Neutral Citation Number: [2020] EWHC 3569 (QB)

Claim Nos: B85YJ731 and C01YM394
Appeal Ref: BM80019A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
ON APPEAL FROM HIS HONOUR JUDGE GODSMARK QC AND A JURY SITTING IN THE NOTTINGHAM COUNTY COURT

Birmingham Appeal Centre
Priory Courts, 33 Bull Street
Birmingham B4 6DS

Date: 23/12/2020

Before :

THE HONOURABLE MR JUSTICE SAINI

- -

Between :

THOMAS ANDREW MAGEE	**First Claimant/ Appellant**
- and –	
ANDREW DANIEL MAGEE	**Second Claimant/ Appellant**
- and –	
THE CHIEF CONSTABLE OF THE DERBYSHIRE POLICE	**Defendant/ Respondent**

- -
- -

Una Morris and **Michael Etienne** (instructed by **Gregsons LLP**) for the **Appellants**
Matthew Holdcroft (instructed by **East Midlands Police Legal Services**) for the **Respondent**

Hearing date: 15 December 2020

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JUDGMENT

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 11am on 23 December 2020.

MR JUSTICE SAINI:

This judgment is in 9 main parts as follows:

I.	Overview -	paras. [1]-[8]
II.	The Facts -	paras. [9]-[28]
III.	The Trial -	paras. [29]-[42]
IV.	PACE s.24: reasonable grounds -	paras. [43]-[69]
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VI.	PACE s.28: grounds for arrest -	paras. [83]-[96]
VII.	PACE s.37: detention -	paras. [97]-[121]
VIII.	Trespass, Assault and Battery -	paras. [122]-[129]
IX.	Conclusion -	para. [130].

I. **<u>Overview</u>**

1. This is an appeal by Thomas Andrew Magee ("the First Appellant") and Andrew Daniel Magee ("the Second Appellant") against a number of rulings by His Honour Judge Godsmark QC ("the Judge") sitting, with a jury, in the County Court at Nottingham in September 2017. The First Appellant is the uncle of the Second Appellant.

2. These rulings were made in the course of the trial of the Appellants' claims against the Respondent, the Chief Constable of Derbyshire Constabulary. The claims arose out of an incident on 14 April 2012, during which the Respondent's officers entered the First Appellant's then address, 79 Cobden Street, Long Eaton, Nottinghamshire, NG10 1BP, and arrested and detained the Appellants (and a third person, Daniel Magee) for burglary. Force, including handcuffing, was used on the Appellants during the course of their arrests and detention.

3. The First Appellant brought proceedings for damages for trespass to land, false imprisonment and assault and battery on 27 April 2015. The Second Appellant brought proceedings for damages for false imprisonment and assault and battery on 13 May 2016. Both Appellants claimed that their detention was unlawful from the moment they were arrested until their release (that is, from around 00:45 on 13 April 2012 to around 09:25 on 14 April 2012).

4. The claims were joined, and the trial of the action commenced on 12 September 2017, some 5 years after the relevant events. Following conclusion of evidence and submissions, the Judge left a number of questions to the jury. The jury returned its special verdict, answering all questions in favour of the Respondent.

5. Notwithstanding the jury's verdict, on 20 September 2017, judgment was entered for the Appellants in respect of a period of 1 hour and 24 minutes' false imprisonment, in relation to a failure to review their detention in accordance with section 40 of the Police and Criminal Evidence Act 1984 ("PACE") (which requires a first review by an officer of at least the rank of inspector within the first six hours after detention is authorised).

6. The Appellants were awarded the modest sum of £275.00 each for this period of false imprisonment. However, this represented very limited success for the Appellants. As a result of the jury's verdict, the First Appellant's trespass claim was dismissed, both

Appellants' main false imprisonment claims were dismissed, and their assault and battery claims were dismissed. Overall, this was a significant failure of their actions.

7. The main issue in this appeal is whether the Judge was right to leave a number of questions to the jury. The Appellants submit that given the burden of proof and the nature of the evidence which had been called, a number of these issues ought not to have been left to the jury, and ought to have been determined in their favour as a matter of law by the Judge. In short, they say that the evidence was such that the Judge should have in fact entered judgment for them on all of their claims.

8. Following the Judge's refusal of permission to appeal, on 21 May 2019, at an oral hearing, Carr J granted the Appellants permission to appeal in relation to all of their grounds.

II. <u>The Facts</u>

9. I have prepared my summary of the essential facts relying upon the pleadings, the uncontroversial parts of the oral evidence and witness statements, and parts of the Judge's summing up to the jury.

10. I emphasise that my summary is not intended to reflect any views as to the evidence but is merely intended to provide a basic factual account to place the appeal in its proper context in circumstances where there is no formal judgment below, this having been a jury trial. In order to make it easier to follow, I will refer to the relevant parties by their actual names (as opposed to Appellant, Respondent etc.).

11. 79 Cobden Street, Long Eaton is divided into bedsits. One of them is on the ground floor. In 2012 this bedsit was occupied by Thomas Magee. On the night of the 13/14 April 2012 the bedsit was boarded up on the outside at the front window.

12. On the evening of 13 April 2012, Thomas, Daniel (his brother) and Andrew (Daniel's son) met socially. They say that they met up initially at 79 Cobden Street before Daniel and Andrew went on to a pub where they stayed for a couple of hours before returning to 79 Cobden Street in the early hours of 14 April 2012.

13. Back at 79 Cobden Street the three were in the communal kitchen but at some point they decided that they needed to get into Thomas' bedsit. Thomas had no key to that room so they went outside and sought access through the window (which was boarded up). They removed the upper of two boards and climbed in. In the course of climbing in Daniel cut his hand on broken glass and began to bleed.

14. During this process of access, the three were seen by a concerned member of the public who called the police at around 12.30am. The police were told that at the house on the corner of St. John Street and Cobden Street, two people had entered, the boards had been pulled off the window and one had got inside. The person who had called the police further informed them that he had gone upstairs to get a better view of what was going on. He gave a description: 'Two white males, one large build, dark tracksuit bottoms, white stripes on side, white — other has gone inside and then the information keeps coming, property may be a flat, light on upstairs, no light downstairs. Male has

now come out and they are putting the boards back, maybe three males', and 'It looks as though they are trying to secure the board from the inside'.

15. Thomas and Andrew Magee said in evidence that once in the bedsit Daniel fell asleep on the bed (having covered his bleeding wound with something from the bathroom). Thomas was sat in the chair and Andrew was sat at the end of the bed, talking in the dark.

16. Thomas and Andrew Magee explained their rather unorthodox means of entry, through the window, as being due to the fact that Thomas Magee had lost his keys a couple of weeks before. He said that he had lost both the key to the communal front door and the key to his bedsit door. He would get in the communal door by asking someone in another flat to "buzz" him in. He said that for a couple of weeks he was unable to get into his bedsit and had slept in the communal kitchen. There was evidence at trial from Mr Thompson, the landlord, who said that he had no knowledge of any loss of a key at this time although he did accept that there had been occasions when Thomas Magee had lost his keys. That set the scene for the arrival of the police.

17. As a result of the neighbour reporting the window entry, the police arrived in the form of PC Stapleton and SPC Williamson at around 12.43am. PC Stapleton said that he recognised the address that they were going to because he had been there before and he had had dealings with not only the "Magees", but with other people there. PC Stapleton said that he believed that Thomas Magee had been evicted from Cobden Street. Derbyshire Police held intelligence that Thomas Magee had a different home address and that he was not staying at Cobden Street, due to a dispute with his landlord.

18. Soon after they arrived, PC Stapleton and SPC Williamson said someone from an upper floor at 79 Cobden Street leant out of the window and told them that the downstairs bedsit should be empty. They also gave evidence about the window saying that at the scene there was broken glass on the floor, blood on the upper wall and on the pavement. They said that inside the bedsit the lights were off. PC Stapleton said that he tried to communicate with those inside but there was no response. He said there was whispering as though they were trying to hide. His radio message into control was, 'Three males inside the address, they have smashed a window to get in, you can hear them'.

