Neutral Citation Number: [2022] EWHC 1280 (QB)
Appeal Ref No: BM10101A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
On Appeal from the Order of HHJ Godsmark QC
Sitting in Mansfield County Court
Case Number: F18YM451

Birmingham Civil Justice Centre,
33 Bull Street, Birmingham B4 6DS
26/05/2022

B e f o r e :

MR JUSTICE COTTER

Between:

ST	**Claimant/Appellant**
- and -	
THE CHIEF CONSTABLE OF NOTTINGHAMSHIRE POLICE	**Defendant/Respondent**

Sarah Hemingway, Counsel (instructed by Gregsons Solicitors) for the Appellant
Cecily White, Counsel (instructed by East Midlands Police Services) for the Respondent

Hearing dates: 23 March 2022 (& further written submissions on 21st April 2022)

HTML VERSION OF JUDGMENT APPROVED

Mr Justice Cotter:

Introduction

1. This is an appeal against the order of His Honour Judge Godsmark QC made on 11th June 2021 at the conclusion of a jury trial of the Appellant's claim of false imprisonment. At the date of arrest on 20th December 2011 the Appellant was aged 14 years. He was arrested at just after 5.30am in his own home and taken to a Police station where he was placed in an adult cell for several hours before an interview after which he was released on bail (which was later cancelled). He was never charged with any offence.

2. The Judge found that, whilst the arrest and detention were "reprehensible", the way the police powers had been exercised "lamentable" and it was doubtful that the actions would be "justified in the court of public opinion", there had nevertheless been reasonable grounds to suspect the Appellant of an offence of robbery and there had been reasonable grounds to believe that the arrest and detention were necessary.

Facts

3. On Thursday 8th December 2011, just outside the Ellis Guildford school gates, a mobile phone was

snatched from a 12 year old pupil ("EB") by another pupil at her school ("J"). The Appellant spoke to EB after the phone was snatched and chased after J. Although, after a short space of time, J returned the phone to EB, the Tesco SIM card and pink phone case were missing. The victim informed the school attendance officer, Samantha Law, and the incident was reported to the police.

4. On Monday 12th December 2011, the school headmaster met with J and his parents and it was decided that he should be excluded from the school.

5. On 14th December 2011, the school headmaster met with the Appellant and his mother. The Appellant set out in his statement that;

> "I explained what had happened and that I had nothing to do with the theft of the phone. The teacher and police officer told me that they believed me that I was not involved. I thought that it was the end of the matter and I did not expect to hear anything more about it."

6. No further action was taken by the school against the Appellant.

7. On 16th December 2011, the victim made a witness statement in which she named the perpetrator as J and identified the Appellant as having also been present. She stated that after J had taken her phone the Appellant came over to her and asked if she was ok, then he said he would go and get J, before running off in the same direction. EB was helped by another older pupil and her mother. They drove and located J and the Appellant, and the phone was handed over but without the pink case (value £5) and Tesco Sim card (which valueless as it was on contract and stopped immediately). She stated of the involvement of the Appellant:

> "I know that ST did not actually take my phone off me but I do not know who stole my case and SIM card."

8. On 19th December 2011, PC Lilliman attended at the school and the acting head teacher (Richard Pierpont) and the school attendance officer (Samantha Law) made police statements. They both stated that they agreed that J could be dealt with by the Restorative Justice System but supported whatever decision the police made. Mr Pierpoint explained within his statement that J had already been excluded from the school following an internal investigation (so PC Lilliman was fully aware of this).

9. On 19th December 2011, J was arrested by the investigating officer PC Lilliman in the presence of his father at 14.25 (presumably at home) and interviewed at 16.01. He said that the Appellant had told him to steal the phone. He also said that he had handed the phone to the Appellant who had taken out the SIM card and removed the phone cover before handing the phone back to J. I pause to observe that this would have been a curious step as the value lay in the phone not the pink case and EB's sim card. In any event J was bailed at 17.38. The bail would have presumably been with a non-association requirement with the Appellant if there was any concern that there may be contact between J and the Appellant (if there was such no bail condition then PC Lilliman must not have considered it a potential problem).

10. It is of significance to note that although (on his own account) J had snatched the phone from EB (and before any attempt had been made to speak to the Appellant) a decision was taken that J was to be bailed pending a Restorative Justice Program. This gives a guide to the seriousness of the offence in the eyes of PC Lilliman. Considerable reliance was placed during submissions by Ms White upon the fact that at all material times the officers concerned with the subsequent arrest and detention of the Appellant, were dealing with the "*very serious indicatable offence of robbery*". This was, in abstract terms, correct. However, offences of robbery cover a very wide spectrum and the decision as to what to do with J puts the seriousness of the Appellant's alleged offending into perspective before the decision to arrest him was made.

11. A decision was made, presumably by PC Lilliman to arrest the Appellant. The only record of the decision making process is:

> "decision taken to arrest ST the next day, to search for the stolen property before he left for school. E-mail sent to night shift to arrest ST and search for outstanding property and I would deal with him in the morning when I started work at 8.00am."

12. The task was allocated to PC Laughland and PC Turnbull who were working a night shift (10.00pm-7.00 am). It is unclear to me if other officers worked different night shift hours.

13. As Ms Hemingway pointed out this was the only record produced of a justification for an arrest and there is no record of any consideration of whether, rather than an arrest, a search warrant should be obtained and/or a voluntary interview requested.

14. PC Lilliman knew that the pink phone case (value £5) and the Tesco SIM had been taken by either J or the Appellant twelve days previously. The item of value, the phone, had been almost immediately handed back to EB devoid of the personal elements (the case and SIM) which most obviously linked it to the victim. In my view any reasonable officer would have regarded the likelihood that the cover and SIM had been quickly discarded, or discarded after the phone was handed back, or after the matter was investigated by the school, as quite high. Objectively speaking, it is very difficult to see why they would have been retained. PC Lilliman also knew that the school (which objectively would ordinarily have some knowledge about the usual conduct of its pupils) had investigated matters and expelled J and not the Appellant (who , it appears, had been spoken to by/in the presence of a Police officer).

15. Whilst J's allegation was the first time that the Police had become aware of the Appellant's potential involvement in taking the phone/items, the decision to arrest appears to have been taken without any or any adequate consideration of;

> (a) Appellant's welfare given his young age, taken against the context of the overall circumstances including the seriousness of the alleged offence (reflected in the decision to refer J, who snatched the phone, to a Restorative Justice meeting);
>
> (b) that the offence had occurred 12 days previously and
>
> (c) that the Appellant would not be difficult to locate.

The request for an arrest, communicated by an "arrestogram" was that the Appellant be arrested during the night and held until PC Lilliman came on duty. It appears that the timing was largely, if not solely for the officer's convenience. Even stopping the facts at this point the basis for the Judge's trenchant criticism can be readily understood.

The arrest, search and detention

16. At about 5:30am on 20/12/2011, PC Turnbull and PC Laughland attended at the Appellant's home in order to effect the arrest request.

17. As the Judge noted in his judgment it was "common practice" to arrest suspects at 5.30 am as it was a good time to catch "people" at home. He found this explanation to be "rather glib" and got the strong impression that arrests at this time were commonplace. In the case of the Appellant, a 14 year old schoolboy, the risk that he would be otherwise difficult to find was, at its highest, negligible. It appears that the reality was that arrests were regularly undertaken at this time so that suspects were available when CID came on duty (as PC Lilliman had requested) and the Judge found it "extraordinary" that the arrest of a 14 year old boy was tied to the convenience of a particular officer's shift. He stated:

> "In my time sitting as a Judge in both civil and criminal jurisdictions I have not heard of such a thing before. I really wonder how many members of the community would agree with such an arrest."

18. PC Turnbull and PC Laughland had been provided with limited information about the arrest. They had the Appellant's details and that he had been named as responsible for a robbery of EB on 8th December 2011 on Bar Lane where a mobile, a case and SIM card were stolen. There is no evidence of any further grounds for arrest or the necessity for arrest being communicated to the officers prior to their arrival at the Appellant's home.

19. When the officers attended at the family home, the Appellant's father, Mr T, answered the door. During a subsequent internal investigation into events (after a complaint by Mr T which included an assertion that she had been "unpleasant and officious") PC Laughland stated "the family practically begged us not to get ST out of bed" (she made no reference to any hostility only "the family's reluctance" to wake the Appellant). It was not in dispute that Mr T said, somewhat unsurprisingly, that he would bring the

Appellant to the station to answer any questions at a more reasonable hour (in his statement he set out that he considered the timing of the officers arrival as "ridiculous" given that they were dealing with the Appellant; a 14 year old). In her witness statement within the present action PC Laughland had stated that Mr T was "immediately extremely resistant and hostile towards us". A transcript of her evidence shows that during oral evidence she stated that "the family were obviously very distressed" (Mr T had set out that the four other children present in the house and been woken up and were very upset) and

> "Mr T was angry. Again, which you know is expected. We are there to arrest his fourteen-year-old son at half-past five in the morning. He is in bed asleep and that is an expectation for any arrest you are going to make. It is a part of the job that isn't very pleasant, and it's met, likewise, by people who are on the other end of that. He was quite hostile towards us. I believe it was ST's father who met us because I can remember his mother being in tears in the living room, which was the first room that we went into."

20. PC Laughland was challenged about the assertion (which was made in her statement for the first time) that Mr T was resistant and hostile;

> "Q: But there is a difference, is there not, by raising concerns and querying why he's being taken down to the station and being hostile - "extremely hostile" in your words - and resistant.
>
> A: It's subjective, isn't it? You know, that's what I said before. It's not a pleasant job. We've gone to do quite an unpleasant job and Mr T wasn't happy about it and he was very vocal in the fact that he was unhappy with what was happening."

21. Mr T gave oral evidence, but there is no transcript of his evidence. PC Turnbull was later to set out during an internal review (which found that Mr T "had understandable reservations about waking the child up at such an hour") that

> "I found it hard not to agree with ST's dad at the time."

22. The Judge made no finding of hostility in his judgment, the only reference being

> "On arrival at the house the police officers found Mr T to be upset, no doubt defensive, but he was offering to take ST to the police station at a more civilised hour."

23. It is a reasonable proposition that many parents would challenge the officers as to the necessity of what they were proposing to do. As PC Laughland conceded her description was subjective. In any event it was not in dispute that whatever his feelings and reaction Mr T made an offer to bring the Appellant to the station voluntarily at a more reasonable hour. Mr T was also allowed to ride in the back of the Police car with the Appellant to the station, something that was said by PC Laughland to be very unusual. This does not sit very easily with the idea that he continued to be hostile to the Officers. Accordingly I approach the submission of Ms White that the evidence PC Laughland establishes that Mr T was indeed verbally "hostile" with a considerable degree of caution. This issue has relevance to the options other than arrest open to PC Laughland.

