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Judgment: approved by the Court for handing down | *Delivered:* **20.05.05**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED

BETWEEN:

CHIEF INSPECTOR C. FORRESTER

Complainant/Respondent;

and

ALAN ALEXANDER LECKEY

Defendant/Appellant.

Before Nicholson LJ, Campbell LJ and Weatherup J

NICHOLSON LJ

Introduction

[1] This is an appeal by way of case stated from a decision of His Honour Judge Burgess (as he then was), hereafter referred to as "the judge", whereby he convicted the appellant of dangerous driving on 1 June 2004. The question posed by him for the determination of the Court of Appeal is:

> "Whether I was correct in convicting the defendant/appellant of dangerous driving, when I had concluded that the action taken by him was the result of what he reasonably believed to be a situation from which he had good cause to fear that death or serious injury would otherwise result in light of the defence of self-defence and section 3 of the Criminal

Law Act (Northern Ireland) 1967 and the defence of duress of circumstances?"

Mr Larkin QC and Mr Torrens appeared for the appellant. Mr McCloskey QC and Mr Valentine appeared for the respondent. We are indebted to counsel for their helpful submissions.

The Judge's finding of fact

[2] These were set out in para. 4 of the case stated as follows:

(i) the appellant was the driver of a police land-rover deployed to control a serious, organised, controlled, prolonged and sustained public disturbance;

(ii) the police had been subjected to a violent assault, the rioters throwing stones, bricks, fireworks, paint bombs, wood and steel poles and that the appellant's vehicle had been surrounded by rioters and that it had been attacked by an individual attempting to break the windscreen with a steel pole;

(iii) the ferocity of the attack and the various weapons used indicated that the rioters had attempted to cause serious injury to the police officers and that the risk to those officers was very real indeed;

(iv) while tactically withdrawing from the scene and after being subjected to attacks for up to three hours, the appellant, driving the last police vehicle, mounted the pavement and drove towards a crowd of people before turning back to follow the rest of his withdrawing division;

(v) that the appellant, while driving the last withdrawing police vehicle, would be particularly vulnerable to being cut off from the rest of his colleagues;

(vi) as the appellant's vehicle was departing the crowd had run some distance to throw missiles at that vehicle;

(vii) that the appellant's vehicle was the only police vehicle to mount the pavement. The crowd towards which the appellant drove was on the footpath.

The Judge's conclusions

[3] These were based on the evidence given by the various witnesses and the facts set out at para. [2] above and were set out in para. 5 of the case stated as follows:

(i) the action that the appellant took was the result of what he believed reasonably to be a situation from which he had good cause to fear that death or serious injury would result but it was not a case of a sudden or unexpected threat;

(ii) the appellant's driving posed a threat of injury to the people present on the footpath and the waste ground and went beyond the objective of "disrupting the crowd".

Accordingly he convicted the appellant of dangerous driving.

Inferences to be drawn from his conclusions

[4] (A) The findings of fact contained in the decision of the judge are understandably more extensive than those set out in the case stated but we must look only at the findings of fact set out in the case stated and the inferences which can reasonably be drawn from them, unless we send the case back to the judge for further findings. We do not propose to do so.

One can infer from the case stated that while the appellant was withdrawing from the scene he and his colleagues in the last police vehicle were at risk of sustaining death or serious injury as had been the case for a period of up to three hours.

(B) One can also infer that as the appellant was executing the manoeuvre of driving onto the footpath and onto "the waste ground" referred to in the judge's conclusions, the crowd had run some distance to throw missiles at that vehicle and were on the pavement and the waste ground.

(C) The judge may have intended to find that the appellant drove onto the footpath and onto the waste ground in order to disrupt the crowd. If so, the judge must have concluded that the appellant's driving manoeuvre went beyond "disrupting the crowd" and was the result of a misjudgement on his part, placing the people on the footpath and on the waste ground in peril, or he may have intended to conclude that mounting the footpath went beyond "disrupting the crowd", as the other police vehicles did not do so.

(D) The question posed for the determination of the court might lead one to the former view as the judge refers in the question to the action taken by the appellant as being the result of what he reasonably believed to be a situation from which he had good cause to fear that death or serious injury would result. Whichever view is correct, the reasonableness of the appellant's response remains to be determined.