19. The police officers said they called on those inside to come out, and gave evidence that those inside became abusive and refused to come out and would not let the officers in. PC Stapleton recalled that at some stage someone inside said that they did not have a key. PC Stapleton also said that he suspected this to be a burglary: Thomas Magee breaking back into his old bedsit. The suspicion, he said, was based upon the following: the report from the member of the public saying that someone was breaking into the bedsit by the front window; the upstairs neighbour saying no-one should be in there, it was after all in the small hours of the morning; and there had been entry through a broken window with boarding pulled away and blood; the lights inside were off and PC Stapleton said the occupants were trying to hide and would not come out. PC Stapleton accepted however that during the time he was outside, he recognised that it was the Magees inside and that Thomas Magee told him, from inside, that he lived there but did not have the key. That, said PC Stapleton, was not enough to remove his suspicions.

20. Inquiries were put in train by the police and attempts were made to contact the landlord. The landlord's mobile phone was called without success. An officer also attended the

landlord's home address but the landlord could not be contacted and, said the police, still the Magees would not come out. So the police decided to enter.

21. An armed response unit was called and arrived at 1.28am. The unit was not called because the occupants of the bedsit were armed but because the unit was available and able to use what was euphemistically called the “big orange key” (equipment to break down a door).

22. The account of Thomas and Andrew Magee was different. They said that at the material time Daniel was asleep, they were talking and they heard movement outside and the walkie-talkies. They heard the police say, 'It is the police, open up'. Andrew remembered a torch being shone into the bedsit from outside although they still did not turn the lights on in response to the police request to open the door. Thomas said, as did Andrew, that they were telling the police that they could not open it because Thomas had lost his keys. Both Thomas and Andrew described Thomas inviting the police to climb in through the window as they had done, but the police would not accept that invitation.

23. The police team were let in to the house through the communal door. Andrew Magee recalled the cry from outside: 'Stand back' and then the bedsit door was broken down. PC Stapleton said that he told the three men inside that they were all under arrest on suspicion of burglary and that once inside all three of the Magees were arrested. At this time, there was some form of scuffle between at least Daniel Magee and two police officers. Thomas Magee said that as the police came in Daniel woke up, jumped up from the bed and that he was then attacked by the police. Thomas Magee said that he was also assaulted, two fists were placed in his chest and he was pushed back into his chair. Thomas Magee said in his witness statement that PC Stapleton had assaulted him but accepted in oral evidence that he did not know which officer had assaulted him and that what he had put in his witness statement was untrue.

24. As to the assault on them, the police account was that Daniel attacked PC Lynn, striking him in the face and that Daniel was taken to the ground by officers, including PC Williamson who grabbed him around the legs. Daniel was subsequently prosecuted for assault and pleaded guilty.

25. As I have said, all three were arrested but Andrew said that he was not told why. Thomas said that he was told that it was on suspicion of burglary and that he protested saying he could not believe he was being arrested for burglary of his own bedsit.

26. Both Thomas and Andrew Magee were handcuffed and taken to St. Mary's Wharf Police Station in Derby, arriving at around 1.15am. Daniel Magee was taken straight to hospital in order to receive medical care and treatment.

27. PS Munro, a custody officer, was responsible for booking in Thomas and she gave evidence, addressed below, as to the process. There was no equivalent evidence in relation to Andrew Magee because the custody record had been lost.

28. Both Thomas and Andrew Magee were released at around 9.26am on 14 April 2012, after a period of about 7 ½ hours in custody. They were told no further action was to be taken against them.

III. The Trial

29. In order to understand the context in which the relevant rulings of the Judge were made, I need to summarise the various stages of the hearing before the Judge and Jury. Before I do that, I need to record some matters of concern.

30. In an appeal of this type it is crucial that not only should there be a full transcript of evidence and argument below, but also that all relevant rulings by the Judge are obtained by the parties, in an approved transcript form.

31. Regrettably, that has not been done in this appeal. The full evidential record and crucial rulings by the Judge following the jury's verdict are not before me in approved transcript form. As to the latter, I have had to rely upon an agreed (but incomplete) note of what was said by the Judge when entering judgment for the Respondents on 20 September 2017. I will call this "the Agreed Note". It is a highly significant document. The Agreed Note is a pastiche of Counsels' own incomplete notes of what the judge said orally.

32. Of more concern however to me was the fact that the main detailed ruling of the Judge of 18 September 2017 on why he left questions to the jury (which was before me and which I will call "the Judgment") was not the focus of the Grounds of Appeal or the written submissions of either party.

33. Somewhat to my surprise, neither party referred to it in their skeletons. It should have been the prime document in the appeal, but it was only in fact addressed once I had asked the parties in oral argument to do so (on a number of occasions).

34. This is, after all, the record of the Judge's reasons for the decisions under challenge, and should have been the target for the arguments on appeal and the basis for supporting the decisions. The Judgment demands significant attention. At the risk of stating the obvious, under CPR 52.21(3) an appellate court reviewing a decision to identify if it is "wrong" cannot sensibly embark upon that task without knowing the judge's reason for the relevant decision.

35. Returning to the chronology, the trial began on 14 September 2017 and concluded on 20 September 2017. In addition to the Appellants, evidence was given by the arresting officer, PC Robert Stapleton and the custody officer, PS Nicola Munro. A number of other witnesses were called.

36. When the Respondent's evidence closed on 15 September 2017, the Judge indicated he had been working on a draft of questions for the jury. Counsel for the Appellants said at that point that she had "a number of submissions to make in terms of issues for which we are going to be saying there is no evidence and the defendant has failed to prove its case and therefore we ought to succeed, as a matter of law, because there is only one rational answer to some of those issues and therefore, if there is only one rational answer they shouldn't be determined by a jury."

37. Counsel for the Appellants then made her oral submissions followed by a response by Counsel for the Respondents.

38. During argument, the Judge's position became clear - he was minded to allow the questions to go to the jury and he considered he had received sufficient argument by way of submissions. The Appellant's Counsel asked that she be entitled to submit written arguments. Written submissions were in due course provided – they mirror those on appeal.

39. The Judge gave an oral ruling on the afternoon of 15 September 2017 ("the Oral Ruling"). He explained he would give a reasoned judgment in due course. The Judge understandably wished to avoid delaying the matter when a jury was waiting for speeches and the summing-up. I have considered the Oral Ruling and it is essentially a more concise version of what was said in the Judgment.

40. Following this ruling, Counsels' speeches and the summing up took up the remainder of that day. There is no complaint about the summing-up. In particular, no issue is taken on appeal that the Judge failed to remind the jury of the burdens (which was included in the questions for the jury) and, specifically, about the gaps in the evidence on certain important matters concerning the Second Appellant. I note from the transcript that the Judge took care to remind the jury of the positions of each party on this specific controversial issue.

41. The Judge's reasoned judgment (what I have called "the Judgment") was delivered on 18 September 2017. I will need to refer to the Judgment in more detail below. It is essentially an expanded version of the Oral Ruling which I have set out above.

42. There was a further ruling on Wednesday 20 September 2017 (the Agreed Note) which was only provided to me in the course of the hearing of the appeal. This ruling by the Judge, after the jury's verdict, explains why the central claims of the Appellants were being dismissed.

IV. **PACE s.24: Reasonable Grounds**

43. At the material time, the relevant provisions of Section 24 of PACE were as follows:

> "Arrest without warrant: constables
>
> ...
>
> (2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.
>
> (3) If an offence has been committed, a constable may arrest without a warrant
>
> (a) anyone who is guilty of the offence;
>
> (b) anyone whom he has reasonable grounds for suspecting to be guilty of it.

(4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.