24. Mr T's offer appears to have caused the Officers some concern. As the Judge recorded:

> "…The police officers were uncomfortable with arresting a 14-year-old boy at 5.30 in the morning and rousing him from his bed to do so. They sought advice from a supervising officer. According to PC Laughland they were told to continue with the arrest. The rationale was that the arrest was for a serious indictable offence, that property from the robbery was still outstanding, that there was the potential to lose that property and thus evidence of involvement in the robbery if an arrest and search did not take place and that the family had already been alerted to the police interest. Thus, if police failed to arrest ST there and then and agreed to a voluntary interview later in the day they would have to forego any enforceable search of ST's room consequential upon the arrest and leave open the opportunity for disposal of evidence. PC Laughland said in evidence that she saw the force of the advice that she was receiving from the supervising officer and continued with the arrest. PC Turnbull undertook a search of ST's room and found nothing. There was a question over whether Mr T could travel with ST to the police station, but this was in due course resolved in favour of him accompanying his son."

25. PC Turnbull did not give evidence at the trial but his recollection of events was recorded within a subsequent investigation following a complaint about the arrest as follows:

> "Having looked into NSPIS record I do remember this particular incident. Myself and Kath were asked by a supervisor (I honestly do not recall who) to do an arrest on behalf of the robbery team who wanted to come on and deal with the male first thing in the morning. I don't recall the exact conversations but I don't think in any way were either Kath as arresting officer or myself rude in any way. I think the male had some understandable reservations about waking the child up at such an hour and I remember voicing his concerns prior to waking ST up to a supervisor but was told we should continue as we were already in the house, had explained why we had come and this may jeopardise the robbery investigation should evidence or property be lost. I did have my own reservations about attending at such an hour considering the age of the boy and the fact that the offence was 12 days old but such 'arrestograms' from other departments are common place and tend not to be questioned. I found it hard not to agree with ST's dad at the time, but we were stuck in an unfortunate situation. Myself and Kath were as polite as could be expected but there did come a point when the arrest had to be made and the subsequent search be completed but we tried to maintain relations going as far as allowing the dad down to the Bridewell with us."

26. Thereafter, the Appellant was taken to Bridewell Police Station where he arrived at 6.00 a.m. PC Laughland explained to PS Russell, the custody officer, that the Appellant had been named as responsible for the robbery and that the arrest was necessary to allow the prompt and effective investigation of the offence or conduct of the detained person. She told PS Russell that there was evidence still unrecovered and that there was another person suspected of involvement in the robbery.

27. At 06.02 PS Russell authorised the Claimant's detention in order to obtain evidence by questioning and/or to secure or preserve evidence (s. 37(3) PACE). The Judge set the details out as follows;

> "…"08.12.11 detainee named as responsible for robbery from Bar Lane where mobile phone, case and SIM card were stolen." Sergeant Russell authorised the detention of ST. The custody record shows the reasons for detention as: "To obtain evidence by questioning, to secure or preserve evidence" and the grounds of detention are recorded as: "To allow prompt and effective investigation, obtain evidence by way of questioning on tape, take statements, view CCTV evidence, prevent evidence being lost or destroyed, prevent contact with co-accused, take fingerprints, photographs, DNA.""

28. The Appellant who had never been arrested before, understandably became very upset when placed alone in a cell, and PS Russell noted in the records at 06.21 that:

> "I explained that there was no other place to put him."

29. PS Russell determined the Appellant should be visited every 30 minutes due to him being a juvenile. The Appellant declined the offer of a meal and drink. The duty solicitor was contacted by an officer (identity unknown) and asked to attend for an interview at 9.00 am. Eventually the Appellant was interviewed when his nominated solicitor arrived (there having been a short delay to facilitate the attendance of a solicitor chosen by his father, in preference over the duty solicitor) and in the presence of his father, acting as an "Appropriate Adult".

30. In a wholly predictable step the Appellant was released shortly after interview. He had been detained for approximately 6 hours (from his arrest at 05.37 to his release at 11.30). The Appellant's bail conditions included a requirement not to associate with J or to contact EB. In January 2012 it was decided that no further action would be taken.

The legal framework

31. As to lawful authority for arrest, the defendant must prove that the initial arrest was lawful and that the detention continued to remain lawful throughout, minute by minute.

Power to arrest without warrant

32. There is a single power of arrest applicable to all offences. Under section 24 Police and Criminal

Evidence Act 1984 ("PACE"), a police officer may arrest a person without a warrant provided they honestly suspect that the Claimant has committed the alleged offence and there must be reasonable grounds for that suspicion. The arresting officer must also believe that the arrest is necessary and there must be reasonable grounds for that belief.

33. Section 24 PACE, so far as is relevant, provides that:

> "…
>
> (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.
>
> …
>
> (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;"

34. For the purposes of this appeal section 24(4) provided the material power in issue. Given the answers to questions posed of the jury it was not disputed that the requirement set out in section 24(2) was satisfied.

35. The Court of Appeal in **Hayes v Chief Constable of Merseyside Police** [2011] EWCA Civ 911 held that the necessity condition involves a two-stage test. The Court will first ask (i) whether the arresting officer honestly believed that arrest was necessary for a section 24(5) reason before considering (ii) whether, objectively, that belief was reasonable. As to the second condition, all that had to be shown was that the constable had honestly believed that arrest was necessary for the section 24(5)(e) reason and that, objectively, that belief and his decision were reasonable in the light of the information known to him at the time. It was not a requirement that the constable should have actively considered all possible courses of action alternative to arrest and taken into account all relevant considerations and excluded all irrelevant ones. As Lord Justice Hughes observed the content of the current section 24 is a result of amendment by the Serious Organised Crime and Police Act 2005 the effect of which was to tighten up the accountability of officers by making the criterion of necessity applicable to all arrests. It incorporates the Wednesbury principle of review via the concept of reasonable grounds.

36. Lord Justice Hughes referred to the judgment of Sir Brian Kerr LCJ (as he then was) in **Re Alexander's Application for Judicial review** [2009] NIQB 20 within which he rejected the submission that the requirement for necessity of arrest meant that there must be no feasible or viable alternative or that arrest must in every case be a matter of last resort. He also considered and rejected the submission that in order to have reasonable grounds for believing arrest to be necessary, the officer must interrogate the suspect as to whether he will attend the police station voluntarily. Sir Brian Kerr LCJ stated:

> "Given the scope of the decision available to a constable contemplating arrest, we do not consider that it is necessary that he interrogate a person as to whether he will attend a police station voluntarily. But he must, in our judgment, at least consider whether having a suspect attend in this way is a practical alternative. The decision whether a particular course is necessary involves, we believe, at least some thought about the different options. In many instances, this will require no more than a cursory consideration but it is difficult to envisage how it could be said that a constable has reasonable grounds for believing it necessary to arrest, if he does not make at least some evaluation as to whether voluntary attendance would achieve the objective that he wishes to secure."

37. Lord Justice Hughes continued:

> "The correct analysis is contained in the last four lines of the passage cited above. The relevance of the thought process is not that a self-direction on all material matters and all possible alternatives is a precondition to legality of arrest. Rather it is that the officer who has given no thought to alternatives to arrest is exposed to the plain risk of being found by a court to have had, objectively, no reasonable grounds for his belief that arrest was necessary. In the single case whose merits were considered, Farrelly, this was precisely the reasoning of the court. The officer in that case had adopted a predetermined decision to arrest and had not thought about any alternative. The court held that he had not, objectively viewed, had reasonable grounds for his belief that arrest was necessary: see para 24."

And added:

> "The officer ought to apply his mind to alternatives short of arrest, and if he does not do so he is open to challenge. The code provides a sensible warning to that effect. But the challenge, if it comes, is not one which requires the officer's decision to be subjected to a full-blown public law reasons challenge. It is one which requires it to be shown that on the information known to the officer he had reasonable grounds for believing arrest to be necessary, for an identified section 24(5) reason."

38. Lord Justice Hughes noted that that the requirement of necessity was present (and had always been present) within section 37 and added:

> "In **Wilding v Chief Constable of Lancashire** (unreported), 22 May 1995; [1995] CA Transcript No 574, this court held that: (i) attempts to define, or to provide synonyms for, "necessary" should be avoided; and (ii) in asking whether further detention was lawful or unlawful the court should ask itself 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. I agree that Parliament must, on ordinary principles of statutory construction, be taken to have assumed this state of the law in adopting the same formulation in the new section 24(4)."

39. In the present case when attending at the Appellant's home the arresting officers were being asked to carry out what was in effect a pre-determined decision made by another officer (PC Lilliman). Lord Justice Hughes recognised the position of an officer "often in a complex case" who will not have access to the material which the officers directing the inquiry will have and that:

> "the decision to arrest and do so at a particular time, will often be part of a closely co-ordinated plan for the inquiry."

40. In such circumstances

> "...information given by others, attached to orders issued by them, can be and usually will be part of the information which goes to his grounds for belief of one or both matters, and thus to the reasonableness of the belief. That that is the law provides another reason why section 24(4) ought to be interpreted in the manner stated, rather than as requiring comprehensive consideration by the officer of all matters capable of being relevant to the decision, which would require him to have access to, and time to digest, a much fuller picture of the overall investigation than is realistic."

41. The approach to be adopted by the Court to section 24 in a case where the grounds for arrest are challenged was set out in **Castorina v Chief Constable of Surrey** Local Govt Review Reports, 30 March 1996 241, and recently amplified and adjusted by Mr Justice Stuart-Smith (as he then was) in the case of **Parker v Chief Constable of Essex Police** [2017] EWHC 2140 (QB) at [14]. The relevant questions as regards necessity of arrest are:

> (a) Did the arresting officer believe that for any of the reasons mentioned in subsection (5) 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.
>
> (b) 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.

42. Guidance is provided in PACE Code G regarding circumstances in which an arrest would be necessary. Code G 1.3 reminds officers that the use of the power of arrest must be fully justified and officers exercising the power should consider if the necessary objectives can be met by other, less intrusive means. Arrest must never be used simply because it can be used. The code states that:

> "2.6 Extending the power of arrest to all offences provides a constable with the ability to use that power to deal with any situation. However applying the necessity criteria requires the constable to examine and justify the reason or reasons why a person needs to be taken to a police station for the custody officer to decide whether the person should be placed in police detention.
>
> 2.7 The criteria below are set out in section 24 of PACE as substituted by section 110 of the Serious Organised Crime and Police Act 2005. The criteria are exhaustive. However, the circumstances that may satisfy those criteria remain a matter for the operational discretion of individual officers. Some examples are given below of what those circumstances may be.
>
> 2.8 In considering the individual circumstances, the constable must take into account the situation of the victim, the nature of the offence, the circumstances of the suspect and the needs of the investigative process."