(E) The judge must have assumed that the answer to the question would determine whether he was correct in convicting the appellant of dangerous

driving, whichever defence was relied on. But he did not find that the appellant's response was unreasonable.

The arguments on appeal

[5] Mr Larkin QC contended on behalf of the appellant that the judge's approach to his task was wrong; that he should have decided, firstly, whether the driving of the appellant was dangerous and then considered the various defences. It was accepted that there was no material difference between the test applied to self-defence and a defence under section 3 of the 1967 Act.

There had to be a reasonable possibility that the appellant's actions were reasonable in defending himself and others (common law self-defence) or reasonable in the circumstances "in the prevention of crime, or in effecting or assisting in the lawful arrest of the offenders or suspected offenders or of persons unlawfully at large." (Section 3 of the 1967 Act).

[6] He submitted that the judge failed to address adequately self-defence or the defence under section 3 of the 1967 Act. Reliance was placed on the decision in R v Renouf [1986] 2 All ER 449 and DPP v Bayer, Hart, Snook and Whittance [2004] 1 Cr.App.Rep. 493.

[7] He argued that the judge addressed only the defence of "duress of circumstances" but in doing so found that self-defence had been made out by concluding that the driving action of the appellant was as a result of what he believed reasonably to be a situation from which he had good cause to fear that death or serious physical injury would result.

[8] In considering the defence of "duress of circumstances" the judge resolved the first question (which is set out at para. [22]) in favour of the appellant but did not go on to ask himself the second question, namely whether a sober person of reasonable firmness, sharing the characteristics of the appellant, might have responded to the situation in the same way as the appellant did. However the findings of the judge established that a sober person of reasonable firmness would have acted as the appellant did.

[9] Mr McCloskey QC on behalf of the respondent pointed out that the written skeleton argument submitted to the judge on behalf of the appellant indicated that the challenges to the prosecution would be based (i) on the argument that his driving was not dangerous and (ii) in the alternative to (i), that he would rely on the defence of duress of circumstances. The judge, referring to R v Martin [1989] 1 All ER 652, identified two basic tests, (or questions), one subjective and the other objective and concluded that the first test was satisfied, but not the second.

In stating the question for the opinion of the Court of Appeal, the judge repeated a material finding of fact made by the judge in favour of the appellant on the subjective test, but concluded that the objective test was not satisfied.

Reliance was also placed on R v Conway [1988] 3 All ER 1025, R v Howe [1987] 1 All ER 771 and R v Graham [1988] 1 All ER 801. The appellant had failed to establish that his conduct was objectively reasonable and proportionate.

[10] In so far as the judge was under any obligation to consider the defence of self-defence or section 3 of the 1967 Act, the overlap in all three defences entailed essentially the same subjective and objective tests: see Hegarty v Ministry of Defence [1989] 9 NIJB 88 and Smith and Hogan (9th ed.) at p. 260.

Our conclusions

[11] The Road Traffic (Northern Ireland) Order 1995 provides by Article 10:

> "A person who drives a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence."

Article 11(1) provides:

> "A person is to be regarded as driving dangerously if … -
>
> (a) the way he drives falls far below what would be expected of a competent and careful drive; and
> (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

Article 11(3) is also relevant but it is unnecessary to set it out.

We do not consider that there is any force in the argument that the judge erred in his approach to the issue of dangerous driving. We consider that defences, such as self-defence, the defence under section 3 of the 1967 Act and duress of circumstances should be examined after a conclusion has been reached that the driving was dangerous.

[12] Three defences were open to the appellant on the findings of fact made by the judge, namely self-defence, use of such force as is reasonable in the circumstances in the prevention of crime and duress of circumstances.

[13] Self-defence is a creature of the common law. The judge concluded that the action that the appellant took was the result of what he believed reasonably to be a situation from which he had good cause to fear that death or serious physical injury would result but it was not a case of a sudden or unexpected threat. This conclusion raised the issue of self-defence although the judge did not expressly hold that the driving manoeuvre was in self-defence or defence of others. He found that it was designed "to disrupt the crowd" but went beyond that objective.