(5) The reasons are

…

(e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;

…"

44. In Parker v Chief Constable of Essex [2017] EWHC 2140 (QB) at [14], Stuart-Smith J set out the relevant questions which arise in relation to the exercise of the statutory power of arrest. I will call these "the Parker Questions" and I have renumbered them as appears below for ease of reference in the remainder of this judgment.

45. Although there was a successful appeal on an unrelated point against this decision (Parker v Chief Constable of Essex Police [2018] EWCA Civ 2788, [2019] 1 WLR 2238), the Court of Appeal cited Stuart-Smith J's approach with apparent approval at [59]. It was also common ground before me that the Parker Questions correctly summarise the relevant questions as a matter of law and, in particular, which questions are subjective and which are objective.

46. The Parker Questions are as follows:

(1) Did the arresting officer suspect that an offence had been committed? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.

(2) Assuming the officer had the necessary suspicion, did the arresting officer have reasonable grounds for that suspicion? This is a purely objective requirement to be determined by the Court.

(3) Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.

(4) Assuming the officer had the necessary suspicion, did the arresting officer have reasonable grounds for that suspicion? This is a purely objective requirement to be determined by the judge, if necessary on facts found by a jury.

(5) Did the arresting officer believe that for any of the reasons mentioned in subsection 24 (5) of PACE, it was necessary to arrest the person in question? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.

(6) Assuming the officer had the necessary belief, were there reasonable grounds for that belief? This is a purely objective requirement to be determined by the judge, if necessary on facts found by a jury.

(7) If the answer to the previous questions is in the affirmative, then the officer has a discretion which entitles him to make an arrest and in relation to that discretion the question arises as to whether the discretion has been exercised in accordance with Wednesbury principles.

47. The Appellants' first complaint relates to Parker Questions (1)/(3). In this regard, the Judge formulated the relevant question for the jury as follows (for both Appellants):

> "Have the police proved that when [the relevant Appellant] was arrested, PC Stapleton suspected that [the relevant Appellant] had committed (or was committing) the offence of burglary?"

48. The Appellants submit that there was an error by the Judge in leaving this question to the jury. They rely upon the observations of Diplock LJ in Dallison v Caffery [1965] 1 QB 348 at 372D-F:

> "…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. A jury, however, 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, to decide whether the evidence on a relevant matter does raise any issue of fact to fit be left to the jury. If there is no real conflict of evidence, there is no issue of fact calling for determination by the jury…"

49. The Appellants' Counsel's essential argument before the Judge (and on appeal) was very attractively presented. It may be summarised as follows:

(1) The Respondent bore the burden of proving that the arresting officer, PC Stapleton, had reasonable grounds to arrest the Appellants and there is both an objective element and a subjective element to the test for reasonable suspicion. The subjective element of the test – but only if sufficient evidence had been called – was a matter for the jury.

(2) The offence in question was burglary, contrary to section 9 of the Theft Act 1968 ("TA 1968"). The offence has both an *actus reus* element, namely entering a building as a trespasser and committing or attempting to commit any of the specified offences, and a *mens rea* element, namely entering a building with the intent to commit any of the specified offences.

(3) At no stage during the course of the evidence did PC Stapleton state what he thought the Appellants were intending to do inside the premises. PC Stapleton stated that he suspected the Appellants of "burglary" but all of the evidence pertaining to this related to his suspicion that the Appellants were trespassers.

(4) It was not enough that PC Stapleton gave evidence that he suspected the Appellants were trespassers and that he suspected them of burglary: he had to give evidence of what he suspected the Appellants intended to do inside the premises and the basis for that suspicion and this had to accord with the definition of burglary as in section 9 of TA 1968, in order for there to be sufficient evidence of *all* of the requisite elements of the offence.

(5) To leave a question to the jury on whether PC Stapleton honestly suspected the Appellants of "burglary" invited the jury to speculate as to whether he suspected the Appellants of intending to steal or cause damage, when there was no such evidence before the court.

50. These submissions were further developed orally by the Appellants' Counsel through references to PC Stapleton's evidence, and I have considered the transcript of that evidence myself following the hearing, as she invited me to do.

51. Counsel for the Respondent argued this ground was misconceived. He began by relying upon R (on the application of Rutherford) v Independent Police Complaints Commission [2010] EWHC 2881 (Admin) at [18]:

> "Accordingly, at the time at which the police officers acted as they did, with the belief they had, the police officers were empowered to act as they did. The power existed and they were justified in using it. There is no requirement at common law for them to be aware of the legal origin of the power they were exercising in order for the exercise of the power to be lawful. A legally accurate identification of the precise legal power under which a police officer acts is not, in the absence of specific provision to that effect, a requirement of its lawful exercise. There is no requirement to call the statutory provision or the correct section or subsection to mind at the moment a police officer exercises any power of stop, arrest or search in order for its exercise to be lawful. An act is not unlawful because a police officer does not ask himself or forgets which power he had, provided that he had the power to do what he did with the knowledge and belief which he had. No authority exists for Mr Thomas' proposition that knowledge of the legal origin of the power being used at the time it is used is necessary for its lawful exercise. I am not surprised that no authority exists; the proposition is untenable."

52. Counsel for the Respondent forcefully submitted that it was sufficient that there was evidence before a jury that the arresting officer suspected the detained person of committing the relevant criminal offence. When an arresting officer states that they suspected the detained person of an offence it is inherent/implied that they suspected the detained person of all of the elements of the offence. In this regard, Counsel submitted that if the Appellants did not accept that PC Stapleton suspected them of each and every element of the offence of burglary it was incumbent upon them to put that specifically to him. This was said to be particularly the case with a word such as "burglary" which is generally understood by the public at large.

53. Counsel for the Respondent took me to the evidence that PC Stapleton repeatedly stated that he suspected the Appellants of being involved in a "burglary".

54. I accept that at no time was it put to PC Stapleton that he was unaware of the elements of a burglary or that he did not suspect the Appellants to be culpable of one or more of those elements. In my judgment, if this point was to be taken, that question should have been put.

55. I also consider it significant that the jury questionnaire specifically informed the jury on its face that (my emphasis),

> "Burglary.

> The offence of burglary involves
>
> a) Entering part of a building as a trespasser (i.e without lawful authority); and
>
> b) Stealing something from there - or intending to steal from or damage property there."

56. Before turning to the Judge's reasons and my own conclusions in relation to this first ground of appeal, in my judgment it is important to underline how low a hurdle "suspicion" is. In Hussein v. Chong Fook Kam [1970] AC 942: Lord Devlin (for the Privy Council) explained at 948B-D

> "…suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' Suspicion arises at or near the starting point of an investigation ... Suspicion can take into account matters that could not be put in evidence at all. ... Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case…"

57. In order to explain the Judge's reasoning in rejecting the Appellant's submission on this ground, I need to set out the relevant parts of his Judgment:

> "1. At the close of the evidence on Friday afternoon, the claimants made a series of submissions to the effect that I should, on the evidence, enter judgment for the claimants without the need for factual findings from the jury. I rejected those submissions saying that I would give further reasons later, these are those reasons.
>
> 2. The legal framework for the submissions came from the authorities of Dallison v Caffery [1965] I QB 348, Balchin v The Chief Constable of Hampshire [2001] EWCA Civ 538 and McPhilemy v Times Newspapers Ltd (No.3) [2001] EWCA Civ 871.
>
> 3. Ms Morris for the claimants acknowledged that on the authority of McPhilemy she had a high hurdle to clear and properly drew my attention to paragraph 34, 'Only when it is plain that one verdict alone would be rational and any other perverse should the issue be withdrawn' and before that, 'It will often be unwise for trial judges to withdraw issues from the jury and by the same token unwise for counsel to invite them to do so'.
>
> 4. Balchin is really a decision on its own facts where a first instance judge took it upon herself to make factual findings which ought to have been left to a jury. In Dallison v Caffrey I was taken to page 372 of the judgment of Diplock LJ as he then was and the passage at (d) to (f) which reads

…

5. None of this is controversial legally but it helpfully sets out the framework to the submissions made on behalf of the claimants. I take from these authorities that at a civil jury trial such as this, it is for the trial judge to identify the factual issues to be left to the jury, the resolution of which will enable that judge to determine the case. Obviously a judge should be wary of substituting his or her view of the evidence for that of the jury and wary of deciding what would be a rational finding of fact and what would be perverse but at the same time there is no need for a jury to determine an issue if there is no conflict of evidence.