43. Code G 2.9 sets out examples of circumstances in which the necessity criteria are likely to be met. In relation to s.24 (5)(e) ('to allow the prompt and effective investigation of the offence or of the conduct of the person in question') the Code gives the following non-exhaustive examples:

> "Where there would be reasonable grounds to believe that the person:
>
> - has made false statements
>
> - has made statements that cannot easily be verified
>
> - has presented false evidence
>
> - may steal or destroy evidence
>
> - may make contact with co-suspects conspirators
>
> - may intimidate or threaten or make contact with witnesses
>
> - where it is necessary to obtain evidence by questioning"

44. As Lord Justice Hughes observed in **Hayes** the code was issued by the Secretary of State under section 66 of the 1984 Act: see section 66(1)(a)(iii) (as amended by section 110(3)(b) of the Serious Organised Crime and Police Act 2005). Its legal effect is stated in section 67(10)(11). A failure by a police constable to comply with any provision of the code does not by itself render him liable to any criminal or civil proceedings. However, in any court proceedings, criminal or civil, the code is admissible in evidence, and if its provisions appear to be relevant to any question arising, it is to be taken into account in determining that question.

45. In the case of **Lord Hanningfield v Chief Constable of Essex Police** [2013] EWHC 243 (QB), it was held that the requirement of necessity had not, on any realistic interpretation of the word, been met on the facts of that case. Mr Justice Eady stated of the necessity of an arrest

> "…, an objective assessment still has to be made, albeit having regard to the factors which actually informed any decision made at the relevant time. Having rehearsed and reconsidered those factors, I have come to the conclusion that the requirement of necessity as laid down by Parliament has not, on any realistic interpretation of the word, been met. Summary arrest was never going to have any impact on the prompt and

> effective investigation of the claimant's credit card expenses. It is not for a judge to second-guess the operational decisions of experienced police officers, but in the circumstances of this case I cannot accept that there was any rational basis for rejecting alternative procedures, such as those adopted successfully by the Metropolitan Police. There were simply no solid grounds to suppose that he would suddenly start to hide or destroy evidence, or that he would make inappropriate contacts. There was only the theoretical possibility that he might do so. I can, therefore, see no justification for bypassing all the usual statutory safeguards involved in obtaining a warrant."

It was also held that as the original arrest had been unlawful, the subsequent detention could not be regarded in itself as lawful simply because the custody officer had not had the same information laid before him. The custody officer's reasons for detention could not cure any defect in the original arrest.

46. As set out above in Hayes, Lord Justice Hughes referred to **Wilding v Chief Constable of Lancashire** (unreported), 22 May 1995; [1995] CA Transcript No 574, in which the court held that attempts to define, or to provide synonyms for, "necessary" should be avoided. As Mr Justice Stewart -Smith observed in **Parker-v-Essex Police** [2017]] EWHC 2140 (QB) necessary is a normal English word which should be applied without paraphrase. In **Commissioner of the Police for the Metropolis v MR** [2019] EWHC 888 (QB), Mrs Justice Thornton stated of the test of necessity

> "The test of necessity is more than simply 'desirable' or 'convenient' or 'reasonable'. It is a high bar, introduced for all offences in 2005 to tighten the accountability of police officers (Hayes at [14]). I simply cannot see that it was necessary to arrest MR on his arrival at the police station. The police were in possession of his mobile phone number and MR had come voluntarily when asked to attend the station."

Detention

47. Once a person is arrested and brought to the police station, the lawfulness of detention is viewed through the eyes of the custody sergeant, as s/he is the responsible officer under Part IV PACE. In relation to detention at the police station, the relevant statutory provisions are sections 37 and 34 of PACE.

48. Under s34(2) it is the duty of the custody officer to order a person's immediate release from custody if the officer becomes aware that the grounds of detention have ceased to apply and s/he is not aware of any other grounds to justify continued detention under the provisions of the Act.

49. Section 37 of PACE is as follows:

> "(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."

50. In **Wilding** the court held that in asking whether further detention was lawful or unlawful the court should ask itself whether the decision of the custody sergeant was unreasonable in the sense that no custody officer, applying his common sense to the competing considerations before him, could reasonably have reached that decision.

The trial

51. As the Judge observed in his judgment that factual questions relating to a person's state of mind and what somebody was or was not told were matters for the jury. It was then for the Judge to consider if any belief was held on reasonable grounds.

52. The jury heard evidence from the Appellant and his father Mr T and also from PC Laughland and PS Russell on behalf of the Defendant.

53. The questions posed of the jury and the answers provided were as follows;

> Question 1: "Have the police proved that when PC Laughland arrested ST she genuinely suspected him of involvement in an offence robbery?"

The answer given by the jury is "yes".

Question 2: "Have the police proved that when PC Laughland arrested ST at 05.37 she genuinely believed it was necessary to arrest him to allow the prompt and efficient investigation of the offence of robbery or the conduct of ST?"

To that question the jury has answered "yes".

Question 3: "Have the police proved that when Sergeant Russell authorised ST's detention at 06.02 he genuinely believed that was necessary in order to obtain evidence by questioning or to secure or preserve evidence?"

The jury have answered that question "yes".

Question 4 is split into four sub-sections: "Have the police proved that when PC Laughland was presenting ST to Sergeant Russell at the Bridewell at about 6 a.m. she told him that:

Statements still needed to be taken?"

Answer "no".

"There was CCTV evidence to be viewed?"

Answer "no".

"There was evidence still unrecovered?"

Answer "yes".

"There was another person suspected of involvement in the robbery?"

Answer "yes".

The final question for the jury is: "Have the police proved that when Sergeant Russell authorised ST's detention at 06.02 on 20th December 2011 he genuinely believed that there was another person suspected of involvement in the robbery who had yet to be apprehended?"

The answer to that question is "yes".

54. In light of the answers provided the Appellant did not contend that the suspicion of involvement in an offence was not reasonable.

The Judgment

55. The Judge first considered the question as to whether there were reasonable grounds for the genuinely held belief that arrest was necessary and specifically whether it was necessary for the prompt and effective investigation of the offence or conduct in question. Having set out the respective arguments. He held that in respect of the arrest;

> "15. As is clear from paragraph 34 of *Hayes* an officer who has given no thought to the alternatives to arrest may be at risk of a court concluding that there were no reasonable grounds for the belief that arrest was necessary. However, in this case PC Laughland did consider the question of arrest, and quite carefully. She was not comfortable with an arrest of a 14-year-old boy at 5.30, given that his father was willing to bring him to the police station later. The police officer opened the matter up to debate and consulted a more senior officer. As PC Laughland put it, having discussed it with that senior officer she was far more settled in her view that it was necessary to arrest ST. She did think about alternatives, sought advice and then concluded that arrest was necessary. I should

add that I found PC Laughland to be an honest and candid witness. She made concessions against interest and at one point agreed that arrests could be made in circumstances where they were not so much necessary as expedient.

16. In my judgment, PC Laughland did have reasonable grounds for her belief that the arrest of ST was necessary at that time. The police arrived at the ST household to arrest ST and search his room for evidence. In many ways the dye was cast once they knocked on the door. Once they had identified themselves and said why they were there it is readily understandable how PC Laughland's thought processes unfolded. She paused before arrest to ask whether that arrest was necessary, but if no arrest was effected the opportunity to compulsorily and lawfully search ST's room there and then was lost. To withdraw without making the arrest gave the opportunity for evidence to be disposed of Seeking a search warrant was not a solution at that point; that would take time, giving the opportunity to dispose of evidence. Whilst it may have been a consideration to de-arrest ST once the search had proved negative, I am not of the view that it was unreasonable to continue his detention. De arrest was one option, but these were officers who had no knowledge of the detail of the investigation and I consider it reasonable of them, once they had effected the arrest, to carry through and to convey ST to the Bridewell and the investigating team, even though the search had proved negative. They did not know what else the investigating team were looking at or looking for."

56. In respect of the detention he held:

"19. Question 5 deals with an error made by Sergeant Russell. He, on the jury's finding, genuinely believed that there was another person suspected of involvement in the robbery who was yet to be apprehended. That was wrong. [J] was the other person suspected, and he had already been apprehended and interviewed the day before. Even though this was a major plank of Sergeant Russell's thought process in considering whether he should authorise the detention of ST, Sergeant Russell in his evidence refused to go so far as saying that but for that factor he would not have authorised detention; there were still other factors in play.

20. In my judgment, the grounds advanced by Sergeant Russell as the basis for authorising ST's detention, even removing the need for statements to be taken or CCTV to be viewed, constitute reasonable grounds for such detention. There was an interview to be conducted with a view to gaining evidence. That interview may or may not have revealed the location of missing items, and the mere existence of a coaccused, whether apprehended or not, gives rise to the possibility of collusion and the hiding of outstanding property should ST be released before interview. My conclusion therefore is that Sergeant Russell had reasonable grounds for the belief which he held that morning that ST's detention was necessary in order to obtain evidence by questions or to secure or preserve evidence."

57. The Judge then set out his deep concerns about the facts. He stated:

"21. I come now to the elephant in the room. I have thus far considered this case according to the words of the statute and the principles extracted from the case law. What I have not mentioned is the principal and stark feature in this case. On 20th November 2011 the police chose to arrest a 14-year-old boy with no criminal record at 5.30 in the morning by rousing him from his bed. I find that disturbing. From the evidence of PC Laughland I get the strong impression that such arrests at this time of the morning were commonplace. I found the explanation that it is a good time to catch people at home to be rather glib. PC Laughland's concession that arrests were regularly undertaken at this time so that suspects were available when CID came on shift I consider to be extraordinary. That the arrest of a 14-year-old boy should be tied to the convenience of the shift pattern of CID officers is, as I say, extraordinary. In my time sitting as a judge in both civil and criminal jurisdiction I have not heard of such a thing before. In a country where it is generally said that policing is by consent of the community I really wonder how many members of the community would agree with such an arrest. I have carefully considered whether the time of the arrest can of itself make it unlawful and, in particular, whether the timing of the arrest impacts upon the necessity of arrest. I have come to the conclusion, at least on the facts of this case, that it cannot. Had the arrest taken place at 7.30 a.m. no doubt we would have all felt more comfortable. However, the point is made by the Chief Constable that there is nothing in the legislation to suggest that an arrest which would

have been lawful at 7.30 a.m. is unlawful at 5.30 a.m. That point was pressed by Ms White for the Chief Constable and I have come to the conclusion that it is correct is law."

