addition to the fact that the interpretation which I have preferred arises out of the natural meaning of the words used in their statutory context, any other approach would give rise to absurdities. On the claimant's interpretation, for example, a constable would be acting unlawfully by removing the coat of a detainee rendered unconscious by heat exhaustion.

35. Another obvious example relates to consent. If, after his detention at a police station, a prisoner asks an officer to take his hat and coat then that

officer is not to be rendered potentially liable to the prisoner in tort on the basis that none of the criteria set out in subsection 4 has been made out.

36. In this case, the Recorder observed that it was no part of the claimant's case that she had made a conscious choice not to have a change of clothing.

37. Where someone is so intoxicated that she is unable to make an informed choice then circumstances will arise in which a police officer can readily assume that consent to the removal of clothing can be implied. Normally, someone in custody who has vomited all over themselves, but lacks the ability to articulate their preference, may be safely taken to have given implied consent to the removal of their outer clothing and its replacement by clean clothing so long as all reasonable considerations of safety and the preservation of dignity have been taken into account.

38. I note, although it forms no part of my reasoning, that some members of the public may well have found it to have been a grotesque result if a woman who: has rendered herself insensible through drink; abused an innocent taxi driver; behaved aggressively to police officers trying to do their job and vomited all over herself should then be found to be entitled to compensation because those same officers, as an act of decency, had then changed her into clean and dry clothing at a time when she was too drunk to know or care.

THE SECOND GROUND OF APPEAL

39. The second ground of appeal is based on the contention that the claimant's rights under Article 8 of the European Convention of Human Rights ("the Convention") had been breached by the way in which she was treated on the evening in question. Article 8 provides:

> "**Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

40. I am entirely satisfied that the qualification to the right to a private life identified in Article 8(2) applied to the circumstances of this case.

41. It is to be noted that breaches of the Codes of Practice under PACE do not, of themselves, automatically amount to a breach of Article 8. In ***Yousif v Commissioner of Police for the Metropolis*** [2016] EWCA Civ 364, the Court of Appeal considered a case in which the claimant's clothes had been removed for his own protection whilst he was in custody. He was unsuccessful in his claim for damages by way of just satisfaction in the County Court notwithstanding the fact that the judge had found that there had been breaches of Code C. As the Court of Appeal held:

> "45…Clearly, the breaches of the Code and guidance form part of the factual matrix within which Articles 3 and 8 must be considered but could not, on any showing, be decisive.

It is also to be noted in this context that section 67(10) of PACE provides:

> "A failure on the part—
>
> (a) of a police officer to comply with any provision of . . . a code;. . .
>
> shall not of itself render him liable to any criminal or civil proceedings."

42. The Court of Appeal summarised the trial judge's approach to the position under Article 8 thus:

> "36. As for Article 8 and the requisite respect for private life, the judge repeated that the police had acted "in a proportionate manner honouring the dignity of what was proving to be a difficult detainee". They had to balance the safety of Mr Yousif, the safety of others (including themselves) and Mr Yousif's personal integrity. Bearing in mind the good faith and the absence of debasing motives, he rejected this claim as well..."

43. The Court of Appeal agreed with the judge's assessment and dismissed the appeal, observing:

> "43…As to the extent of the breaches, the officers were cross examined about the Code and the guidance; the judge made a number of findings about them. In particular, it is conceded that an appropriate adult should have been called by the custody officer…
>
> 44. For my part, as did the judge, I readily accept that there were also breaches in relation to the search (on the grounds that a third officer was present to bag the clothing and it could, in fact, be seen over the CCTV)…"

44. This led to the conclusion at paragraph 70 that:

> "…all that happened to Mr Yousif was a consequence of what was clearly his own failure to engage and flowed from what it was agreed were the legitimate and good faith concerns of the police to ensure that he was safe while in custody. Breaches of the Code and guidance were not deliberate. Having regard to the findings of the judge (which were justified on the evidence), all the actions taken by the police in relation to Mr Yousif were 'strictly necessary'; they do not give rise to any actionable wrong and do not, in this case, establish any breach of Article 3 ."

And specifically, in relation to Article 8:

> "71. Moving shortly to Article 8, this is not a case (unlike Wainwright) in which an in-depth analysis based on the right to private life or, indeed, a different answer resultant upon that analysis is appropriate. This provision has a specific exception for the protection of health: in my judgment, on the facts of this case and the justified findings of the judge, there can be no doubt that the police can justify what was undeniably an invasion of Mr Yousif's privacy by reference to the necessity in a democratic society for the police as custodians of a person lawfully arrested on suspicion of having committed an offence to take all necessary steps to protect his or her safety."

45. The first two alleged breaches on this appeal relate to the monitoring of the claimant's cell. It is argued that the decision to place the claimant in a monitored cell in which the camera broadcast to the custody suite was made before she had shown signs of physical resistance to the officers. It cannot be disputed, however, that her behaviour in the corridor justified CCTV surveillance thereafter. On this issue, I find that Article 8 was never engaged. There was no interference with the claimant's rights to privacy until after a time when she had already behaved in a way which fully justified such intrusion. Furthermore, the decision to monitor her cell and broadcast the footage to the custody suite was both lawful and necessary. Indeed, it subsequently equipped officers to see that she had fallen over and hurt herself so that she could be given prompt medical attention.

46. The third alleged breach is said to arise out of the provisions of Annex A 11(c) of Code C:

> "When strip searches are conducted:
>
> (c) except in cases of urgency, where there is risk of serious harm to the detainee or to others, whenever a strip search involves exposure of intimate body parts, there must be at least two people present other than the detainee. The presence of more than two people, other than an

> appropriate adult, shall be permitted only in the most exceptional circumstances…"

47. I am entirely satisfied that, in the circumstances of this case, exceptional circumstances prevailed. The Recorder found, as she was entitled to, that the claimant had been aggressive and was flailing her arms on the way to the cells. She had earlier been kicking out at officers as she was being transported to the police station. The fact that four female members of staff were deployed to remove her soiled clothing was entirely justified. Indeed, if fewer had been involved then there may well have arisen a greater risk that one of them would be injured because the claimant could not otherwise have been adequately restrained.

48. The remaining alleged breaches all relate to the actions of Inspector Fairhurst in seeing the claimant in her underwear in the cell, through the hatch in the door and over the CCTV monitor. The Recorder found that the claimant had been given clothes and that Inspector Fairhurst may well have assumed that she would be wearing them when he saw her. Whatever he saw, the Recorder was satisfied that, by the time he gave evidence, he had no specific recollection of it. The Recorder further found that the fact that the removal of her clothing was monitored was a proportionate response to the risk to the custody staff. On the facts of this case, her conclusion was unassailable.

CONCLUSION

49. The observations of the Court of Appeal in ***Yousif*** apply with equal force to the circumstances of this case. All that happened to the claimant was a consequence of what was clearly her own failure to engage and flowed from … the legitimate and good faith concerns of the police to ensure that she was safe while in custody."

50. This appeal is dismissed.