6. For the claimants Ms Morris' first submission was the state of the evidence was such that there could be no rational basis for finding that, on arresting the claimants, the police, in the form of PC Stapleton, had a reasonable suspicion that the Magees had committed an arrestable offence. It is necessary to look very briefly and in summary at what are the undisputed facts.

7. Briefly, Thomas Magee had occupied as his bedsit a room at 79 Cobden Street in Long Eaton. On the night of 14 April 2012 the police got a report from a member of the public saying that people were breaking into the property by removing boarding at the front window and entering through that window. On arrival, the police found boarding removed. They believed, it is said, that Thomas Magee had been evicted from the flat. It is said also that there was a reluctance for those inside to reveal their presence.

8. It is agreed that there was something said along the lines by Thomas Magee or those inside the property, when challenged by the police, that Thomas Magee lived there but he had lost his key. The evidence of the police in the form of PC Stapleton as arresting officer was that he suspected that the claimants were engaged in a burglary. Ms Morris's point is that since the officer did not specify what type of burglary he suspected, there could be no reasonable ground tor that suspicion. The submission, as I understand it, is that since PC Stapleton did not address his mind to the different components of burglary, that is trespass, and then intent to steal or to cause damage or indeed grievous bodily harm, there was no evidence of exactly what PC Stapleton suspected and therefore no evidence of any reasonable suspicion.

9. I reject that submission, PC Stapleton said in terms that he suspected a burglary; burglary is entry as a trespasser and either stealing or intending to steal or cause criminal damage. If the evidence is that the officer suspected burglary that is quite capable of covering all elements of the offence. The requirement is that the arresting officer must have an honest suspicion of an indictable offence; he said that he did and that the offence was burglary. He does not, in my judgement, need to dismantle that

> suspicion into its component parts. It may be a matter for submissions to the jury that no such suspicion of an indictable offence was held because for example, an officer did not understand what the constituents of the offence were, but there was no suggestion of that in this case, no one was suggesting to PC Stapleton, you do not know what a burglary is.
>
> 10. There is evidence that would enable a jury to find that PC Stapleton did suspect a burglary; that is a jury question. Whether or not that suspicion was reasonably held is then a question, primarily, for me and I consider, at present, that it remains a matter for submissions."

58. In my judgment, there is no error of law or of fact in this reasoning, which essentially reflects the Oral Ruling. Indeed, it would be hard to improve upon it.

59. The Judge directed himself according to the relevant case law, including Dallison (para. 4), and was right (para. 9) to decide that a suspicion of burglary is enough without the officer having to "dismantle" that suspicion into component parts. He was right in identifying on the undisputed facts (para. 6), there was evidence which would enable a jury to find that PC Stapleton did suspect a burglary.

60. The reasoning is unimpeachable. Indeed, had the Judge withdrawn this issue from the jury he would have risked committing the error identified by Simon Brown LJ in McPhilemy v Times Newspapers Ltd [2001] EMLR 34, per Simon Brown LJ at [34]:

> "…it will often be unwise for trial judges 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."

61. The Appellants' next complaint under Section 24 of PACE relates to Parker Questions 2/4: did PC Stapleton have reasonable grounds to suspect that the Appellants had committed or were committing the offence of burglary?

62. As the extract from the Judgment above shows (see the last sentence of para. 10 of the Judgment), the Judge said he would determine this objective question himself following submissions.

63. He decided this issue in favour of the Respondent and his brief reasons are in the Agreed Note (see para. 68 below).

64. The central argument of the Appellant is that on the evidence before the Judge, this was not a conclusion open to him. It is said that there was no evidence that PC Stapleton had reasonable grounds to suspect that the Appellants were guilty of the "complete" offence of burglary.

65. The argument of Counsel for the Appellant, although not put in this way, has to be that the Judge's conclusion on this issue was perverse. There would not be any other way an appeal court could entertain such a complaint concerning a factual conclusion.

66. Before turning to my consideration of this submission, it is helpful to recall the relevant legal principles which were summarised by the Court of Appeal in Parker at [115] as follows:

> "The bar for reasonable cause to suspect set out in section 24 (2) of the 1984 Act is a low one. It is lower than a prima facie case and far less than the evidence required to convict: *Dumbell v Roberts* [1944] 1 All ER 326, 329A and *Hussien v Chong Fook Kam* [1970] AC 942, 948 —949; see also *Castorina's case* 160 LG Rev 241 and *O'Hara's case*, at p 293. Further, prima facie proof consists of admissible evidence, while suspicion may take account of matters that could not be put in evidence: *Hussien's case*, at p 949, and *O'Hara's case*, at p 293. Suspicion may be based on assertions that turn out to be wrong: *O'Hara's case*, at p 298D —E. The factors in the mind of the arresting officer fall to be considered cumulatively: *Armstrong's case*, at para 19, and *Buckley's case*, at para 6."

67. It is plain from this extract that "grounds" within s. 24 (2) of PACE relate to the factual matters that support the officer's suspicion – the 'particulars of the case against him'.

68. I need to turn to the Agreed Note for the Judge's reasons for determining this issue in favour of the Respondent:

> "Grounds of arrest. The jury found in relation to both that there was an honest suspicion on the part of PC Stapleton that the offence of burglary was being committed. It is said that objectively there were no reasonable grounds for that suspicion. The basis for that suspicion is that PC Stapleton did not say what species of burglary was involved: theft, criminal damage or grievous bodily harm. He did say that he suspected burglary. I take that to be a compendious term. The jury has found that suspicion was genuinely held. The question is whether that was reasonably held. I have no doubt that it was. The reasons that were given by PC Stapleton were that the police had found a situation where people were breaking into a property through a boarded up broken window at night. There are various possibilities. One obvious possibility is burglary – a trespass – why go through the window? One obvious motive is to steal or cause damage inside. It is entirely reasonable. There is no need to break it down into individual parts. It is all encompassed into the words 'burglary has been or would be committed."

69. I agree with this conclusion. My reasons are as follows:

(1) First, where people are seen breaking into a property and the police are told that they are not permitted to be there, that is plainly a reasonable basis to suspect

that they may be burgling the property. I wholly endorse the following observation (or puzzled query) of the Judge in an exchange with Counsel for the Appellant during submissions:

> "JUDGE GODSMARK: People force their way into a property at night through a window and you cannot suspect that they are burglars?"

(2) Second, PC Stapleton's evidence in the transcripts I was taken to was plainly sufficient to set out reasonable grounds to suspect that the Appellants were burglars. Without identifying every point, the following points are of significance in this regard:

(a) The police had been called in connection with a burglary.
(b) It was 00:30.
(c) Entry had been forced.
(d) Damage had been caused.
(e) Multiple sources had stated that the property should be vacant.
(f) The property was in darkness.
(g) The occupants refused to speak to or co-operate with the police.
(h) They refused to co-operate despite having sustained an injury.
(i) They refused to co-operate for a substantial period of time.
(j) The occupants did not have a key.
(k) The occupants refused to leave.
(l) PC Stapleton was aware of the Appellants and their arrest and conviction histories.

(3) Third, bearing in mind how low the hurdle is, the question may be posed what further factual matters would be required to give rise to a reasonable suspicion if one did not exist in the circumstances of this case.

