APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 26
HCA/2018/622/XC

Lord Justice General
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL FROM THE SHERIFF APPEAL COURT IN TERMS OF SECTION 194ZB OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

REBECCA McCALLUM

Appellant

against

PROCURATOR FISCAL, EDINBURGH

Respondent

Appellant: R E More (sol adv), Robert More & Co
Respondent: Borthwick AD; the Crown Agent

22 March 2019

[1] The appellant is now 38 years old. On 22 November 2017, she lived at an address in Edinburgh with her then 14-year-old son. In circumstances which we shall explain, she came to be convicted of two charges of assaulting police officers at her home address a little before 10pm on that date. The police officers were acting unlawfully and this case concerns the extent to which a citizen is entitled to resort to force by way of response.

The circumstances in which the events occurred

[2] In the course of the evening of 22 November 2017, police constables Jill Urquhart and Scott Dugan were instructed to attend at the appellant's home and detain her in terms of section 14 of the Criminal Procedure (Scotland) Act 1995 in relation to an allegation of assault. Their instructions were that, having detained her, they were to transport her to a police station for interview.

[3] The officers attended at the appellant's home at around 9:40pm. The appellant opened the door of her flat in response to their knocking. She was wearing her nightclothes. The officers explained their intentions during a brief discussion at the doorway. The appellant made it plain that she had no intention of accompanying them and attempted to close the door of her flat. She was physically prevented from doing so by both officers who then crossed the threshold of her property, entered the hallway there and each took a hold of one of her arms with the intention of physically removing her.

[4] As was made plain in the case of *Gillies* v *Ralph* 2008 SCCR 887, in order to enter private property without invitation (and, *a fortiori*, to enter private property forcibly and against the will of the occupier), police officers ordinarily require the authority of the courts in the form of a warrant. The statutory power of detention contained within section 14 of the 1995 Act did not make provision for the power of entry onto private property (see the opinion of the court delivered by Lord Reed at paragraphs [9] & [10]).

[5] It was conceded by the Crown before the sheriff who presided at the appellant's summary trial, before the Sheriff Appeal Court, who refused her appeal against conviction, and before this Court that the legal position was clear. The conduct of the police officers in forcing entry to her home and in taking hold of the appellant in an effort to remove her therefrom was unlawful.

[6] The conduct of the police officers caused the appellant to struggle with them. During the course of that struggle she reiterated vociferously that she was refusing to go with them, that they were assaulting her, that they had no right to do what they were doing and that they should leave her alone. She was correct in all of this. She also engaged in various insults. In an effort to avoid being removed from her house the appellant flailed her arms and legs and tried to physically prevent the officers from removing her. The struggle continued for a period of around 15 minutes during which the officers were unable to control or subdue the appellant and they summoned assistance from other officers. On their arrival she was subdued sufficiently to permit the combined group of officers to physically remove her to a police station.

[7] The police officers concerned apparently had no appreciation of the restricted nature of their powers. In the Note on the evidence in the stated case which he prepared the sheriff explained that:

> "It was clear that both officers were under the mistaken impression that – as a matter of law – in the event of the appellant refusing to cooperate, they were entitled in the exercise of their powers under section 14 to take whatever steps were necessary to physically compel her to return to the police station; that misapprehension clearly extended to a belief that they were entitled to enter her home, seize her and compel her to come with them."

It is not plain what information was subsequently conveyed in their statements by the officers involved but it is to be assumed that an inaccurate understanding must have been formed in the procurator fiscal's office, as the appellant faced charges, on summary complaint, of assaulting each of constables Urquhart and Dugan then acting in the execution of their duty, in contravention of section 90(1)(a) of the Police and Fire Reform (Scotland) Act 2012.

