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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY THE DIRECTOR OF PUBLIC PROSECUTIONS

Before Kerr LCJ and Girvan LJ

KERR LCJ

Introduction

[1] This is an application by the Director of Public Prosecutions for judicial review of decisions of Robert Alcorn, a resident magistrate, sitting as a court of summary jurisdiction at Antrim Magistrates' Court on the 10 July 2007. Mr Alcorn acceded to an application made on behalf of a defendant, Inspector Christopher Yates, that he had no case to answer on a charge of assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861. He refused an application made on behalf of the prosecution that the summons be amended to include an offence of assault contrary to section 42 of the 1861 Act and dismissed the case against Mr Yates.

Background

[2] The prosecution arose out of an incident that occurred in the early hours of Sunday 25 September 2005 when police were called to a disturbance at the Stables Bar, a public house in Antrim. When they arrived a large number of people were outside the bar and police had to deal with a public order situation. A PSNI video evidence vehicle was in attendance and video footage was taken of the incident. The defendant, Inspector Yates, had arrested, and was trying to detain, a Mr McGuigan. The video footage shows that Robert Allen was

attempting to prevent the detention of Mr McGuigan by placing his arms around his body. At this point Inspector Yates can be seen on the film aiming two blows with his fist at Mr Allen's head. The first of these did not connect and the second appears to have glanced off Mr Allen's temple.

[3] Subsequently Mr Allen made a complaint that he had been assaulted by the defendant and this allegation was investigated by the Office of the Police Ombudsman for Northern Ireland. Before that investigation began, Mr Yates had made a witness statement about the events on 25 September 2005. That statement was made later on that day. In it Mr Yates said that at about 12.30 am he and two other police officers responded to a call about a disturbance from the manager of the Stables Bar, that about 10-15 people were fighting. When they arrived it was clear that there had been a serious disturbance some time before. A number of men outside the public house had serious facial injuries and were drunk.

[4] Mr Yates was approached by the driver of a taxi parked outside the stables bar who complained that his nearside wing mirror had been ripped off by one of the men outside the pub – one Barry McGuigan. Mr Yates arrested Mr McGuigan who struggled violently and attempted to escape; in this struggle Mr Yates was pulled across the road to the pavement on the opposite side of the road. Mr McGuigan's girlfriend tried to get between him and the prisoner. Other members of the crowd were attracted to the struggle and Mr Yates' colleagues did their best to keep people away. Eventually, after Mr McGuigan had feigned unconsciousness and after his girlfriend had lain on top of him to prevent him being handcuffed, Mr Yates succeeded in handcuffing Mr McGuigan and raised him to a standing position in order to take him to a nearby police vehicle.

[5] According to Mr Yates, at this point he was attacked from behind by one Stephen Alexander and Robert Allen then jumped on Mr McGuigan's back and got him into a bear hug to get him away from Mr Yates. Throughout this time Mr Yates claimed that he was shouting at the people around telling them that Mr McGuigan was under arrest and that they should not interfere. In the struggle he said that his earpiece was deliberately ripped from his ear and lost to him and that he felt someone pulling at his gun belt. His baton, CS spray and police issue hand gun were all vulnerable to being taken off him and he could not maintain his grip on McGuigan's handcuffs and also defend himself and his equipment. He shouted at Mr Allen to let go of McGuigan and himself and told him he would use force if he didn't back off immediately, as the situation was getting out of his control. On Mr Yates' account, Mr Allen appeared to draw back his right fist as if he was going to hit him. At this point the inspector claimed that he was too close to use CS spray or his baton. He therefore punched out with his right fist to the only target available to him which was Allen's face. He evaded

the first punch and Mr Yates again warned him to back off but he continued to struggle so Mr Yates threw another punch which, he then believed, landed on Mr Allen's nose.

[6] At this point, according to the inspector, Mr Allen released his hold on McGuigan, putting his hand to his injured nose. Mr Yates was then able to pull McGuigan to the nearest police vehicle. By this stage other officers had come to assist the inspector and they kept back persons who might have intervened, allowing McGuigan to be detained in the police vehicle. When this was accomplished, the inspector instructed Constable Maguire to arrest Mr Allen for obstructing police.

[7] Mr Yates was interviewed under caution on 30 June 2006 by investigating officers from the Police Ombudsman's office. During this interview he produced a pre-prepared statement. He pointed out that it was he who had asked for the CCTV Evidence Gathering Truck to be present outside the Stables Bar to monitor disorder. It is clear that the inspector's statement had been composed after he had seen the CCTV footage of the incident and Robert Allen's statement of complaint. In summary the police inspector said that the footage created a misleading impression in that it showed only a brief snapshot of the entire incident; it did not show Stephen Alexander jumping on his back and "trying to strangle" him. Mr Yates claimed that before he came into view on the video film, he had already been assaulted three or four times by at least three different people.

[8] Having viewed the video film the inspector claimed to have realised that there were what he described as "perceptual errors" between his recollection of events and what had actually occurred but he asserted that there had been no intention to mislead. In particular Mr Yates now believed that neither punch that he threw at Allen was effective. The first punch missed and as the second punch was thrown Robert Allen turned his face away and Yates fist appeared to make slight contact with Allen's temple.

[9] The inspector claimed that the decision to punch Allen was only made after other CRS options had been considered and rejected as unsuitable or impossible. He considered that he was in a life threatening situation. His firearm was at risk and he had been taught that if your firearm was threatened you should do whatever was necessary to ensure that the firearm was retained.

[10] During the interview of Mr Yates, one of the interviewing officers, Andrew Coulter, stated that the video footage showed that, when Mr Yates punched Mr Allen on the second occasion, Allen had already released his grip of McGuigan and both persons (Allen and McGuigan) were restrained by Mr Yates and other

police. He then put it to Mr Yates that the force used was not proportionate and reasonable given the circumstances. In reply, Mr Yates said that he "strongly believed" that it was both proportionate and reasonable.