V. PACE s.24: necessity

70. The claimed error by the Judge in relation to this ground was his decision to leave the following question to the jury:

> Have the police proved that when Thomas Magee was arrested, PC Stapleton believed that it was necessary to arrest him in order to either
>
> a) allow a prompt and effective investigation?
>
> or
>
> b) prevent Thomas Magee causing loss or damage to property?

71. This is Parker Question (5). The relevant legal principles concerning the "necessity" question were not in dispute between the parties. The Respondent bears the burden of proving that the arrest of the Appellants was necessary.

72. The application of the necessity criteria was considered in Richardson v Chief Constable of West Midlands Police [2011] 2 Cr App R 1, in which a schoolteacher successfully challenged the lawfulness of his arrest for assaulting a pupil, after he had attended the police station voluntarily. The decision in Richardson was considered in Hayes v Chief Constable of Merseyside Police [2012] 1 WLR 517 where Hughes LJ, at [40], having acknowledged that it might be quite unnecessary to arrest a schoolteacher who had attended the police station voluntarily, explained that the correct test for the assessment of whether an arrest met the requirements of necessity was:

> "…(1) the policeman must honestly believe that arrest is necessary, for one or more identified section 24(5) reasons; and (2) his decision must be one which, objectively reviewed afterwards according to the information known to him at the time, is held to have been made on reasonable grounds..."

73. The decisions in Richardson and Hayes and also Lord Hanningfield v Chief Constable of Essex Police [2013] 1 WLR 3632 were considered more recently in R (on the application of TL) v Chief Constable of Surrey Police [2017] EWHC 129 (Admin) where at paragraph 40, Jay J observed:

> "However, it should be emphasised that the underlying concept in section 24(5) is that of necessity. This cannot be envisaged as a synonym for "desirable" or "convenient". For present purposes, the issue may be formulated thus: should this Court, in the exercise of its review function, conclude that an arrest was necessary to allow the prompt and effective investigation of this complaint?"

74. Counsel for the Appellants submitted that during the course of PC Stapleton's evidence, there was no specific reference to section 24 of PACE, nor subsection (5) of the same section. She argued that, at its highest, PC Stapleton said that the reason for arresting the Appellants was to prevent them from committing further offences and so that they could be taken into custody and interviewed. It was submitted that no explanation was given for why it was believed that the Appellants would commit further offences and indeed no evidence was given as to what those offences were; and no evidence was given as to exactly when PC Stapleton expected that the Appellants would be interviewed, aside from when they had "*sobered up*".

75. The Appellants submitted that in these circumstances, no question ought to have been left to the jury on whether PC Stapleton believed the arrest of the Appellants to have been necessary to allow a prompt and effective investigation or to prevent loss or damage to property. Counsel argued that the evidence called by the Respondent was insufficient to meet the requirement of necessity for a lawful arrest.

76. She explained that the effect of this lack of evidence was twofold. First, the Judge ought to have determined as a matter of law that the Respondent had failed to establish that, even if PC Stapleton had considered necessity prior to the arrest of the Appellants, his

decision, objectively reviewed, was not made on reasonable grounds, since, even on his own evidence, the decision-making process contained no reference to section 24(5) of PACE (and the specific criteria set out therein). Second, there ought to have been no question for the jury on whether PC Stapleton honestly believed it was necessary to arrest the Appellants to allow a prompt and effective investigation or to prevent loss or damage to property, there being no evidence for the same.

77. Counsel for the Respondent submitted that PC Stapleton had explained in evidence why he considered it was necessary to arrest the Appellants: it was in order to stop them committing further offences and so that they could be taken into custody and interviewed. Accordingly, it was argued that PC Stapleton's evidence plainly satisfied s. 24 (5) (c) (iii) and s. 24 (5) (e).

78. I was referred, in relation to s. 24 (5) (e) of PACE, to the Statutory Code to PACE Code G which provides that an example of the need to arrest for a prompt and effective investigation would include,

> "interviewing the suspect on occasions when the person's voluntary attendance is not considered to be a practicable alternative to arrest, because for example: … it is thought likely that the person: … may collude or make contact with, co-suspects or conspirators;"

79. Counsel for the Respondent said that this was plainly applicable to this claim. In this instance there were three suspected offenders. He submitted that each of the alleged offenders would need to be interviewed. It would plainly be necessary to ensure that they could not collude to ensure the prompt and effective investigation of the offence.

80. I accept the Respondent's submissions and they were in substance accepted by the Judge in the Judgment:

> "11. The next submission also relates to lawfulness of arrest. The submission is that there is no evidence that the claimant's arrest was necessary and that brings into focus Section 24 of the Police and Criminal Evidence Act. The power of summary arrest is exercisable only if the arresting officer has reasonable grounds for believing that it is necessary to arrest the person in question; that is Section 24(4). It needs to be necessary for any of the reasons mentioned in Section 24(5). Relevant to this case is Section 24(5)(c)(iii):'To prevent the arrested person causing loss of or damage to property' and Section 24(5)(e), 'To allow the prompt and effective investigation of the offence or of the conduct of the person in question'.
>
> 12. The evidence of PC Stapleton was that he considered it necessary to arrest the claimants because, as he put it, 'If I left them there they might commit further offences' he said they needed to be taken into custody to sober up so they could be interviewed about the allegations and he said they needed to be arrested to obtain evidence by questioning'. It seems to me that those reasons given by PC Stapleton are capable of satisfying

> Section 24(5). I do not consider it necessary that the reasons given should recite a statutory mantra. It is a question for the jury as to whether those reasons proffered by PC Stapleton fall within either Section 24(5)(c)(iii) or Section 24(5)(e). I therefore reject the submission that this issue should be withdrawn from the jury."

81. Again, I consider this reasoning to be unimpeachable. The Judge directed himself correctly in law and asked himself whether there was an evidential basis for the question to be safely put to the jury on the necessity issue. There plainly was such a basis.

82. In my judgment, he was also right to say that there was no need for a "statutory mantra" to be recited by the officer in his evidence. I reject this ground of appeal.

VI. PACE s.28: grounds for arrest

83. Section 28 of PACE provides as follows:

> "28 Information to be given on arrest
>
> (1) Subject to subsection (5) below, where a person is arrested, otherwise than by being informed that he is under arrest, the arrest is not lawful unless the person arrested is informed that he is under arrest as soon as is practicable after his arrest.
>
> (2) Where a person is arrested by a constable, subsection (1) above applies regardless of whether the fact of the arrest is obvious.
>
> (3) Subject to subsection (5) below, no arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of, or as soon as is practicable after, the arrest.
>
> (4) Where a person is arrested by a constable, subsection (3) above applies regardless of whether the ground for the arrest is obvious.
>
> (5) Nothing in this section is to be taken to require a person to be informed—
>
> (a) that he is under arrest; or
>
> (b) of the ground for the arrest,
>
> if it was not reasonably practicable for him to be so informed by reason of his having escaped from arrest before the information could be given."

84. The relevant legal principles concerning the operation of section 28(3) PACE 1984 in practical terms were considered in Chapman v DPP (1989) 89 Cr App R 190, where, at 197, Bingham LJ said:

> "It is not of course to be expected that a police constable in the heat of an emergency, or while in hot pursuit of a suspected criminal, should always have in mind specific statutory provisions, or that he should mentally identify specific offences with technicality or precision. He must, in my judgment reasonably suspect the existence of facts amounting to an arrestable offence of a kind which he has in mind. Unless he can do that he cannot comply with section 28 (3) of the Act by informing the suspect of grounds which justify the arrest."

85. The parties were agreed that the authoritative statement of the law in relation to s. 28 (3) was to be found in Taylor v Chief Constable of Thames Valley Police [2004] EWCA Civ 858, [2004] 1 WLR 3155, where Clarke LJ explained at [26] (my underlined emphasis):

> "In the light of all the authorities I would hold that the modern approach to the application of section 28 (3) is that set out in . . . the judgment in *Fox, Campbell and Hartley v United Kingdom* (1990) 13 EHRR 157, 170. The question is thus whether, having regard to all the circumstances of the particular case, the person arrested was told in simple, non-technical language that he could understand, the essential legal and factual grounds for his arrest. In the light of the case law as it has developed I doubt whether it will in the future be necessary or desirable to consider the cases in any detail, or perhaps at all. It seems to me that in the vast majority of cases it will be sufficient to ask the question posed by the European Court of Human Rights.… [35] Each case depends upon its own facts. It has never been the law that the arrested person must be given detailed particulars of the case against him. He must be told why he is being arrested."