The sheriff's decision

[8] Accepting that the officers had no lawful authority to enter the appellant's property, and could not therefore have been executing their duty in doing so, the sheriff acknowledged that the appellant was entitled, as he put it, "to physically resist". He concluded that she was entitled to use "only reasonable force short of cruel excess". He concluded that the force which she used was well in excess of what was justified and that her conduct therefore amounted to an assault at common law upon each officer. The terms of the charges of which the appellant was convicted were as follows:

> "(003) on 22 November 2017 at 39/1 West Savile Terrace, Edinburgh you [...] did assault Jill Urquhart, Constable, the Police Service of Scotland and did repeatedly pinch and nip her on the body to her injury;
>
> (004) on 22 November 2017 at 39/1 West Savile Terrace, Edinburgh you […] did assault Scott Dugan, Constable, the Police Service of Scotland and did kick him on the body."

The sheriff's approach to the use of force

[9] The relevant Findings in Fact made by the sheriff were these:

> "10. The appellant physically resisted the officers and struggled with them for a considerable period. Inter alia she thrashed out with her arms and kicked with her legs. She continued to shout and swear.
>
> 11. In the course of the struggle she deliberately kicked PC Dugan in the groin.
>
> 12. Further in the course of the struggle the appellant put her hands between the legs of PC Urquhart and continually and forcefully pinched the skin on the inside of the officer's thigh; having grabbed the flesh on each occasion she twisted it with her hand."

In his Note on the evidence the sheriff explained that the backward kick to PC Dugan (reflected in the conviction on charge 004) was something which the constable had some difficulty remembering when he gave his evidence but his colleague was clear about it in her account. He described the appellant's behaviour towards the female officer as seizing the

soft part of the flesh of the officer's thighs and pinching it as hard as she could, twisting the flesh as she did so. He stressed that this was extremely painful for the officer both at the time and afterwards. He explained that photographs which she took of her own injuries showing extensive bruising were produced.

[10] Having described the evidence which he accepted in relation to the appellant's conduct, the sheriff went on to provide his opinion as to the quality of her behaviour in this fashion:

> "I am bound to say this after 40 years of being in these courts (in one incarnation or another) I have not come across such a viciously ingenious assault upon an officer. In my view, it required a peculiarly unpleasant cast of mind to even think of it."

He drew his assessment of the appellant's conduct together by explaining that:

> "Broadly put then, I was satisfied that these two episodes went well beyond any kind of reasonable resistance to an unlawful detention."

It is to be noted that whilst the sheriff provided a description of the appellant's conduct in his Note on the evidence, he gave no account of the actions of the police officers, beyond mentioning their initial taking hold of the appellant and referring to their intentions. Defence production 1, which contains photographs of a number of areas of bruising to the appellant's arm, is not mentioned and there is no account from the sheriff of any injury sustained by the appellant, nor of how any such injury might be weighed in a balance with the injuries sustained by the female officer.

[11] The relevant questions posed by the Sheriff in his stated case were:

1. Was I entitled to hold that the appellant's actings went beyond what was reasonable resistance to an unlawful detention and amounted to cruel excess?

2. Was I entitled to convict the appellant of assault at common law?

After the stated case had been completed and submitted by the sheriff he provided an addendum, having realised that a passage from his draft report had not been transposed into the final version. The passage which he wished to have included was in the following terms:

> "It is, in my respectful view, axiomatic that what is reasonable or what is cruel excess depends upon the circumstances in any given case. One factor I was bound to consider was the potential mischief or harm faced by the appellant. I do not diminish the seriousness of an unlawful detention, but the worst scenario faced by this appellant was that she would be wrongly detained and taken by police officers to a police station. They might have required at worst to use reasonable force and indeed, had she been compliant, no force at all. Whatever else she faced, she did not face a brutal attack, with risk to life and limb, requiring her to defend herself by this level of violence."

Proceedings before the Sheriff Appeal Court

[12] The application for a Stated Case ran to 6 pages and was mostly a narrative of the evidence led. The legal submission stated was that the appellant was entitled to act in the manner in which the sheriff had held that she did in light of the unlawful conduct of the police officers. The appeal sheriff who granted leave noted that the case raised the issue of:

> "how far an individual can go to resist an unlawful act by Police Officers."