58. The Judge then went on to describe the arrest and subsequent detention as lawful but "nonetheless reprehensible" and the way that the police powers exercised in relation to the Appellant; "lamentable".

The Appeal

59. There are four grounds of appeal, which argue that the Judge erred in law in finding that;

(1) the timing of an arrest cannot have a bearing on the lawfulness of the arrest.

(2) the matters in the mind of the arresting officer amounted to reasonable grounds to believe it was necessary to arrest at the time that the arrest was effected and thereafter to detain at the police station.

(3) an unnecessary arrest could be made necessary by fault of police wrongly taking steps to effect that arrest.

(4) the matters in the mind of the custody officer amounted to reasonable grounds to believe it was necessary to detain the Claimant following the arrest.

60. In respect of ground one Ms Hemingway submitted that the Respondent's argument that, where it is determined that an arrest is necessary, it matters not at what time or in what circumstances the arrest takes place, cannot not be right. She submitted that even if, contrary to the Appellant's argument, there had been reasonable grounds to believe it necessary to make an arrest, the arresting officer should have had the Guidance in Code G in mind before making the decision to arrest or not at the material time. There was a clear failure on the part of the arresting officer to consider the individual circumstances, as set out in paragraph 2.8; specifically that the Appellant was a child, until after PC Laughland took steps to effect the 'arrestogram'. She operated on the basis that it was usual to make arrests at that time in the morning, in part because it was convenient for CID shift patterns. Administrative convenience does not equate to necessity.

61. Had PC Laughland considered the circumstances in which she intended to arrest a boy of 14 years old, of good character, then she could not have failed to have decided that a 5:30am knock on the door and arrest in his bedroom was not necessary. On any reasonable analysis, without more input from the investigating officer highlighting a need to arrest at that time, she had no reasonable grounds to believe that such an arrest was necessary.

62. Moving to ground three (before returning to ground two) Ms Hemingway submitted that there were no grounds to suppose that; (a) if he had indeed stolen these two items, the Appellant would, if he had kept them (which was unlikely) rather than immediately disposing of them, suddenly start to hide or destroy evidence twelve days after the event (and after a school investigation) or (b) that he would make inappropriate contacts, not least because the co-accused was expelled from school and subject to his own bail conditions. There had only been the theoretical possibility that he might do either, even after he became aware that the police wished to speak with him.

63. There was no contemporaneous evidence at all as to why it was thought necessary to arrest the Appellant and thereby circumvent the usual statutory safeguards in obtaining a search warrant, or otherwise inviting him to voluntarily attend for interview, prior to the officers actually attending at his home. In the circumstances, Ms Hemingway contended that the Defendant had failed to prove that there were reasonable grounds for the arrest prior to the attendance of PC Laughland.

64. Ms Hemingway also argued that it was perverse to find that officers in the course of effecting an otherwise unlawful arrest could then make the arrest lawful through their own unreasonable actions. She referred to paragraph 12 of the judgment:

"As the supervising officer had pointed out, once the police had arrived the family was alerted to the police interest in ST and its reason. There was nothing, it is said, unreasonable in the police fearing that, should they leave ST to come to the police station later under his own steam without arrest and search, an opportunity to gather evidence would be missed." (underlining added).

65. She also relied upon what PC Turnbull said when asked by the officer investigating the complaint;

> "…I remember voicing his [Claimant's father's] concerns prior to waking ST up to a supervisor but was told we should continue as we were already in the house, had explained why we had come and this may jeopardise the robbery investigation should evidence or property be lost."

66. There was no record of the conversation with the supervising officer produced by any one of the three officers involved, and Ms Hemingway submitted that it could be presumed that the officer was on the night shift and therefore not involved otherwise with the investigation. There was nothing in the evidence that suggests the supervising officer was able to assist with the grounds for the arrest beyond what was already known to the attending officers. The rationale appears to have been, "now that you are there you ought to get on with with the arrest".

67. At paragraph 16 the Judge explained his finding that there were reasonable grounds for believing that the arrest was necessary stating "*In many ways the dye was cast once they knocked on the door".* However what PC Turnbull described as the "*unfortunate situation*", had been caused by the officers' prior decision to attend at the Appellant's home at 5.30 am thus alerting him to the fact that they wished to interview him and to search his property. If there were no reasonable grounds to believe an arrest was necessary up until that moment the arrest could not be properly made necessary by the officer's own mistakes. Were it otherwise it would drive a coach and horses through the protections given by Parliament to those suspected of committing offences.

68. Ms Hemingway submitted that the Judge recognised that PC Laughland *"paused before arrest to ask whether that arrest was necessary"*, but that was not until she had already taken significant steps towards making that arrest; she was in the house speaking to the Appellant's father. The implication of the finding is that she had not previously turned her mind to whether or not the arrest was necessary as she should have done before knocking on the door.

69. As for the second ground Ms Hemingway submitted that no reasonable Judge, properly directing himself, could have found that the arrest and detention was lawful in the circumstances, given the evidence of what was known to PC Laughland.

70. The alleged offence was not factually or evidentially complex, yet PC Laughland was provided with very limited information through the "arrestogram". This appears to have been the usual position. She knew the details of the suspect, the general nature of the offence, the name of the victim and the fact that property was outstanding. That, on any reasonable interpretation, could not amount to sufficient detail to provide reasonable grounds for belief in the necessity of arrest. PC Laughland simply was not in a position to consider the factors in section 24(5) PACE and Code G para 2.8, because she did not have sufficient information to reasonably do so.

71. This was shown to be the case as upon challenge by the Appellant's parents, she was unable to say why the arrest was necessary as opposed to inviting the Appellant to voluntarily attend with his father and a solicitor at a more civilised hour. The advice provided by a supervising officer, as set out above, added nothing, to the matters known to PC Laughland.

72. The Judge also found that PC Laughland was justified in continuing to detain and transport the Appellant to the station on the basis that she *"had no knowledge of the detail of the investigation and did not know what else the investigation team were looking at or looking for*" . The absence of knowledge that she should have had to enable her to make a proper decision could not reasonably found the basis for a belief that ongoing detention was necessary. Such reasoning is perverse where the legal requirement is for there to be in existence information known to the officer that provides reasonable grounds for the detention.

73. As for ground four, Ms Hemingway relied on the jury's findings that the custody officer, PS Russell, had noted a list of 'reasons for detention' on the custody record, some of which had not been relayed to him by PC Laughland. They were wrong. She submitted that the extra grounds indicate that the list was a 'tick box' exercise that was not based on a tailored assessment of the need for the Appellant's detention in a police cell, as opposed to any other detainee brought into the custody suite.

74. Importantly it was a "major plank" of PS Russell's thought process that there was a co-accused who was still outstanding and could be alerted to police interest thereby avoiding arrest. This had no basis in reality and, according to PC Laughland, was not based on any information she relayed to him

because the existence of a co-accused was not something that factored into her decision to arrest. When PC Laughland had been asked in cross examination about J, she was clear that she was not aware of him at the time she made the arrest, she was not aware of any purported need to prevent J and the Appellant communicating and thus it did not form part of her grounds for arrest.

75. In the premises, although the jury found that PS Russell genuinely believed that there were a number of reasons for detention, Ms Hemingway submitted that none of them, individually or cumulatively, could reasonably amount to a lawful ground for continued detention. That is especially so given the clear indication that the Appellant would voluntarily attend with his father to answer any questions.

Respondent's submissions

76. Ms White submitted that this was "a serious crime, involving a 12 year old girl being robbed on her way home from school". The arresting officer PC Laughland knew that the Appellant had been named as being involved in the robbery of a mobile phone, cover and SIM card; she did not need to know all the circumstances of the robbery.

77. The jury was also satisfied that PC Laughland told Sergeant Russell, who authorised the Appellant's detention at the police station, that there was still evidence unrecovered and that there was another person suspected of involvement in the robbery, and accordingly that PS Russell genuinely believed the Claimant's detention was necessary in order to obtain evidence by questioning or to secure or preserve evidence.

78. As for whether PC Laughland's belief in the need to arrest the Appellant was reasonable, the undisputed evidence, recorded by the Judge, was that PC Laughland knew that:

    (a) the offence in question (robbery) was a serious or indictable offence;

    (b) there was property from the robbery still outstanding;

    (c) there was the potential to lose that property, and thus evidence of involvement in the robbery, if an arrest and search did not take place. Accordingly, there was a need to search the Claimant's room;

    (d) there was a need to secure or preserve evidence;

    (e) there was a need to obtain evidence by questioning in interview;

    (f) there was a need to prevent contact with a co-accused;

79. Any one of these six grounds was sufficient to justify PC Laughland's genuine belief in the necessity of the arrest, as being objectively reasonable.

80. As for the timing of the arrest, the Judge did not find (and the Defendant never argued) that the timing of an arrest can never have a bearing on its lawfulness. The Judge correctly recognised that there is nothing in section 24 of PACE, nor the case law applying that provision, which requires an arrest to be performed, or not performed, at a certain time. Self-evidently, arrests pursuant to section 24 PACE may take place lawfully at any time of the day or night. All that section 24 PACE requires, so far as necessity is concerned, is that the officer reasonably believes it is necessary to arrest, at the time that s/he exercises that power, for one of the reasons outlined in section 24(5)(e) PACE 1984.

81. The circumstances of the arrest, including the Appellant's age and the time of arrest, were not such as to render an otherwise lawful arrest unlawful. The conditions of section 24 PACE had been met. The circumstances of the Claimant's arrest, "uncomfortable" though they may have been in the eyes of this Judge, did not render PC Laughland's grounds for believing it was necessary to arrest him, unreasonable. The factors bearing upon the need to arrest were weighty. Ms White submitted "this was a serious offence, with lines of enquiry to be pursued". As the Courts have long recognised:

    "It is an inherent, but regrettable, risk of the police diligently performing their duties that sometimes innocent members of the public are arrested. However, as long as the police act lawfully, those who suffer from this risk have to bear the cost in the interests of the

rest of society's need to be protected from crime."[1]

82. Moreover, there was and is a strong public interest in respecting the margin of operational discretion on the part of the police, a public service required to allocate (sometimes emergency, and often scarce) resources for the benefit of society as a whole. There was nothing inherently unreasonable in the decision to coordinate the time of the arrest to ensure that by the time the Appellant had been booked in, the investigation team would be on duty ready to progress their enquiries. The reason for the Claimant's detention had, after all, been to conduct a "prompt and effective investigation". The police cannot be expected to perform arrests at the convenience of those they arrest. PACE 1984 does not require them to do so.