(I note in passing that in this case the arresting officer said very little: 'I am arresting you on suspicion of violent disorder on 18 April 1998 at Hillgrove Farm').

86. Both parties also referred me to Walker v Commissioner of Police of the Metropolis [2014] EWCA Civ 897; [2015] 1 WLR 312, in which the arresting officer told the detainee that he was 'under arrest for public order'. At [43] Sir Bernard Rix LJ explained:

> "My mind has wavered on this, because public order can denote a wide variety of offences, some much more serious than others: see the 1986 Act. Section 5, let us say disorderly conduct, is a merely summary offence, unlike other offences in the Act. However, as Clarke LJ said in Taylor's case [2004] 1 WLR 3155, para 35: 'Each case depends upon its own facts. It has never been the law that the arrested person must be given detailed particulars of the case against him. He must be told why

> he is being arrested. In the particular circumstances of this case Mr Walker must have been fully aware that he was being arrested for his conduct in the face of PC Adams and that this was regarded as being a public order offence. It seems to me that that is here a legally and factually adequate explanation of the reason for his arrest. Although in some situations legal labels may matter more than in others, I do not think that the particular legal label of a particular offence matters so much if the arrested person knows that he is being arrested for the conduct he has immediately carried out, a fortiori in the face of the arresting officer, and after warnings that such conduct may lead to his arrest."

87. The relevant question which the Judge left to the jury was as follows:

> "Have the police proved that when Thomas Magee was told that he was under arrest on suspicion of burglary, the circumstances were such as to make him aware that he was being arrested on suspicion of burglary at 79 Cobden Street committed that night?"

88. In submitting that the Judge was wrong to leave this question to the jury, Counsel for the Appellants argued that in order to comply with the requirements of section 28(3) of PACE on the facts of this case, PC Stapleton had to say something more than what the offence in question was (burglary). She said that this is not a case where the Appellants had received a warning about their conduct (and it is not in dispute that the Appellants were not actually committing a burglary). She relied on the facts that throughout the course of the incident, the First Appellant was explaining that he lived at the premises. Therefore, it was submitted that the Appellants needed to be told that they were under arrest and that they were under arrest for burglary and why, notwithstanding the First Appellant's protestations about the lawfulness of his presence in the premises, they were nevertheless being arrested. She argued that "grounds" in this context means something about why the discretion to arrest has been exercised (and must have been what PC Stapleton had in mind).

89. The Appellants' Counsel argued that the effect of the state of the evidence was twofold. First, in the light of PC Stapleton's admission that he did not give and did not attempt to give the grounds for the arrest in relation to either Appellant, as a matter of law the Judge should have determined the issue in the Appellants' favour. She submitted that there was no evidence that any grounds for arrest were given. The test was whether the Appellants had been provided with the "*essential legal and factual grounds*" in the particular circumstances of the case. The test had not been met, on the Respondent's own evidence. Second, bearing in mind that it was accepted that the grounds for arrest were not given, there ought to have been no issue for the jury to determine, since there was a clear breach of section 28(3) of PACE, and thus no question left to the jury on that matter.

90. In response, the Respondents contended that the Appellants have wrongly conflated the 'grounds for suspecting' (s. 24) with the 'ground for the arrest' (s. 28(3)). The two terms are not interchangeable. The "grounds for suspecting" are the basis for the arresting officer's suspicion. The ground for the arrest is *why* the detained person is being

arrested – the *when*, *where* and *what* of the particular offence. I consider this submission to be correct.

91. The Respondent submitted on the facts the Appellants were fully aware of the ground for which they were arrested and indeed they did not say at any stage that they were unaware of the "when, the where and the what of the offence" – it was plain from all the circumstances and properly and fairly conveyed by PC Stapleton telling them that they were under arrest on suspicion of burglary.

92. I was also taken to the Appellants' pleaded case that 'The officers then stated that they believed the persons in the premises were burgling it'. It was submitted that the Appellants were aware of, and told, the essential legal and factual grounds for their arrest – because they were suspected of burgling the premises that they were in. Again, I accept the substance of these submissions which Counsel for the Respondent presented with clarity and persuasion.

93. The Judge's reasons in his Judgment on this issue were as follows:

> "13. The next submission relates to the information given on arrest. Under Section 28 of the Police and Criminal Evidence Act, on arrest a person must be informed of the ground for that arrest. That simple statement begs the question what is meant by grounds? The most recent Court of Appeal authority is, I think, Walker v Metropolitan Police Commissioner [2015] 1 WLR 312 in which the leading cases of Taylor v Chief Constable of Thames Valley [2004] EWCA Civ 858 and the decision of the European Court of Human Rights in Fox Campbell and Hartley v The United Kingdom were revisited.
>
> 14. In Walker a person was arrested and told that it was for public order. The judge found that the claimant had been aggressive and threatening to the police on their arrival, that a police officer had told the claimant to calm down or he would end up getting arrested, that the claimant had stood in the front doorway of the house in such a way as to prevent the claimant from leaving and thus detaining the claimant for a few seconds without touching him, that the claimant had continued to be aggressive and pushed the officer and the officer had then arrested the claimant giving public order as the reason for the arrest.
>
> 15. In Walker the Court of Appeal at paragraph 39 referred to a passage from Taylor, in particular the passage of Clarke LJ [cited]
>
> …
>
> Paragraph 43 also cites Clarke LJ in the same case of Taylor, 'Each case depends upon its own facts; it has never been the law that the arrested person must be given detailed particulars of the case against him. He must be told why he is being arrested'.

> 16. One considers that alongside the commentary in Archbold, citing Fox at paragraph 15-201, 'Upon making an arrest for violent disorder it has been sufficient to refer to violent disorder with a reference to the time and place. There is no need to specify the precise way in which the arrestee was said to be taking part' that is echoed in Blackstone. According to the Police and Criminal Evidence Act Code C, note for guidance IO(b) and Code G, note for guidance 3, 'Where a person is arrested for an offence he must be informed of the nature of the suspected offence and when and where it was allegedly committed'.
>
> 17. From these sources I conclude that a person must be made aware, on arrest, of what offence he is being arrested for and when and where it was allegedly committed. What is required to be communicated, or at least the arrested person made aware of, is what, when and where. There is no requirement to give any detail of precisely how it is alleged that the offence was committed. From the case of Walker itself it seems that the circumstances of arrest may be such as to make the arrested person aware of at least some of the grounds and in my judgment this is and remains essentially a jury question and it will be left to them as such."

94. I put to Counsel for the Appellants in argument the point that the Judge's summary of the relevant principles to be drawn from the cases (see para. 17 immediately above) was to my mind plainly accurate. She did not suggest any aspect in which it was incorrect, and I consider it was indeed accurate.

95. As to the application of those principles, on the evidence the Judge was in my judgment right to leave the question to the jury: there was an evidential basis for them to find that the essential legal and factual grounds for the Appellant's arrest were communicated to them.

96. Accordingly, I reject this ground for the reasons given by the Judge.

VII. PACE s.37: detention

97. Insofar as material, section 37 of PACE provides:

> "(1) Where –
>
> a person is arrested for an offence –
>
> without a warrant…
>
> the custody officer at each police station where he is detained after his arrest shall determine whether he has before him sufficient evidence to charge that person with the offence for which he was arrested and may detain him at the police station for such period as is necessary to enable him to do so.