In giving its decision the Sheriff Appeal Court noted that the appeal turned on the question of whether the sheriff was entitled to hold that the appellant's actings went beyond what was reasonable resistance to an unlawful detention and amounted to cruel excess. The SAC noted that the sheriff had directed himself correctly to the law, "namely that the appellant was entitled to take reasonable steps to resist that unlawful detention". The SAC noted the sheriff's description of the conduct engaged in by the appellant and his view that the two relevant episodes went well beyond any kind of reasonable resistance to an unlawful

detention. The SAC noted his conclusion that the acts were carried out "not in resistance but in uncontrollable anger with the intention of distressing and injuring the officers".

[13] At paragraph [4] the SAC stated:

> "We have considered the sheriff's assessment of both the law and the facts which he found proved and can find no fault in his reasoning."

The appeal was therefore refused.

[14] Leave to appeal to the High Court was granted upon the basis that the sheriff had erred in his findings in law by concluding that the appellant was entitled to use only reasonable force short of cruel excess. It was submitted that the correct test to apply was that the appellant was entitled to use all necessary force short of cruel excess. The Sheriff Appeal Court was said to have erred in supporting the sheriff's application of the incorrect test.

Submissions for the appellant

[15] On behalf of the appellant reliance was placed on the decision in *Wither* v *Reid* 1980 JC 7. In that case the female appellant was charged that she did assault, resist, obstruct and hinder a female police officer in the execution of her duty while lawfully searching her. The issue was whether or not the search had been unlawful. In his report to the court the presiding sheriff stated that:

> "If the search carried out by the two female police officers was lawful, there is in my view no question but that the accused is guilty of the offence charged; if, on the other hand, the search was unlawful, the accused was entitled to use all necessary force – short of cruel excess – to resist the removal of her clothing and the indignity and humiliation of a body search. The latest authority on this would appear to be the English case *of R* v *Jones* [1978] 3 All E.R. 1098"

In the subsequent case of *Stocks* v *Hamilton* 1991 SCCR 190, which again concerned conduct directed towards a police officer, the issue was whether or not the appellant was acting in

response to unlawful conduct. Relying upon *Wither* v *Reid* the sheriff concluded that "all necessary force short of cruel excess" was the test to apply.

[16] In presenting this argument on behalf of the appellant, Mr More acknowledged that in neither of these cases had the court been required to address the question of whether or not the respective sheriffs had framed the test appropriately. The sole issue in each had been the legality of the search or detention.

[17] It was submitted that in the circumstances which ensued the appellant was entitled to resist entry by the officers to her property, she was entitled to resist their efforts to remove her and she was entitled to take steps to remove them. To frame the degree of force to which she was entitled to resort in terms of reasonableness was not helpful, given the purpose for which force could legitimately be deployed. It followed that the test of necessity as formulated by the sheriff in *Wither* v *Reid* was appropriate.

[18] Attention was drawn to the clear findings made by the sheriff in the present case that the "assaults" took place in the context of the struggle which happened immediately after the officers entered the appellant's home. They were part of the resistance which the appellant was properly entitled to resort to in light of the officers having entered her home. It was relevant to note the time of night and the appellant's state of dress.

[19] It was also submitted that the sheriff had in fact erred in the application of the test which he set. On his approach, the question ought to have been whether the level of violence engaged in by the appellant was or was not reasonable in light of the particular actings of the police officers towards her. It was plain from what the sheriff said in his addendum that he was considering the question of the reasonableness of the appellant's conduct by some different test, namely the extent to which she would have been

inconvenienced by simply complying with their request and accompanying them to a police station.

[20] In all of these circumstances it was submitted that the Sheriff Appeal Court had erred and ought to have answered questions 1 and 2 as posed in the Stated Case in the negative.

Submissions for the Crown

[21] The advocate depute submitted that the sheriff and the Sheriff Appeal Court had applied the correct test and he relied upon the concession that there was no opinion available from this court which supported the formulation advanced on the appellant's behalf.

[22] The advocate depute submitted that the test was whether the appellant had engaged in force which was cruelly excessive. He submitted that on the Findings in Fact and the Note of evidence the sheriff had been entitled to reach the view that the appellant's resistance merited this description. He submitted that the whole circumstances required to be taken account of in order to determine whether cruel excess was present. In this regard the Crown founded upon the injuries which were sustained by the female police officer.