[14] (A) In R v Williams (Gladstone) [1987] 3 All ER 411 Lord Lane CJ, delivering the judgment of the Court of Appeal in England and Wales, said at p.415:

> "In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case.
>
> We have read the recommendation in the Criminal Law Revision Committee's 14th Report, Offences Against the Person (Crim. 7844) (1980) in Rt IX, para. 72(a) of which the following passage appears:
>
> "The common law defence of self-defence should be replaced by a statutory defence providing that a person may use such force as it reasonable in the circumstances as he believes them to be in the defence of himself or any other person.
>
> In the view of this court that represents the law as expressed in DPP v Morgan [1976] AC 182 and in R v Kimber [1983] 3 All ER 316…."

We consider that the two passages quoted from the judgment are inconsistent but that the second passage is a correct statement of the law. The words: "…and that the force used was reasonable or may have been reasonable" should be inserted before the words "then the prosecution have not proved their case" on the first passage.

Lord Lane CJ was assuming that the force used was reasonable in the first passage.

(B) In Beckford v The Queen [1988] 1 AC 130 Lord Griffiths, delivering the judgment of their Lordships in the Privy Council, approved the decision in Williams (Gladstone) that a genuine belief in facts which if true would justify self-defence is a defence to a crime of personal violence because the belief negatives the intent to act unlawfully: see pp. 144E to 145E:

> "The test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances, as he honestly believes them to be in the defence of himself or another." (See p. 145H.)

It appears clear to this court that the Privy Council accepted that an objective test was required in respect of the degree of force used.

[15] In our view "such force as is reasonable" does require an objective test, based on the subjective belief. The degree of force used by an accused may not be regarded as reasonable if he uses excessive force or has over reacted. In Palmer v The Queen [1971] AC 814 Lord Morris of Borth-y-Gest said (at p.832):

> "…it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."

But the jury must be told that it is not enough to show that the accused believed the force used was reasonable. In the present case the judge found as a fact that "it was not a case of a sudden or unexpected threat."

[16] Blackstone's Criminal Practice 2005 states at A3.35:

> "The degree of force used by an accused will not be regarded as reasonable unless the accused believed that it was necessary to use that degree of force.
>
> It would seem that the reasonableness of the degree of force used is coming close to being treated as merely evidence of whether the accused was genuinely motivated by self-defence…, excessive force being evidence that self-defence was not the accused's real purpose."

We note the comment but remain of the view that an objective test is needed.

[17] In R v Owino [1996] 2 Cr.App.R. 128 part of the head note reads:

> "Held, … the test of the appropriate degree of force a person was entitled to use in self-defence was not any degree of force which he believed was reasonable, however well founded this belief. A jury must decide whether a defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or a threatened attack. A defendant must be judged in accordance with his honest belief, even though that belief may be mistaken. *But the jury has then to decide whether the force used was reasonable in the circumstances as he believed them to be…*"

[18] In The Queen v Martin (Anthony) [2002] 1 Cr.App.R.27 Lord Wolff CJ said at pp. 325, 326:

> "A defendant is entitled to use reasonable force to protect himself, others for whom he is responsible and his property."

Citing Beckford v R he proceeded:

> "In judging whether the defendant had only used reasonable force, the jury has to take into account all the circumstances, including the situation as the defendant honestly believes it to be at the time, when he was defending himself. It does not matter if the defendant was mistaken in his belief, as long as his belief was genuine. Accordingly the jury could only convict Mr Martin if either they did not believe his evidence that he was acting in self-defence or they thought that Mr Martin had used an unreasonable amount of force. These were issues which were ideally suited to a jury…
>
> It cannot be left to a defendant to decide what force it is reasonable to use because this would mean that even if a defendant used disproportionate force but he believed he was acting reasonably, he would not be guilty of any offence. It is for this reason that it

> was for the jury, as the representative of the public, to decide the amount of force which it would be reasonable and the amount of force which it would be unreasonable to use in the circumstances in which they found that Mr Martin believed himself to be in. It is only if the jury are sure that the amount of force which was used was unreasonable that they are entitled to find a defendant guilty if he was acting in self-defence."