> (2) If the custody officer determines that he does not have such evidence before him, the person arrested shall be released [-]
>
> (a) without bail unless the pre-conditions for bail are satisfied, or
>
> (b) on bail if those pre-conditions are satisfied,
>
> (subject to subsection (3)).
>
> (3) If the custody officer has reasonable grounds for [believing that the person's detention without being charged is necessary to secure or preserve evidence relating to an offence for which the person is under arrest or to obtain such evidence by questioning the person], he may authorise the person arrested to be kept in police detention…"

98. In Wilding v Chief Constable of Lancashire (22 May 1995, unreported), the Court of Appeal considered the meaning of 'necessary' in the context of the custody officer's determination under s.37(2) PACE of whether a person's detention without charge 'is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him.'

99. The Court held that the word 'necessary' had to be construed in the light of all the circumstances and that (per Beldam LJ at p.10),

> "…a court, in deciding whether or not a person has been unlawfully detained, should ask itself the question, in circumstances like this, whether the decision of the custody sergeant was unreasonable in the sense that no custody officer, acquainted with the ordinary use of language and applying his common sense to the competing considerations before him, could reasonably have reached that decision."

100. That approach to determining the lawfulness of the custody officer's decision to authorise detention was endorsed in Al-Fayed v Commissioner of Police of the Metropolis [2004] EWCA Civ 1579 at [96]-[98].

101. The relevant questions left to the jury were as follows:

> "Have the police proved that, when PS Munro authorised the detention of [the First Appellant] at the police station, she honestly believed that such detention was necessary to secure or preserve evidence – or to obtain evidence by questioning?
>
> If PS Munro did believe that the detention of [the First Appellant] was necessary to secure or preserve evidence – or to obtain evidence by questioning, have the police proved that what PS Munro was told about the circumstances of [the First Appellant's] arrest was sufficient to make her belief reasonable?
>
> Have the police proved that when [the Second Appellant] was told that he was under arrest on suspicion of burglary, the

circumstances were such as to make him aware that he was being arrested on suspicion of burglary at 79 Cobden Street committed that night?

Have the police proved that the detention of [the Second Appellant] at the police station was authorised in the honest belief that such detention was necessary to secure or preserve evidence – or to obtain evidence by questioning?"

102. The difference in the questions as regards each Appellant arose because the factual position in relation to each of them at trial was different, as explained further below. In short, the custody officer, PS Munro had authorised the First Appellant's detention but there was no evidence of a similar nature in relation to the detention of the Second Appellant. She had not dealt with the Second Appellant's reception into custody.

103. In respect of the First Appellant, Counsel argued that the Judge should not have left this issue to the jury for reasons which I summarise as follows:

(1) The custody record only stated that the circumstances of his arrest were that he had been arrested for burglary at 79 Cobden Street. The custody record did not state anywhere what the grounds for that arrest were. Both PC Stapleton and PS Munro gave evidence that the policy at the time was for the grounds for arrest to be recorded on a separate form. No such form had ever been disclosed and, in fact, PS Munro's evidence was that the procedure was for the forms to be destroyed. PS Munro had no independent recollection of the incident involving the Appellants and therefore was unable to assist with what any grounds for the First Appellant's arrest were said to be.

(2) The requirement for the custody officer to have reasonable grounds for belief in the necessity of detention requires similar considerations as those required when looking at the test of reasonable grounds for arrest. It is perverse to suggest that the custody officer's assessment of whether detention without charge is necessary for a particular offence can be reasonably and lawfully carried out without any consideration of whether the information being presented to the custody officer amounts to that offence in law.

(3) There was no evidence as to what PS Munro took into account when determining whether there were reasonable grounds for the First Appellant's detention, aside from that he was presented as someone who was under arrest purportedly for burglary at 79 Cobden Street.

(4) As such, in the absence of relevant evidence, the issue ought to have been determined as a matter of law by the Learned Judge, in the First Appellant's favour. There ought to have been no question for the jury on the same.

104. The position in respect of the Second Appellant was submitted to be even worse for the Respondent's case. There was no custody record for the Second Appellant available at trial and no custody officer was called to give evidence in respect of the Second Appellant's detention. Counsel accordingly submitted that there was no evidence as to whether the Second Appellant's detention was authorised, who might have authorised it, if it was authorised, the grounds on which it might have been authorised and the

reasons for authorisation of detention. As to the contention that the Second Appellant's detention was probably authorised on the same basis as the First Appellant's detention, Counsel argued such a course was "extremely dangerous". This was because such a course did not invite the jury to draw an inference but instead to speculate on what a person of an unknown identity *might* have done and the reasons they *might* have had for so doing.

105. In response, Counsel for the Respondents reminded me that the Appellants did not challenge the evidence that at the material time custody sergeants were provided with 'yellow forms' that set out in more detail the surrounding circumstances of an arrest. He also took me to oral evidence from PS Munro that confirmed that not every arrestee has their detention authorised, and that she was clear that she would have considered the circumstances of the detention and that had there been no basis for the detention of the First Appellant then he would have been released.

106. It was submitted that it was plain that, on the circumstances as they were, the detention of the First Appellant for the purpose of interview was both necessary and lawful (or at least it was matter for the jury).

107. In relation to the Second Appellant, Counsel for the Respondent said it was regrettable that the custody record had been lost, but he said that was not surprising given the passage of time. He conceded that that there was no direct evidence as to who authorised the Second Appellant's detention. However, he prayed in aid the point that the issues in relation to each Appellant were identical. This was the central point upon which he relied as basis for the matter being left to the jury.

108. The Judge addressed the Section 37 issue as follows in the Judgment:

> "18. A further submission is made in relation to the authorisation of the detention of Thomas Magee. Section 37 of the Police and Criminal Evidence Act deals with the basis upon which an arrested person can be detained before charge. The custody officer must have reasonable grounds for believing that detention without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning. In relation to Thomas Magee, the custody sergeant was Sergeant Munroe. Her evidence was that she was told at the time the circumstances of Thomas Magee's arrest. That would have been on what she described as the yellow sheet filled in by officers who brought him in. The yellow sheet it appears has now been destroyed after a passage of time. Sergeant Munroe says that she would have believed at the time, from what she was told, that detention was necessary to secure or preserve evidence and to obtain evidence by questioning. She says this because that is what she recorded on the custody form itself. The submission is that there is no evidence of precisely what she was told and thus no evidence that she had reasonable grounds to detain, however, the requirement is not to prove what Sergeant Munroe was told. What is required to be proved is that Sergeant Munroe had the belief that detention was necessary to secure or preserve

evidence or to obtain evidence by questions. She says that she did and recorded that belief on the custody sheet. It is a matter for the jury as to whether or not they accept that evidence but if they do they can find that such belief was held.

19. I also regard the issue of what Sergeant Munroe was told about the arrest to be a jury question. It is not for me to make findings about what Sergeant Munroe was told and then decide whether any belief as to the necessity for detention was reasonable. This, in my judgement, is an occasion when whether or not a belief is reasonable will turn upon the view taken by the jury as to what they consider it likely that Sergeant Munroe was told. The jury will not need to make findings as to the precise words used to her. They will simply need to consider whether they are satisfied that Sergeant Munroe was told, sufficient in the circumstances, of the arrest of Thomas Munroe, as they find them to be, to make any belief as to the necessity for the detention, reasonable. That may involve drawing an inference. It will be for them to decide whether it can be drawn.

20. Andrew Magee poses a different problem. His custody record is lost and so there is no direct evidence of why he was detained or on whose authority. The claimant says without such evidence Andrew Magee's case, at least on continued detention, must succeed. The defendant says that because Andrew is in exactly the same position as Thomas, the jury could draw inferences that the same reasoning was applied to him. This is the point which caused me the greatest hesitation. Could a jury properly find, on the balance of probabilities, that the same criteria for detention of Thomas applied to Andrew, even though there is no direct evidence? I have concluded that they could so find. Whether they do or not is another matter but these are essentially jury issues and will be left to the jury."