83. As for the rationale for the arrest, which was reiterated to the officers by their supervisor, this did not rest on the fact that the officers had attended the Claimant's home. The grounds relied upon by PC Laughland did not come into existence at the property. It was, nevertheless, not unlawful or unreasonable to have regard to the fact that, once the officers had arrived at the Appellant's home, the Appellant had been alerted to police interest. This would, equally, have been the case had he been invited to attend for voluntary interview, which is why that was not a viable option (as reflected in the judgment at paragraph 16). This consideration did not render an otherwise unlawful arrest lawful, nor did the judge so conclude.

84. As for ground 4, the jury was satisfied that PS Russell genuinely believed it was necessary to authorise the Claimant's detention in order to obtain evidence by questioning or to secure or preserve evidence. They were satisfied that PC Laughland had relayed to PS Russell

    (i) that there was still evidence unrecovered, and

    (ii) that another person was suspected of involvement in the robbery i.e. that there was a co-accused. The interview may have revealed the existence of the missing items.

85. These were, as the judge correctly concluded, ample grounds to justify the Appellant's detention in order to obtain evidence by questioning or to secure or preserve evidence, per s.37(3) PACE, as being reasonable. The fact that PS Russell may have erroneously believed the co-accused was still at large, when in fact he had already been arrested and interviewed, was neither here nor there: as the Judge stated "*the mere existence of a co-accused, whether apprehended or not, [gave] rise to the possibility of collusion and the hiding of outstanding property should [the Claimant] be released before interview*".

Analysis

86. In my judgment what was, as the Judge reasonably described, a reprehensible and lamentable state of affairs, was the result of a number of mistakes. They were made sequentially each building on the last.

87. I start with the central feature in this case; the Appellant's age. The authorities to which I have referred when setting out the relevant legal principles do not specifically consider the arrest or detention of children and there was a stark difference between the submissions of Ms Hemingway and Ms White as to the relevant legal framework.

88. Ms Hemingway placed very considerable emphasis within her submissions upon the fact that the officers were dealing with a child of previous good character yet they gave little or no regard to this fact when considering both the necessity of arrest and detention.

89. I do not believe it would be an injustice to the submissions of Ms White to state that she argued that there was little or no material difference in the way that an officer considering arrest or detention should treat a suspected offender who was a child or young person as opposed to an adult. She made no concession that the fact that a potential offender was aged 14 could have any significant impact on the test of necessity either for arrest or detention. This may in part have been because the arresting officer, PC Laughland said that she did not consider the Appellant to be a child rather a teenager and, despite some initial concerns, no steps were taken to accommodate the Appellant's age other than, with some reluctance, allowing his father to travel in the police car to the station (he did not have his own car) and more regular checks of his cell.

90. The Judge was rightly very concerned about what he referred to as the "principal and "stark" feature and the "elephant in the room"; that "the police chose to arrest a 14 year old boy with no criminal

record at 5.30 in the morning". He found the conduct "disturbing", "extra ordinary", "lamentable" and "reprehensible" and part of the explanation given for the timing of the arrest "glib". From a very experienced Designated Civil Judge with, as he stated, considerable experience of both the civil and criminal jurisdictions these were strong words indeed. He was nevertheless satisfied that the conduct was lawful (although he doubted it would receive endorsement in the court of public opinion).

91. Having carefully considered the judgment and heard submissions on appeal, which to a large extent were a repeat of submissions before the Judge, it is my view that the Judge felt constrained to accept an overly reductionist approach advanced by Ms White in relation to the consideration of relevant circumstances. This was typified by the submission that PS Russell need only factor into his consideration that it was an allegation of a serious indictable offence; robbery and that;

    (a) there was still outstanding property

    (b) there was a co-accused.

    to make it a lawful decision to detain, regardless of other obviously material matters. The fact that he held the erroneous belief that another suspect was yet to be apprehended and also gave, within his justification for detention, other reasons which were wrong ; such as that statements needed to be taken and CCTV to be viewed, were, in Ms White's submission, irrelevant. The officer did not need to take them into account. Also irrelevant was that there were no juvenile facilities available for detention for a 14 year old child who had been arrested in relation to a crude and simple alleged offence committed 12 days earlier or that even a limited enquiry would have revealed the very limited value of the property outstanding, that it would be highly unlikely to be destroyed/hidden in the limited timeframe before an interview and that the co-accused had been interviewed the previous day and released on bail.

92. Consideration by an officer of the necessity for arrest or detention does not require consideration of all potentially relevant circumstances. So much is clear from the judgment of Lord Hughes in **Hayes.** There is no need for a self- direction as to all factors that weigh in favour of arrest and those that weigh against. Also a failure to comply with any provision of the code does not by itself, without more, render an arrest or detention unlawful. Rather if its provisions appear to be relevant to any question arising, it is to be taken into account.

93. However, these principles are not, to use an apposite term a "get out of jail free card" for an officer who has failed to properly evaluate the need for arrest or detention. The test of necessity is designed to protect the public from autocratic decisions and as explained by Lord Thomas LCJ in **R (B) -v- Chief Constable of Northern Ireland** [2015] EWHC 3691 the objective second limb of the test set out in **Hayes** encompasses the concept of Wednesbury reasonableness. Although not bound to take into account all considerations an officer should consider, to give at least some thought to, obviously material ones including any practical alternatives which are less intrusive than arrest. Were this not a requirement the test would be watered down so as to provide an inadequate safeguard. Code G 1.3 reminds the officers that the use of the power of arrest must be fully justified and in exercising the power they should consider if the necessary objectives can be met by other, less intrusive means. Arrest must never be used simply because it can be used (or is simply convenient for the progression of an investigation).

94. In the present case there was a central and obvious consideration; the Appellant was a child. In my judgment the Judge was led into error by submissions which, to a significant extent, equated children with adults. At first blush Ms White's submissions find some traction in the fact that sections 24 and 37, and the then current Code of Practice, contain no specific requirement to treat children differently in respect of the elements necessary for a lawful arrest and subsequent detention. During submissions it was telling that she referred to "people" e.g. arrests cannot be arranged for the convenience of "people" and many "people" will find arrest distressing, but that this is unavoidable. As a broad principle, the starting point must be that it is wrong not to differentiate between children and adults when considering the necessity of arrest and detention. Age is an obviously material consideration and some thought must be given to it.

95. In my judgment the Judge should have concluded that the approach of the officers failed to factor into the assessment of the necessity, the best interests of a 14 year old child. Where time for reflection exists, the test of necessity for arrest and detention requires anxious scrutiny of the fact that a child is involved. This approach is consistent with the duty under the Children Act 2004 and wider obligations. Given his trenchant criticism of the arrest and detention of the Appellant had the Judge considered the

duty to consider the best interests of the child, notwithstanding the lack of express reference in the Act or code of practice, he may well have reached a different result.

96. Children and young people are a protected group with specific vulnerabilities. As Gandhi observed the true measure of any society can be found in how it treats its most vulnerable members. In this country the treatment of children in detention is governed not only by domestic legislation but also by the UN Convention on the Rights of the Child (UNCRC) which the UK has signed and ratified. Article 3 sets out that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 37 states

> "Parties shall ensure that:
>
> …
>
> (b) …….. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used *only as a measure of last resort* and for the shortest appropriate period of time." (emphasis added)

97. That requirement that the 'best interest of the child' should be integral to the decisions and actions of public bodies is also set out in section 11 of the Children Act 2004 which provides:

Section 11

> "Arrangements to safeguard and promote welfare
>
> (1) This section applies to each of the following—
>
> …..
>
> (h) the local policing body[2] and chief officer of police for a police area in England;
>
> (2) Each person and body to whom this section applies must make arrangements for ensuring that—
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children;…."

98. Understandably, there is considerable public interest in the arrest and detention of children and the means by which they may more readily be diverted from the formal criminal justice system. Many substantive criminal offences, such as robbery, draw no distinction between child/young person or an adult. However there are many aspects of criminal law which treat those aged under 18 very differently from those aged 18 or over. The obvious rationale is that it would be wrong to treat, to take the facts in this matter, a 14 year old as equally mature as an 18 year old. Examples of differences in treatment are that the ordinary court for an alleged offender under the age of 18 is the Youth Court and there are separate sentencing guidelines that recognise the need to have regard to the welfare of the child or young person.

99. Proper recognition by those engaged within the criminal justice system of the need to consider the best interests, safeguarding and promotion of the welfare of children must begin with the first interaction, which, as regards a suspected offender, is usually within the investigation stage. Relevant to the current case, before any arrest, an officer should, as directed by guidance in Code G paragraph 2.8, consider the broader circumstances and whether arrest is necessary. Within that assessment process the fact that the person to be arrested is a child requires specific consideration due to the need to have regard to the duty to safeguard and promote the welfare of children. Indeed it should be front and centre of the consideration of relevant circumstances and requires an assessment of whether a less intrusive step than arrest or detention is a practical alternative.

100. The College of Policing (the professional body for policing) has developed Authorised Professional Practice (APP) which can be accessed online. The current College of Policing guide (which was not cited to the Judge or in argument before me) states;

> **Arrest and detention of children and young persons**
>
> "Officers must take into account the age of a child or young person when deciding whether any of the Code G statutory grounds for arrest apply. They should pay particular regard to the timing of any necessary arrests of children and young people and ensure that they are detained for no longer than needed in accordance with paragraph 1.1 of Code C. Officers should avoid holding children overnight in police cells unless absolutely necessary.
>
> Reviewing inspectors and custody officers should ensure that the provisions of PACE have been strictly applied to avoid keeping children and young people in police custody any longer than necessary, both pre and post-charge."

101. This guidance has clearly sought to reflect the fact that the power of arrest must be exercised only after adequate consideration of the welfare of children. Reference to this guidance does not create any issue of retroactivity in the present case as it reflects what was correct approach in law at the time of the matters before the Court.

102. I now turn to the facts of the arrest and detention in this case.

103. In the present case it is necessary to start with the "arrestogram" issued by PC Lilliman. As the statute sets out the relevant question is whether the arresting officer

> "has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question."

So there should be consideration of whether one of the subsection 5 reasons exists and then consideration of whether in light of the ground/s it is necessary to make an arrest. Paragraph 2.8 sets out that a constable must take into account the circumstances of the suspect as well as the situation of the victim and the needs of the investigative process. Here PC Lilliman was faced with a suspect who was a 14 year old school boy of good character who had not been sanctioned by the school after an investigation (as a general proposition a school would be likely to have insight into/knowledge of his general behaviour) in relation to an incident which had occurred nearly two weeks earlier. Another boy involved, who had actually performed the central act (the snatching of a mobile phone) had been bailed by PC Lilliman to a restorative justice process. Items of only minimal value had not been recovered. The phone had been returned almost immediately.