[19] In Zecevic v DPP (Victoria) (1987) 162 CLR Mason CJ stated that he was "unable to accept that self-defence lacks an objective element. Howe (1958) 100 CLR 448, Palmer [1971] AC 814 and five of the judges in Viro (1978) 141 CLR 88 assert the existence of an objective element." He, therefore, considered that the joint judgment of Wilson, Dawson and Toohey JJ correctly stated the law of self-defence and would conform to the law in the United Kingdom as expounded in Palmer and Reg v McInnes [1971] 3 All ER 295 (which adopted for England and Wales what the Privy Council said in Palmer). At p. 661 Wilson J, Dawson J and Toohey J stated:

> "The question to be asked in the end is quite simple – it is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in that form, the question is one of general application and is not limited to cases of homicide. Where homicide is involved some elaboration may be necessary… A killing which is done in self-defence is done with justification or excuse and is not unlawful….if the response of an accused goes beyond what he believed to be necessary to defend himself or if there were no reasonable grounds for a belief on his part that the response was necessary in defence of himself, then the occasion will not have been one which would support a plea of self-defence…it will be for the jury to determine how it must be regarded."

With qualifications which are not relevant to this case, Brennan J also agreed with the joint judgment.

In R v Clegg [1995] 1 AC 482 the head note reads in part:

> "Held, dismissing the appeal, that where a person used a greater degree of force in self-defence than was necessary in the circumstances he was guilty of murder: that there was no distinction to be made between the use of excessive force in the prevention of crime or in arresting an offender; and that it made no difference that the person using it was a soldier or police officer acting in the course of his duty."

[20] The judge concluded in this case that the appellant believed reasonably that he was in a situation from which he had good cause to fear that death or serious physical injury would result if he did not take the action that he did. But he did not expressly go on to consider whether the driving manoeuvre was such that he, as the finder of fact, was sure that an unreasonable amount of force was used.

[21] Section 3(1) of the 1967 Act provides:-

> "3.-(1) A person may use such force as is reasonable in the circumstances in the prevention of crime …."

If this defence has the same characteristics as self-defence, then the circumstances will be as the accused honestly believes them to be. But the force used cannot be what the accused believes to be reasonable. It must be based on reasonable grounds. In R v Clegg [1995] 1 AC 482 it was held that there was no distinction to be drawn between the use of excessive force in self-defence and the use of excessive force in the prevention of crime: see the head note cited at para. [19]. See also R v Hegarty [1986] NI 343 at 348, 249 per Hutton J (as he then was).

The judge did not indicate whether the driving manoeuvre was in self-defence or in the prevention of crime or both. But whichever defence is considered, the result is the same. We cannot be sure that the judge was satisfied beyond reasonable doubt that the driving manoeuvre of the appellant was unreasonable. He found that it went beyond the objective of "disrupting the crowd". It may be implicit in his finding that he was sure that the manoeuvre was not intended to prevent crime but he did not say so.

[22] The defence of duress of circumstances was also open to the appellant. The judge cited R v Martin [1989] 1 All ER 652 in which it was held that, assuming the defence was open to an accused, the defence should be left to the jury with a direction to determine two questions, firstly, whether the accused was, or might have been, impelled to act as he did because, as a result of what he reasonably believed to be the situation, he had good cause to fear that otherwise death or serious physical injury would result, and

secondly, if so, whether a sober person of reasonable firmness, sharing the characteristics of the accused, would have responded to that situation by acting as the accused had acted, and to acquit if both questions are answered affirmatively since the defence of necessity will then have been established.

The judge appears to have answered the first question in the affirmative and not to have answered the second question. If the first question was answered in the affirmative , the second question is whether another police officer of reasonable firmness, sharing the characteristics of the appellant, would have driven his Landrover onto the footpath and onto the waste ground, endangering the lives of those on the footpath and on the waste ground. It would appear likely that his answer would have been in the negative but we cannot be sure as he did not say so. The defence requires more than an honest belief, it appears. The belief must be reasonable,. It also requires an objective test which may be slightly more favourable to an accused, as the reasonable man "shares the characteristics of the accused." See R v Martin. But there was no finding that this appellant had characteristics which differentiated him from a reasonable police officer.

[23] The result is that the conviction must be quashed. We direct a re-trial before another judge, although Mr Larkin QC invited us to send it back to the Recorder. We consider it unfair to ask him to adjudicate afresh, having regard to our judgment.