109. I consider the Judge's conclusions and reasoning in relation to the First Appellant to be justified and legally correct. On the basis of the evidential material before me, it was appropriate to leave it to the jury to determine whether PS Munro had the belief that detention was necessary to secure or preserve evidence or to obtain evidence by questions. The Judge was also right to regard the issue of what PS Munro was told about the arrest to be a jury question. Further, there was no error in his reasons for holding that it was not for him to make findings about what she was told and then decide whether any belief as to the necessity for detention was reasonable.

110. Like the Judge, the lack of evidence in relation to the Second Appellant, is a matter that caused me real concern. The question on appeal however is whether I can say that the Judge's decision to allow the jury to consider whether the same criteria for detention was "wrong", bearing in mind that the decision under challenge resulted from his factual evaluation as to evidence.

111. I approach that question by asking whether, on the material before him, that decision was open to him. This question has to addressed with a recognition that this is an issue where there is room for reasonable disagreement.

112. Applying those standards, I consider this was a lawful decision. This was not a case of the evidence being all one way, where on no conceivable basis could a jury, properly directed, decide the factual issues concerning the Second Appellant in favour of the Respondent. I have not ignored the fact that this is a case concerning liberty of the subject and the burden upon the Respondent. I found Ms Morris' powerful submissions on this issue very persuasive, and excellently structured, but ultimately I was not persuaded there was an error by the Judge.

113. In both civil and criminal trials, fact finders commonly need to reach conclusions based upon inferences. There must however always be a core basic factual foundation for drawing the inference. The evidence I refer to below concerning the Second Appellant provided such a basis. As explained in Mackenzie v Alcoa Manufacturing (GB) Limited [2019] EWCA Civ 2110 at [43]-[51], whether it is appropriate to draw an inference, and if it is appropriate to draw an inference the nature and extent of the inference, will depend on the facts of the particular case.

114. On the facts of this case, the evidence was that the three suspects were treated, save for the hospital transfer of Daniel Magee, in essentially the same manner. It is striking that the Second Appellant refers in both the Particulars of Claim and in his witness statement to being "booked in" – so he accepts that the process was undertaken. There was evidence before the jury in relation to the booking in process in general. The considerations that applied to both Appellants were the same and accordingly on the facts of this particular case it was not wrong for the Judge to allow the jury to draw inferences (if they wished to) from the evidence as a whole about the detention of the Second Appellant.

115. In my judgment, a jury, acting on the balance of probabilities, was in principle able to make findings in favour of the Respondent on the basis of this evidence, even though it was weak. Weakness of a case is not a basis for withdrawing an issue from a jury. One needs to be much closer to the situation described by Diplock LJ in Dallison (cited above) where there is no real conflict of evidence.

116. Indeed, it would be usurpation of a jury's vital role in civil actions of the present type to remove from a jury an issue where (whether for or against the police's position) the evidence is *capable* of leading to a determination of the issue one way, or another.

117. In this case the jury could of course, as Counsel invited them to do in her powerful closing speech, have rejected the Respondent's case as to inference in relation to the Second Appellant. But allowing them to enter into the issue was not an error by the Judge. It was well within the margin permitted to him in making an evaluation as the trial judge.

118. I reject this ground of appeal.

119. For completeness, I should record that the Judge returned to this subject following the verdict when addressing a submission of Counsel for the Appellants that (despite the jury's verdicts) judgment should still be entered for them.

120. The Agreed Note records his ruling as follows:

> "The position with Andrew Magee is significantly different. There is no direct evidence but the same points arise. The jury had the same questions for consideration. Even in the absence of such direct evidence, could the jury infer that whoever authorised the detention of Andrew Magee was told that they were under arrest on suspicion of burglary and authorised it in the honest belief that it was necessary? The jury's conclusion on the balance of probabilities is that there would be no distinction between Andrew and Thomas. They found such a belief would have been honestly held. For the same reasons, I also left to them the question of whether any such belief was reasonable. This was a significant step to take but it was one that the jury was entitled to take. If not, I would have withdrawn it from them. They were entitled to infer that the position would have essentially been the same and that whoever authorised the detention of Andrew Magee would have authorised it in the honest belief that it was necessary and would have done so on reasonable grounds knowing the circumstances of the arrest. In this position I do not propose to revisit my decision to leave those questions to the jury. Again, if it had been for me, I would also have come to the same view. I would have considered it likely that the decision was the same, the information given about both would have been effectively the same or so similar to make no material difference. I would have found that such information was reasonable and that it would have been communicated to the custody sergeant who gave authorisation for detention in the belief it was necessary on a statutory basis. The decision making of the custody sergeant was reasonable, given the circumstances of the arrest. The submissions made in relation to the need for detention are rejected."

121. Although the challenge before me was to the decision to leave this issue to the jury and not to determine it as a matter of law in the Second Appellant's favour, there is (in addition) no error of factual or legal analysis in the Judge's post-verdict conclusions set out above.

VIII. **Trespass, Assault and Battery.**

122. It was common ground that (save in respect of the issue of handcuffing) if the arrests were lawful the trespass and assault and battery claims fall away as being parasitic. I have rejected the appeal in relation to the arrest, so they do fall away and I say nothing further about them.

123. The handcuffing claim was the subject of a separate claim. The Appellants argued that the Respondent called no evidence from officers who handcuffed them and it could not be said to have proved the reasonableness of their handcuffing. It was submitted to me that it could not be inferred from the circumstances as to why those officers, who were

not called to give evidence, might have used the force they did. It was also said that it could not be inferred from PC Stapleton's evidence as to why he might have handcuffed the Appellants that other officers, whose identities have not even been confirmed from the evidence, might have had the same reasons.

124. Counsel accordingly argued that the Judge should have found that as a matter of law and fact, these uses of force for which no justification had been proffered amount to assault and battery.

125. The Judge determined the handcuffing issue himself. The Agreed Note records his reasons:

> "Handcuffs. It is said that the application of handcuffs is an assault. This needs to be justified. It is correct that there has been no direct evidence as to the need for handcuffing, save for PC Stapleton. He said that they would have been applied for officer safety. This was for the purpose of transport to the police station. We know it was an arrest was in circumstances where violence had been offered at the scene by Daniel. Officers had been attacked by one of the three arrested and the suggestion was made that Thomas Magee rose in circumstances that may have posed a threat. There was no direct evidence as to the thought process of the officers. The question is whether the application of handcuffs was reasonable, rather than inevitable. In my view it was not unreasonable for those who were arrested to be handcuffed when they were transferred. I reject the assertion that this constituted an assault. In relation to Thomas Magee there was the potential that handcuffs were used inappropriately or overtightened. PC Stapleton agreed that the application of handcuffs was painful and would often leave a red mark. He gave a demonstration on the police solicitor. He was concerned in applying the usual technique that they might cause her pain. Thus Thomas Magee's description is therefore no more than the usual application of handcuffs. Andrew Magee said it was nothing worth worrying about. Thus in relation to the application of assault, I reject that assertion as well."

126. The question on appeal is whether this was a conclusion open to the Judge (applying a perversity standard of review). In my judgment, this was plainly a rational conclusion.

127. On the facts of this case, there was no requirement for the Respondent to call the witnesses responsible for the handcuffing. A defendant clearly takes a risk in not calling such evidence, but calling that specific type of evidence was not a necessary condition of succeeding on this aspect of the case.

128. The Judge was entitled to draw inferences from all of the evidence before him and to conclude that the use of force was reasonable. I note that Daniel Magee was convicted, on a guilty plea, of assaulting one of the attending officers at the time the three occupants of the bedsit were arrested. The evidence of the attitude of the Appellants and their companion towards the officers on the night amply justified the Judge

concluding handcuffing was justified. This was a situation of violence or potential violence.

129. I reject this ground.

IX. <u>Conclusion</u>

130. The appeal is dismissed.