104. There was no evidence before the Judge that any consideration was given by PC Lilliman to the welfare of the Appellant. As I have set out it was an obviously material circumstance that he was obliged to consider within his assessment of the necessity of arrest. I reject any submission to the contrary. Within the Convention the arrest of a child should be a measure of last resort and after adequate consideration of any realistic practical alternatives. PC Lilliman does not appear to have weighed up whether there was an alternative to arrest, specifically obtaining a search warrant and/or seeking a voluntary interview. As for the former given the very limited value of what was retained (and the obvious potential for it to have been almost immediately discarded after the offence or within the intervening 12 days) it is somewhat surprising that a search of the Appellant's house was thought to have the realistic possibility of bearing fruit. However if a search was considered as potentially of assistance in the investigation then consideration should have been given to obtaining a warrant rather proceeding straight to an arrest. The only consideration PC Lilliman gave to timing of the arrest appears, on the very limited information available, to have been in relation to his own convenience as the investigating officer (i.e. to get the search done before he came on duty the next morning). An arrest must be necessary; not merely convenient. It is to be noted that he knew that the co-accused had been excluded (so could not meet the Appellant at school) and that he had released him on bail (presumably with a no contact with the Appellant and the victim conditions; as he subsequently applied to the Appellant if not then he was not worried by the prospect of contact). Fear of collusion was not set out as a reason for the arrest and it is difficult to see any realistic basis for such a concern if there was a search and a request for a voluntary interview thereafter. Further, if a search proved negative and the phone cover and SIM card could not be found the prospect that an opportunity to recover evidence would be lost because the Appellant would retrieve them and do something with them in the limited

window before a voluntary interview was vanishingly small. As a result there was no realistic basis for a suspicion that the Appellant would harm the investigation if not arrested.

105. An arrest had to satisfy the high bar of being necessary not just convenient and, given the evidence before the Judge, and on an independent, objective analysis, he should have reached the conclusion that PC Lilliman had failed to clear it. This was the first serious mistake. However, although PC Lilliman was issuing an instruction, the final decision to arrest would be taken by someone else.

106. An overarching mistake made by the arresting officer PC Laughland, was that she considered that being a teenager somehow meant that the Appellant was not considered a child. If she approached matters on the basis that a child was a person aged twelve and under and there should be no differentiation in her approach between a 14 year old and a 19 year old she was clearly wrong.

107. PC Laughland had very limited information from the "arrestogram" issued by/on behalf of PC Lilliman. She was tasked with carrying out a predetermined decision to arrest and search. This appears to have been the usual position. She knew the details of the suspect, the nature of the offence, the name of the victim and the fact that property was outstanding (but not exactly what property). However, despite the fact that the alleged offender was a child and that offence was not factually or evidentially complex, she was not provided with even the basic details of the facts of the alleged offence or of the role allegedly played in the robbery by the Appellant (and who had accused him of what). She had no idea that the co-accused was in reality the accuser and, bar the fact that there was some outstanding property, she was otherwise unaware of the needs of the investigative process. She did not know that the co-accused had already been arrested and bailed. When asked why the obtaining of a search warrant was not a more proportionate way of dealing with matters she explained

> "I can't answer that, not knowing all the circumstances. And again I would just say that we effected the arrest and then move away from that, and that becomes a CID investigation. Or it is an ongoing CID investigation, so I don't know what their considerations would have been at the time, and there are so many different things that could bring bearing to that, and I'm not aware of those."

108. In my judgment, on any proper objective consideration given that a child was to be arrested, the limited information which was (it appears) set out in the "arrestogram" could not have amounted to sufficient detail to provide reasonable grounds for belief in the necessity of arrest. PC Laughland simply was not in a position to properly consider obviously material factors and if there was a practical alternative to arrest of a schoolboy in what was not a complex matter. She could not adequately consider the factors in section 24 PACE and Code G para 2.8, because she did not have sufficient information to reasonably do so. The very concept of an "arrestogram" exposed any arresting officer to the risk that an arrest may be unlawful as the officer simply did not know enough about the offence and/or the offender a fortiori if the offender is a child. As Sir Brian Kerr observed it is difficult to envisage how an arresting officer has reasonable grounds for believing it necessary to arrest, if he/she does not make at least some evaluation as to whether voluntary attendance (for interview) would achieve the objective they wish to secure.

109. In the present case the lack of knowledge to enable a proper evaluation of the need for arrest was highlighted by the challenge to the proposed arrest made by the Appellant's father. PC Laughland was effectively stopped in her tracks and was unable to say why the arrest was necessary as opposed to inviting the Appellant to voluntarily attend with his father and a solicitor at a more civilised hour. It is telling that she had to stop and seek advice. The advice then provided by a supervising officer, as set out above, added nothing, to the matters known to PC Laughland (as Ms Hemingway submitted as he/she was on night shift the assumption must be that they knew no more detail about the offence/offender than PC Laughland) merely pointing out that now they were there she should continue to arrest. When pressed on other available options to arrest PC Laughland relied on a lack of information as justification for the arrest. She stated:

> Q. "ST's father said that he could bring him in voluntarily later on?"
>
> A. "Mm-hm."
>
> Q. "That was open to you, was it not, and that would have been a more proportionate way of dealing with the matter? Would you agree?"
>
> A. "Again, I don't necessarily agree with parts of what you are saying because I'm not

privy to the rest of that investigation and the circumstances surrounding it. So it would be very difficult for me to say I do or don't agree. I'm not saying I don't, but I'm not saying I do. I just am not aware of the rest of the circumstances of that investigation."

[L/29-30] A: "Yes. I apologise because I'm struggling to think of another way to answer it for you, but because that's the way it's always been done as far as I'm aware."

And

A: "We didn't know anything at that point about the investigation. We wouldn't."

Q: "Okay. And there is nothing on the arrestogram, is there, as to why the arrest is necessary?"

A: "Not that I can recall, no; and not normally, no. It's just the way things have been done in the past, so I can't answer if they are done that way at the moment. It is just that we are just asked to go and lodge a person and this person is suspected of X, Y or Z and to get them into custody for the CID the next morning."

Q: "And it is routine to just go and effect that arrest. You do not question it normally?"

A: "No."

And

Q: "It was disproportionate, was it not, to arrest?"

A: "Potentially, yes."

Q: "And it was unnecessary to arrest him at that time?"

A: "I don't necessarily agree with that, no. He was arrested at that time given the information that we were given at that time without having any further information in relation to the greater investigation. So I don't necessarily — I don't believe it was unnecessary, given what we knew at the time."

110. On any evaluation this was not a complex investigation. The failure of others to provide adequate, basic information to an officer who is asked to arrest someone for a simple and straightforward matter cannot provide a justification for that arrest. If it were otherwise "arrestograms" with limited information would provide an obvious route to circumvent the requirement to properly consider the necessity of arrest. If in doubt, as PC Laughland clearly was, an officer cannot "play safe" and arrest someone because given all the circumstances as known to others it may be necessary. Rather the officer must gain further information to enable a proper assessment of the necessity for arrest, a fortiori if a child is the person to potentially be arrested. In my judgment the Judge should have found, as he was asked to find by Ms Hemingway, that PC Laughland arrived at the Appellant's door without objectively justifiable grounds for an arrest because she did not have the requisite information. This was the second serious mistake.

111. I accept Ms Hemingway's submission that the Judge would have been wrong if he approached the issue before him on the basis that the lack of basic information in this simple matter, which should have been available given that it was the arrest of a child in a simple matter which was proposed, itself could properly support the necessity of arrest. However I am not wholly satisfied that he did approach it in this manner. It was the Judge's finding that it was reasonable not to de-arrest (as opposed to arrest) as the officers *"had no knowledge of the detail of the investigation and did not know what else the investigation team were looking at or looking for*". This was predicated on a lawful arrest based primarily on the need for a search.

112. The third mistake was one of timing and made by the arresting officers. They decided to attend at the Appellant's home at the early hour of 05.30. It bears repetition that PC Turnbull stated

"I did have my own reservations about attending at such an hour considering the age of

the boy and the fact that the offence was 12 days old but such 'arrestograms' from other departments are common place and tend not to be questioned."

113. I recognise that in evaluating the grounds for the decision to arrest the Judge had to allow sufficient room for individual judgment and the exigencies of policework. Ms White is correct that a Court must be careful to give due regard to matters of operational discretion.

114. There was no record of the reasons for the arrest made by PC Laughland or PC Turnbull (in my experience this itself was unusual). However it seems clear on the evidence before the Judge that no (or no significant) consideration was given to steps to ensure that a 14 year old child was detained for no longer than needed. It was an obviously material factor as part of the required regard to the fact what was being considered was the arrest of a child. In fact the timing of the arrest meant that the Appellant was bound to spend a minimum of two hours being processed and detained (as it happened in an adult cell) probably longer. During the subsequent investigation of a complaint PC Laughland stated that she told the Appellant's father that if he came along with the Appellant to the station

> "..he would potentially have to wait several hours."

115. The timing was as a result of a "general practice" that had developed. The evidence of PC Laughland was

> Q: "So you want to have the person arrested ready for CID when they come on duty?"
>
> A: "yes."
>
> Q: "Why?"
>
> A: "Because - this is an awful answer, your Honour, but because that's the way it's done."
>
> And
>
> Q: "And you said that the arrestograms come through and you are really looking to arrest people around about 5.30 so that they are ready for when the CID team comes on. Is that right?"
>
> A: "Yes, that's right."
>
> Q: "That is the general practice."
>
> And
>
> A: "But these are called "planned arrests" and the planned arrests by CID are generally always done at 5.00/half-past five in the morning."
>
> Q: "And it might be said that that is not because it is necessary: it is because it is expedient?"
>
> A: "Yes. Yes, it fits."

116. During submissions I posed the question of Ms White as to whether, all other things being equal, it would have made any difference at all to the assessment of necessity if the officers had chosen 1.30 am as opposed to 5.50 am to attend at the Appellant's home meaning he spent several more hours in detention. In her view it did not as it would not affect the lawfulness of the arrest and was, at its highest, a matter of operational discretion. She relegated it to a general circumstance which the officer was not required to consider. I cannot accept this proposition. The consideration of the welfare of children cannot be watered down to a mere matter of an officer's discretion as to whether it should be afforded any weight. Rather it must be considered, as an obviously material factor, when assessing whether the arrest of a child is necessary at any particular time. Given the other surrounding features of the offence and investigation, it is difficult to see how the arrest of a sleeping 14 year old boy at 1.30 am to ensure a search of his bedroom and to enable him to be questioned after 8.00 could conceivably be considered to be necessary as opposed to simply convenient. However, that would be the effect of the

argument advanced to the trial Judge. It is wrong.