[23] The advocate depute accepted that upon the approach which he argued for the sheriff would be bound to take account of the conduct of the police officers and of any injuries sustained by the appellant. Despite his submissions, the advocate depute found himself unable to explain why it would be unreasonable for a woman in her nightclothes to kick an adult man, with such limited force as to cause no injury, who, along with an associate, was unlawfully attempting to physically remove her, against her will, from her own home at night. Having reflected on this difficulty, he intimated that the Crown would concede that the conviction in relation to the male officer could not be supported.

Discussion

What is the correct test to apply to the appellant's acting's

[24] In order to analyse this question it is necessary to set matters in their proper context. The sheriff acknowledged that the appellant was entitled to "physically resist". However, he did not discuss the context in which she would be entitled to do that, nor did he explain the content of that entitlement. It seems clear that whatever right he had in mind had only a limited content, since he described the kick which the appellant delivered to PC Dugan as one of the actions which were "wholly beyond the pale, quite unnecessary and well beyond what was reasonable".

[25] The advocate depute acknowledged, in response to questions from the bench, that the two police officers unlawfully forced their way into the appellant's property. He acknowledged that as a consequence she was entitled to use force to eject them. He also acknowledged that the officers acted unlawfully in laying their hands on the appellant and acted unlawfully in attempting to forcibly remove her from her home. He acknowledged that this conduct constituted an assault upon the appellant and that she was entitled to use force to resist their efforts to remove her.

[26] These concessions begin to put the matter into a proper context. The appellant was attempting to thwart the illegal efforts of two intruders who were determined, by whatever steps were necessary, to physically remove her from her home in her nightclothes at almost 10pm and take her elsewhere, leaving her 14 year old son alone in the house. That they were uniformed public servants did not alter the facts of the situation. It was the appellant's right to stop them from achieving their aim (cf the position in France and the concept of rebellion, as described in Glanville Williams Textbook of Criminal Law, 4th Edition at paragraph 24-049).

[27] It was common ground between the appellant and the Crown that there required to be a level of proportionality between the conduct which the appellant could legitimately engage in and the right which she was seeking to exercise. The abject failure of the appellant's efforts to eject the police officers and to defeat their determination to take her into custody might of itself tend to raise the question of how her conduct could be characterised as disproportionate.

[28] The question remains of how to frame the appropriate test. The source of the submission for a test of "all necessary force short of cruel excess" was the report of the sheriff (Roy A Wilson) in the case of *Wither* v *Reid (*at page 10*)*, apparently relying on the English case of *R* v *Jones*. However, an examination of what was said in the decision of the Court of Appeal (Criminal Division) makes matters a little less straightforward than might have been thought.

[29] The case of *Jones* concerned a middle-aged lady who was unlawfully required to provide her fingerprints at a police station. It is instructive to note briefly the factual circumstances. The lady informed the officers that she was not prepared to consent to the request to take her fingerprints and the officers then attempted to do so by force. The lady defended herself "stoutly". In the course of doing so she bit a woman police constable and kicked her leg. She also bit a male police constable. After this resistance the police officers desisted. Her efforts were therefore successful but she then found herself facing two charges of assaulting police constables in the execution of their duty and was duly convicted. On appeal, it was ascertained that the police officers had acted unlawfully in requiring the appellant to provide fingerprints and in attempting to acquire them by force. In giving the judgement of the court which included Shaw LJ and Mais J, Peter Pain J stated:

> "It follows that the appellant was lawfully entitled to resist attempts to make her give her fingerprints by force. No suggestion was made that she used more force than was reasonably necessary for the purpose."

Rather than "all necessary force", it can be seen that what the Court of Appeal had referred to was force which was "reasonably necessary". On this being pointed out to him Mr More volunteered that his argument had been weakened.

[30] In the absence of any previous decision of this court in which the question raised was debated it may be of value to take account of other cases from England where analogous issues were raised.