117. It is unfortunate in my view that the revised code of practice for Code G (applicable to arrests after 12th November 2012) still makes only limited reference to children. However, it does set out;

> "Juveniles should not be arrested at their place of education unless this is unavoidable."

118. Whilst this would direct an officer to arrest a child or young person at home I very much doubt an arrest in the very early morning such as took place in the present case with the inevitability of some hours in detention before an interview was envisaged by the authors.

119. There was no reference within the Judgment to the upholding of a complaint made by the Appellant that the timing of the arrest was totally unnecessary. In my judgment the decision is instructive and illuminating (including as to what was considered as acceptable by fellow officers at the time). Detective Inspector Leona Scurr concluded that the timing of the arrest was too early in the morning. As she recorded PC Turnbull stated

> "I found it hard not to agree with ST's dad at the time but we were stuck in an unfortunate situation…."

120. The report reached the following conclusion

> "The arrest could have been made in the evening of 19/12/11 but the decision on the timing of the arrest had to be balanced with keeping a juvenile in custody into the late evening on a school night. DC Lilliman asked officers to arrest ST early in the morning so that when the officer came on duty at 8am on 20/12/2013 he could progress the investigation straight away. The arresting officers from the night shift were allocated and instructed by the night shift sergeant and experience of how long it would take to arrest, search, transport book in and complete paperwork for DC Lilliman ready for 8am. It transpires that ST was arrested at 5.37 hrs, booked into custody at 6.00hrs and a solicitor requested by the OIC for interview at 08.15 hrs. I agree that this arrangement has contributed to a 2hr delay in ST being dealt with in custody and uphold complaints 1 and 6. The preferred options would have been to arrest ST in the evening on 19/12/11 or arrest him two hours later on the 20/12/11 and the investigating officer to have come on duty earlier to commence suspect interviews rather than have a two hour delay."

121. DI Scurr did not uphold a complaint that the Appellant should not have been arrested at all. She stated:

> "The rationale for arresting ST early in the morning was to prevent him having the opportunity to go to school on 20/12/11 and be in contact with the co-accused who may reveal the details of his suspect interview thus interfere with the course of the investigation."

Of course, this was incorrect as the co-accused had been excluded from school.

122. PC Lilliman wanted the Appellant arrested so that he could interview him at 8.00 (which would mean arrest before school). There was no indication that this potential for contact formed any part of this decision making process. Indeed given that he knew that J had been excluded from the school (and he had just released him presumably with a no contact bail provision as with the Appellant or if not then the potential for contact did not concern him) it would be difficult to see what the realistic foundation for such a concern would be.

123. Ms Hemingway properly and fairly referred me to the decision of Mr Justice Wyn Williams in **Mouncher and others -v- The Chief Constable of South Wales Police** [2016] EWHC 1367 (QB). One argument advanced was that:

> "All the Claimants complain about the fact that they were arrested at or about 6.30 a.m. in the morning. There were suggestions in the closing submissions of their lawyers that the timing of their arrests might tip the balance when an assessment was being made about the reasonableness of the decision to arrest i.e. that the timing of the arrest was a material factor to be taken into consideration when deciding whether the decision to arrest was reasonable."

Wyn Willliams J stated at paragraph 442

> "…I have been shown no authority which suggests that the manner of an arrest or the circumstances in which it is made is a factor to be taken into account when determining whether a decision to arrest has been made lawfully. I can see why that is so. It would be strange, indeed, if the lawfulness of a decision to arrest depended upon fine judgments as to the timing of an arrest or, for that matter, the place where an arrest is to be carried out. Accordingly, in assessing whether the decision to arrest the Claimants was unreasonable as alleged by them I propose to leave out of account the fact that the arrests took place very early in the morning at the Claimants' homes."

124. In that case the Judge was not concerned with the arrest of a child. In so far as the Judge was of the view that, when considering the necessity of arrest, timing and/or the place of arrest cannot be highly material factors to be taken to account then, at least as regards the arrest of a child, I would respectfully disagree.

125. In the present case the Judge stated

> "I have considered whether the timing can of itself make it unlawful and in particular whether the timing of the arrest impacts on the necessity of arrest. I have come to the conclusion that, at least on the facts of this case, it cannot."

Ground one of this appeal is that the Judge fell into error in finding that timing cannot ever be a relevant factor to be taken into account. Ms White submitted that the Judge made no such finding.

126. There are two questions which are conflated within the two sentences in the judgment as set out above

> (a) Can timing impact on the necessity for arrest i.e. is it a factor which can be taken into account when considering, objectively, whether reasonable grounds existed for the belief arrest was necessary; or is it irrelevant?
>
> and
>
> (b) Can timing of itself make an arrest unlawful?

In my judgment, the answer to the first question is in the affirmative, certainly as regards the planned arrest of children. It is not irrelevant. Necessity must be considered as at the time of the arrest and what may be necessary at a certain time may not be necessary at a different time. I am not sure the Judge found otherwise. The second question as posed is difficult to answer as timing can only be just one of several factors to be taken into account when assessing the necessity of arrest. A better question would have been; given the material circumstances of the case did the officer have reasonable grounds for the belief that arrest was necessary at the time it took place. In the present case the Judge should have considered that the answer was in the negative; but that involves consideration of ground two of this appeal. Given that I do not believe ground one can stand alone, I shall consider grounds one and two together.

127. As I have set out before, when the decision to arrest was finally made three serious mistakes had been made (four if one takes PC Laughland's view as to what constitutes a child) Ms White submitted that relevant matters should be considered cumulatively. In so far as this means there must be consideration of all the relevant factors at the time of arrest (and later detention) she is undoubtedly right. However, for the reasons which I have set out the Judge should have concluded that at the point of knocking on the door, Officers Laughland and Turnbull were seeking to follow through on an inappropriate instruction made without adequate consideration of obvious alternative options, without adequate information and having taken a decision as to timing without due regard to the welfare of the child. So insofar as the dye was cast it was cast because of the serious mistakes that had already been made. It would have required something significant to have occurred in the house to provide objectively reasonable grounds for belief that arrest was necessary.

128. After entering the Appellant's home the Officers were faced with a new factor. The Appellant's father offered to bring him to the station voluntarily at a more reasonable hour that morning. Given the matters which I have already set out, specifically that this was a 14 year old, they had to undertake the revised evaluation; they could not simply rely on the information previously given to them and simply ignore this

offer. An obvious practical alternative to arrest has been presented to them. As the Judge found PC Laughland "opened up the matter for debate" and consulted a senior officer; so this was clearly a troubling matter. The decision which she took was to proceed with the arrest as:

> "if no arrest was effected the opportunity to compulsorily and lawfully search the Appellant's room was lost. To withdraw without making the arrest gave the opportunity for evidence to be disposed of."

Viewed objectively this reasoning did not and could not cure the mistakes which led to the officer standing in the Appellant's living room. Further, whilst the potential for a compulsory search would be lost if the Appellant was not arrested; not necessarily so the potential for lawful one. What the officers present at the premises, and also the senior officer who was consulted by them, failed to consider was the obvious option of asking the Appellant's father to allow a voluntary search. The officers were faced with a very unusual situation, and as the Appellant was 14 years old he had no legal power to prevent a search if his father, the owner of the house, permitted it. Ms White argued that Mr T had been hostile and "this is relevant to the viability of voluntary options". As I have already set out the Judge made no finding that Mr T was initially (and then remained) hostile. He was upset and unhappy at what the Officers proposed to do, but whether that could properly have been described as hostile remained very much an area of dispute (Mr T subsequently made a complaint that PC Laughland was unpleasant and officious). In any event it is accepted that Mr T had put forward a practical alternative to arrest. Given this offer there would have been nothing wrong with outlining the option of a voluntary search to Mr T, even as "Hobson's choice" if there was to be no arrest. Ms Hemingway conceded that the issue was not canvassed with the witnesses. However, it was for the officers to establish that arrest was necessary and given this was a 14 year old boy and his welfare was a factor to be considered if a search was considered necessary they should have considered this obvious alternative to arrest and asked Mr T if he would permit it. I recognise that, as Lord Justice Hughes stated it is not necessary for an officer to give a self-direction on all material matters and all possible alternatives as a precondition to legality of arrest. However the evidence was that the officers gave no thought at all to achieving the central objective of a search without arrest. That they did not do so was consistent with the lack of any real regard to the fact that the Appellant was a child and not an adult. It was a fourth serious mistake and yet further undermined the grounds for belief that an arrest was necessary.

129. PC Laughland's evidence about the search revealed how ill thought through the process had been. She was challenged by Ms Hemingway as to why, given the search of the Appellant's bedroom had produced no results, he was not de-arrested and Mr T taken up on his offer to bring the Appellant into the station at a later time voluntarily. The answer was

> "We could have done, but that's not our call to make because again we don't know, as far as property is concerned, exactly what was missing and whether it had been hidden elsewhere in the house. And then the detectives following on with that investigation could have requested another search, as you said, or that day, later on that day, of the house. We only looked in his bedroom".

So at the time of the arrest PC Laughland did not even know exactly what the "outstanding property" was. She then conducted a limited search of one room. Objectively it could not be considered as either an adequately planned or executed search. The reason why was that PC Laughland had not been provided with adequate information about the alleged offence which on any view, was a simple and straightforward incident.

130. During submissions Ms White argued that the Judge's comment that to withdraw without making the arrest "*gave the opportunity for evidence to be disposed of*" meant that in his view, even if there had been a voluntary (negative) search, the risk of the Appellant disposing of evidence after the officers left and before the Appellant attended for a voluntary interview at a more respectable hour that morning (as was offered) meant that arrest was still necessary. In my judgment no officer applying common sense would take that view given that the offence occurred 12 days previously, involved goods with very little or any value (the SIM card was useless and the pink diamante case bought for £5 by EB) that in the short time available that morning before a voluntary interview the Appellant would take any steps to dispose of them such that evidence otherwise obtainable was lost. As Ms Hemingway correctly stated when interviewed the Appellant was either going to deny ever having the items (which he did) or co-operate as to their whereabouts. It is difficult to see the scope for any other alternative. As it is I am very far from sure that the Judge's comments bear the meaning Mr White submits that they have (not the least of the reasons for which is that he did not consider the possibility of a voluntary search). If they were intended to cover this potential for evidence to be lost then the Judge fell into error if he considered this a legitimate concern. Objectively it was fanciful.