[31] In *R* v *Wilson* [1955] 1 WLR 493 the court was dealing with a charge of assault on a gamekeeper in the context of an unlawful attempt to arrest invoking a statutory power then available. The trial judge directed the jury that they might find the appellant guilty of a common assault if they were of opinion that he used more force than necessary to avoid the unlawful apprehension. In giving the judgement of the court Lord Chief Justice Goddard said (at page 494):

> "That again is a perfectly unimpeachable statement of the law. If a person is purporting to arrest another without lawful warrant, the person arrested may use force to avoid being arrested, but he must not use more force than necessary."

[32] In *Lindley* v *Rutter* [1981] QB 128 the Divisional Court (Donaldson LJ and Mustill J) said (at page 136) that the defendant was entitled to use reasonable force to resist an unlawful attempt to search her and to remove her brassiere. However she had used more force than was necessary and so was guilty of a common assault. Although *R* v *Jones* was not mentioned in this decision the issue appears to have been framed in a similar way.

[33] In *Samuels* v *The Commissioner of Police for The Metropolis* [1999] EWCA Civ 883 the Court of Appeal was concerned with a claim for damages for assault, false imprisonment

and malicious prosecution. Brooke LJ (with whom Bingham LCJ and Chadwick LJ agreed) framed the issue with which the court was dealing in this fashion:

> "…was PC Senior entitled to stop and search the plaintiff in the events that had occurred? If he was not, then he committed an unlawful assault when trying to search him, and another unlawful assault when seeking to arrest him. The plaintiff was entitled to use a reasonable amount of force to resist the first unlawful assault ..."

[34] In *R* v *McKoy* [2002] EWCA Crim 1628 the trial judge (HHJ Inman) was described by the Court of Appeal : Kay LJ, Andrew Smith J and HHJ Colston QC (at paragraph 6) as having given a model direction of what was needed in the circumstances when he directed the jury that the defendant had not been lawfully arrested and:

> "was free to use reasonable force in all the circumstances to free himself".

He later instructed the jury that they should consider whether the force used by the defendant was:

> "of a reasonable magnitude to secure his release"

[35] In *Cumberbatch* v *Crown Prosecution Service* [2010] MHLR 9 the Queen's Bench Divisional Court (Laws LJ, Lloyd Jones J) noted that the appellant could not be guilty of resisting police officers in the execution of their duty in effecting an unlawful arrest:

> "provided the appellant did not use unreasonable force in resisting unlawful arrest." (paragraph 21)

[36] In *Dixon* v *Crown Prosecution Service* [2018] 4 WLR 160 the court noted that the appellant was entitled to use reasonable force to try to free himself from officers attempting an unlawful arrest and said (Leggatt LJ at paragraph 32):

> "He was entitled in that way to defend his rightful liberty. What he was not entitled to do to defend his liberty was to use unreasonable force."

[37] This brief look into how the issue has been dealt with in England and Wales may suggest that, with the passage of time, the tendency has been to frame the issue in terms of what was reasonable rather than what was necessary. However, the picture which seems to emerge is of a consistent reiteration of the right of a citizen to use force in response to an unlawful attempt by police officers to interfere with his personal integrity, or liberty, and the recognition of an entitlement to use sufficient force as may be necessary for that purpose, qualified by the test of proportionality. So the level of force used requires to be reasonable for its purpose.

[38] In the case of *Cumberbatch* (at paragraph 10) the Divisional Court described the appellant as being "entitled to defend himself" against the unlawful attempt to arrest him. The legal issues which arise from the circumstances which the present appellant found herself in are similar to, but perhaps not identical to, those governing the law on self-defence. Nevertheless, each concerns a citizen who is entitled, as a matter of right, to engage in force to protect their own personal integrity.

[39] In relation to self-defence, the Jury Manual gives suggested directions on the subject at page 30.3 which includes the statement that:

> "In our law, if a person is attacked, or is in reasonable fear of attack, he is entitled deliberately to use such force as is needed to ward off that attack"

[40] Viewed in isolation, that statement might suggest the existence of a right the content of which is unconstrained. That is not the case of course.

> "The degree of force which is in law permissible to repel an unprovoked attack, escape from which is not reasonably possible and the use of which will warrant an acquittal on the ground of self-defence, must be adjusted to the violence and quality of the attack which has to be repelled. [……] The protection which the law affords to the victim of an attack is not a licence to use force grossly in excess of that necessary to defend himself" – see the opinion of Lord Cameron in *Fenning* v *HM Advocate* 1985 JC 76.

[41] As Lord Cameron (with whom Lord Justice General Emslie and Lord Brand agreed) made clear, the focus in self-defence is on what was necessary in light of the circumstances faced by the person attacked. The right will be lost if force grossly in excess of that necessary is used, what is sometimes called cruel excess.

[42] Whilst not identical then, the situation in which a citizen faces an unprovoked and unlawful attack is nevertheless similar to the situation in which a citizen is subjected to an unlawful physical attempt to take him into police custody. The citizen who is unlawfully attacked has the right to use such force as is necessary to bring the attack upon him to an end. The citizen who is subject to an unlawful attempt to take him into custody has the right to use such force as is necessary to prevent that from happening. That must be the true content of the "right to physically resist", as it was termed by the sheriff in the present case. In each situation the level of violence which the respective hypothetical citizen will be entitled to respond with will be linked to, and may be adjusted according to, what is being done to him and what remains necessary in order to bring the unlawful conducted directed towards him to an end. Just as when judging a claim of self-defence, the actions of a citizen who responds to unlawful conduct by a police officer ought not to be judged in too fine a scale and allowance must be made for fear and the heat of the situation.

[43] It therefore seems to us that in order properly to frame the test to be applied to someone in the position of the present appellant it is helpful to include the concept of necessity. This gives content to the question of how to measure the reasonableness of the individual's response. It informs the test of proportionality. We note that in a different but related context the European Court of Human Rights has stated that the lawful use of force must not exceed "what is reasonably considered necessary in the circumstances" – (*Raninen*

v *Finland* (1997) 26 EHRR 563 at paragraph 65). Accordingly, in our opinion, the correct test to apply is to ask whether the appellant's conduct was reasonably necessary in order to provide effective resistance to the unlawful actings to which she was subjected.

The application of the test to the present case

[44] In assessing the evidence in the present case the sheriff did not seek to apply the test which we have identified. Nor, can it be said, that he applied a test that was broadly similar. The account which he gives of the case focuses heavily, almost exclusively, on the conduct of the appellant. There is no description of what the police officers did by way of subduing her, overcoming her resistance or removing her from the property. Although it is said in the application for a stated case that she was handcuffed by them this is not mentioned by the sheriff. The fact that the appellant acted with the intention of distressing and injuring the officers can hardly be determinative. This will be the implicit purpose in many circumstances where there is use of legitimate force. The extent to which that intention was lawful must depend upon what was being done to trigger the appellant's conduct. As noted, the sheriff makes no reference at all to the appellant's own evidence of being bruised or to the photographs said to support those injuries.

[45] There are two passages in the addendum to the Stated Case which, in our view, are sufficient to demonstrate that the sheriff's attention has been focused disproportionately on the fact that violence was directed towards police officers and that as a consequence he failed to direct himself to the appropriate question.

[46] The first is the passage quoted in paragraph [11] above where he suggests that the mischief, as he puts it, which the appellant faced was being wrongly detained which might have required no force at all had she been compliant. In looking at the matter through this

lens the sheriff has failed to face up to the fact that the appellant's entitlement was to react to the unlawful entry to her home and to defeat, if she could, the unlawful attempts to physically remove her therefrom.

[47] The second is again quoted in paragraph [11] above. It is the passage where he refers to a brutal attack with risk to life and limb. There is simply no basis upon which the appellant's conduct as described in Findings in Fact numbers 11 and 12 could be equated with the sort of violence that would be proportionate to a brutal attack with risk to life and limb. The conclusion that the sheriff has overstated and failed properly to assess the level of violence engaged in by the appellant is informed by the language which he used to describe its quality. It is inescapable when it is remembered that the sheriff applied this characterisation not only to the pinching and nipping inflicted on the female officer but also to the barely remembered kick to the male officer which was not even said to have led to any form of injury.

[48] For these reasons we are satisfied that the decision of the Sheriff Appeal Court was wrong in law and we shall answer the first two questions posed in the Stated Case in the negative.