131. It was no part of PC Laughland's thinking, or the Judge's objective analysis, that the possibility of contact with J was a factor making arrest necessary. She confirmed in cross-examination that

> Q: "So you were not aware of the need to prevent ST and J communicating?"
>
> A. "No."
>
> Q. "So that was not a ground, as you thought, to arrest him?"
>
> A. "No."

132. Given the matters which I have set out I cannot see how, after undertaking an objective review, the Judge could have found that reasonable grounds existed for the belief that arrest was necessary. The arrest was founded on successive mistakes. It was a lamentable decision taken without any due regard for the welfare of a child.

133. Accordingly the second ground of appeal is made out.

134. Given my analysis and conclusion on ground two it is not necessary to separately consider ground three. It is also not strictly necessary to consider ground four as the arrest was not necessary and the custody officer's reasons for detention could not cure any defect in the arrest. However given the arguments advanced and the importance of some of the issues raised I shall deal with it briefly.

135. After arrest the Appellant was taken to Bridewell Police Station where he arrived at 6.00 a.m. It bears repetition that Section 37 of PACE which deals with the authorisation of detention states as follows;

> "(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."

136. As when considering grounds 1 and 2 when considering Ground 4 I have born very much in mind that I must allow room for individual judgment and the exigencies of the custody desk. I also recognise that PS Russell had very considerable experience as a police officer and that should carry some weight within the evaluation of his decision making. However this was an unusual case and required him to step away from the (very) routine considerations of the detention of adults. When subject to objective analysis the only proper conclusion is that he did not do so, and he gave cursory if any regard to obviously material factors. Reasonable grounds for his belief that detention was necessary did not exist, and the Judge should have found this was the case.

137. The Custody record sheet records:

> "Reasons for arrest – to allow the prompt and effective investigation of the offence or of the conduct of the detained person."
>
> "Circumstances – 8.12.11 detainee named as responsible for robbery on Bar Lane where mobile phone, case and SIM card were stolen."

138. At 06.02 PS Russell gave the following reasons for authorising the Appellant's detention:

> "to obtain evidence by questioning and/or to secure or preserve evidence."

As for grounds they were set out as:

> "To allow prompt and effective investigation, obtain evidence by way of questioning on tape, take statements, view CCTV evidence, prevent evidence being lost or destroyed, prevent contact with co-accused, take fingerprints, photographs, DNA."

139. When the Appellant became very upset when placed alone in a cell, and PS Russell noted in the records at 06.21 that "*I explained that there was no other place to put him.*" In his statement Sergeant Russell explained that

"the Bridewell did not have specific accommodation for young detainees and to have allowed then to sit in open areas created a risk to harm to them in that they may have been exposed to disturbing behaviour from other detainees or even physical harm."

140. It seems rather strange (to say the least) that the perceived view as regards the best interests of a distressed child was that sitting in an open area or elsewhere in the building (with a parent or otherwise) was worse than being in a cell on their own. In any event any other option was not given to the Appellant; he was placed in a cell (and potentially exposed to listening to any disturbing behaviour from other cells).

141. Ms Hemingway criticises the approach by PS Russell to the Appellant's detention. She argued it was clearly a tick box approach with inadequate thought/care given to what was ticked. He set out as grounds for detention that there were statements to obtain and CCTV to watch; neither of which was correct. He was wholly unaware of the offer of voluntary attendance. Of even greater significance the Jury found that PS Russell incorrectly thought that there was another person involved in the robbery yet to be apprehended. This was the Judge found *"a major plank of his thought process*". He stated in evidence that

> Q: ..."And I do not know whether you are aware, but his father, on arrest, was always saying, "Well I can bring him down to the station. I will bring him in for interview.""
>
> A: "I can't comment on that. I wasn't aware of anything like that."
>
> Q: "You were not told that?"
>
> A: "No."
>
> Q: "You did not know about that. So for you, that was not an option that you thought was available at the time. Is that right?"
>
> A: "Obviously not. I wouldn't have authorised the detention otherwise. I have on occasion refused to authorise detention and say "No; the necessity to arrest isn't met here. He can do this as a voluntary attendee", and I've closed the custody record. I have done that previously."
>
> Q: "Okay?"
>
> A: "On this occasion obviously I didn't think that."
>
> Q: "Okay. So if ST was brought in and Officer Laughland said "Look, we have picked him up at 5.30 in the morning. His dad is acting as his appropriate adult. They are here. They are being cooperative. I don't know if it is necessary for you to detain him", would it have at least played in your mind "Okay, well let's just let him sit with his dad in the waiting room and we will interview him when a solicitor gets here"?"
>
> A: "No, not at all. Because on the grounds for detention I have recorded the fact that it was to prevent contact with co-accused, and that would have been the primary reason for his detention for me - to make sure that the co-accused, who no doubt they were going to try and arrest, wasn't alerted to the fact that arrests were being made."

Given reliance on matters which were incorrect; including the "primary reason" for detention Ms Hemingway had powerful ammunition to attack the decision as one reached without adequate consideration of obviously material factors which required consideration and which were not just background circumstances which the officer need not take into account.

142. The Judge found that there was an interview to be conducted with a view to gaining evidence. That interview may or may not have revealed the location of missing items, and the mere existence of a co-accused, whether apprehended or not, gave rise to the possibility of collusion and the hiding of outstanding property should the Appellant be released before interview. He did not refer to the possibility of bail conditions (if thought necessary and proportionate). The Judge concluded that Sergeant Russell had reasonable grounds for the belief which he held that morning that the Appellant's detention was necessary in order to obtain evidence by questions or to secure or preserve evidence.

143. In my judgment the Judge fell into error by concluding that the mere existence of another suspect (without more and whether apprehended or not) gave rise to a sufficiently real possibility of collusion and together with the risk of hiding outstanding property was sufficient that detention was objectively justified without the need to go further. Sometimes an arresting officer has only limited knowledge beyond very basic details and those details are sufficient, without more, to justify detention. This was not the case here. I return to the central significant factor; PS Russell was faced with the detention of a 14 year old boy. As I have set out PC Laughland should have had more information available to her before the decision to arrest was taken. The Judge's approach should have been to assess PS Russell's decision to detain against the material facts which, on a reasonable analysis, he should have known; not as he mistakenly believed them to be (there being no explanation for the mistakes). Otherwise there would be a perverse incentive not to provide to the custody officer with correct information and/or information beyond the most basic detail of the offence. I do not accept Ms White's submission that all PS Russell needed to be satisfied of before detention was lawful was that there was property still not found and that there was a co-accused. In the circumstances of this case and when faced with detaining a child there was a duty to seek some more detail and no reasonable custody officer applying his mind to the decision to be taken could have concluded differently. Otherwise there would be no distinction between the treatment of an adult and the treatment of a child.

144. The reasons given by PS Russell for detention were;

(a) to obtain in evidence by questioning and/or

(b) to secure or preserve evidence.

As regards the former there was, objectively, no basis for believing that there was a risk of the Appellant absconding and no indication whatsoever that if bailed to attend voluntarily e.g. in three hours time he would not have done so. Given the statutory obligation to release unless detention was necessary there needed to be careful consideration of the second ground; not just "the ticking of a box" without an adequate basis. The structure of the Act provides the important safeguard of an independent assessment by the custody officer before a person can be deprived of their liberty. A perfunctory nod towards the cells will not suffice.

145. So what did PS Russell have before him as obviously material circumstances as regards the need to detain a child in order to secure or preserve evidence? He knew the following;

(a) The offence has occurred twelve days previously and the search that morning had been negative.

(b) There were no juvenile facilities at the station so the Appellant would be a 14 year old in an adult cell (in accordance with the policy it was safer than him being sat elsewhere)

(c) The Appellant was accompanied by his father (who, if asked, would have repeated that the Appellant would attend an interview on a voluntary basis).

(d) There was no suggestion of a realistic risk that the Appellant would abscond.

(e) The risk of collusion with the co-accused to destroy evidence or for the Appellant to destroy it himself had to be in the window before interview which was to be sometime later that morning; rather than just generally.

(f) The Appellant could be released on bail with conditions (if thought necessary and proportionate) not to contact the co-accused or attend school before the interview (during submissions I raised the issue whether the Appellant could have been bailed not to leave the Police station. However as set out above it appears that PS Russell would have viewed this as inappropriate given the lack of facilities and also this may have been reasonably considered as legally problematic).

(g) He could not be interviewed for at the very least two hours, potentially significantly longer.

146. In my judgment given these factors simple reliance on the existence of "outstanding property" in the abstract and with no more detail was not enough given he had a child (of good character) stood before

him. A theoretical abstract risk was simply not enough and no reasonable custody officer applying a common sense approach to what was known by PS Russell would have believed otherwise. As it was he never gave a thought to voluntary attendance.

147. Any further questioning and/or basic investigation by, or at the instruction of, PS Russell would have revealed that the risk of evidence being lost if the Appellant was released on bail before an interview that morning was negligible. The seriousness of the offence would also have come into focus. The relevant property was a pink phone case worth £5 and a worthless Sim card taken 12 days previously (when the phone had been returned) and which had not been found on a search of the Appellant's bedroom. The co-accused who had actually taken the phone had been interviewed and released on bail to restorative justice (with the risk that he could destroy evidence). Any risk could be addressed by conditions of bail which could have prevented the Appellant from going to school and contacting the co-accused. There was an obvious practical alternative to detention.

148. On an objective analysis;

> (a) on the basis of what PS Russell knew (ignoring his mistakes) reasonable grounds for belief detention was necessary were not present; and
>
> (b) had any further information been obtained the need to release would have become even clearer.

149. Objective consideration of the relevant factors should have led the Judge to conclude that there were no reasonable grounds for believing that it was necessary to place a distressed boy in a cell. No custody officer, properly applying his common sense to the competing considerations before him, could reasonably have reached that decision. In my judgment it was clear on the evidence (and the facts as found by the jury) that PS Russell, failed to consider obviously material factors and instead relied on grounds which did not exist (such as the need to obtain statements and watch CCTV). Importantly he was also wrong in a "major plank" in his reasoning in that he believed there was another suspect to be apprehended. His primary reason for detention was erroneous. The Judge found the decision taken to detain was reprehensible and lamentable. I would respectfully agree. However I cannot agree with his finding that the belief that detention was necessary was held in reasonable grounds. Ground four would have succeeded.

150. For the reasons set out above the appeal succeeds. I leave it to Counsel to try and agree a consequential order.

Note 1 *Castorina v Chief Constable of Surrey*, per Woolf LJ at 19C. [Back]

Note 2 Amended in 2011; previously the wording was “the police authority” [Back]