The grant of a direction

[11] Mr Alcorn explained his decision to accede to the application for a direction and to refuse the application to amend the summons in paragraph 8 of his affidavit: -

> "I did not accede to the request of prosecuting counsel to amend the summons to one of unlawful assault contrary to section 42 of the Offences against the Person Act 1861 for the very simple reason that there was no evidence of any such assault. It was conceded in the defendant's statement that he struck Allen once. He did so after warning Allen to let one McGuigan (whom Yates had arrested) and himself go. He also warned Allen he would use force if he (Allen) did not comply. It was absolutely clear that the blow was struck by the defendant in the execution of his duty. There was no evidence in the prosecution case to the contrary. I made it clear at the hearing that for me to convict of a section 42 offence there had to be *mens rea* on the part of the defendant as well as the *actus reus*. It is not open to me to convict of an offence when the evidence does not support it."

[12] It was clear that the evidential foundation for the offence of assault occasioning actual bodily harm did not exist. There was no evidence that any injury had been sustained by Mr Allen as a result of the inspector's having struck him, despite Mr Yates initial claim that Mr Allen released his grip on McGuigan in order to hold his injured nose. It was not argued on appeal that the magistrate should not have acceded to the application for a direction on the section 47 charge. The focus of the challenge to his decision was his refusal to substitute the section 42 charge.

The arguments

[13] For the DPP, Mr McAlister submitted that the issue to be decided on the application for a direction was not *mens rea* or the intention of the defendant when striking the injured party. It had not been in issue that the defendant intended to strike the injured party. The question for the resident magistrate was

the lawfulness of the striking of the injured party, on the basis that the blow was struck in self-defence or that it involved the use of reasonable force for one of the purposes prescribed by section 3 of the Criminal Law Act (Northern Ireland) 1967. The magistrate did not address this issue, or else failed to appreciate its significance. The conclusion that the blow was struck by the defendant in the execution of his duty missed the point that the defendant would only be acting in the execution of his duty if his actions towards the injured party were either made in self-defence or reasonable force under section 3. There was cogent prosecution evidence from the PSNI video and the statements and interview of the defendant that the actions of the defendant were not lawful.

[14] On the magistrate's refusal to amend the summons Mr McAlister argued that the power to do so was available to the magistrate under article 46 (3) of the Magistrates Courts (Northern Ireland) Order 1981 and that there was nothing that contraindicated the exercise of the power.

[15] For the magistrate Mr Paul McLaughlin submitted that the averments in paragraph 8 of his affidavit should be construed as indicating that the magistrate had addressed the question of the lawfulness of the force used by the inspector. When he stated that "there was no evidence of any such assault", the magistrate was referring to an unlawful assault and to his conclusion that this assault could not be characterised as unlawful since a defence of self defence and/or a defence under section 3 of the 1967 Act had in effect already been made out. In this context the magistrate was entitled to take account of the exculpatory parts of the inspector's statements. Mr McLaughlin accepted, however, (as did Mr David Dunlop who appeared for Inspector Yates) that *mens rea* was not a material issue at the direction stage since the police officer had admitted striking Mr Allen.

[16] On the question of whether the magistrate was correct in refusing to amend the summons, Mr McLaughlin submitted that article 46 (3) of the 1981 Order could not be invoked where, as here, the offence proposed to be substituted for the section 47 charge was a summary offence which may not be tried on indictment. On that account, it was not, Mr McLaughlin argued, available as an alternative charge. The magistrate had no power to consider the alternative charge of section 42 assault and was right not to allow the trial to continue on that charge.

Substitution and conviction of alternative offences

[17] Article 46 (3) of the Magistrates' Courts (Northern Ireland) Order 1981 deals with the circumstances in which a magistrate may convict of an alternative offence. It provides:-

> "Where a resident magistrate deals summarily with an offence specified in Schedule 2 and the offence is such that, had the accused been charged on indictment with that offence, he might lawfully have been convicted of an alternative offence, the magistrate may convict him of such alternative offence."

One of the offences specified in Schedule 2 is section 47 of the Offences against the Person Act 1861.

[18] Rule 46 of the Magistrates' Courts Rules (Northern Ireland) 1984 provides:-

> "Where a resident magistrate in exercise of the power conferred by Article 46(3) of the Order, having dealt summarily with a charge for an indictable offence, convicts the accused of an offence in the alternative to that charged, an entry to that effect shall be made in the Order Book and specifying the alternative offence of which he was convicted."

[19] In advancing the case that Mr Alcorn did not have power to convict Mr Yates of an offence under section 42, Mr McLaughlin relied on the decision of the Court of Appeal in England and Wales in the case of *R v Mearns* [1991] 1 QB 82. In that case the appellant had been tried in the Crown Court on an indictment charging him with assault occasioning actual bodily harm contrary to section 47 of the 1861 Act. He was found not guilty of that charge but guilty of common assault. He appealed against conviction on the ground that the judge had erred in law in allowing the jury to consider and return a verdict of guilty of common assault when a count alleging the same was not included on the indictment, as required by section 40 of the Criminal Justice Act 1988.

[20] The submission advanced on behalf of *Mearns* was that since October 1988, common assault, instead of being a common law offence which could be tried either on indictment or summarily, was now, by statute, a summary offence only. However, section 40 provided that in an indictment alleging assault occasioning actual bodily harm, an alternative verdict of guilty to common assault may be given in appropriate circumstances, but only if a count to that effect was included in the indictment. No such alternative count had been included in the indictment and this was deemed fatal to the conviction which was duly quashed by the Court of Appeal.

[21] We do not consider that the decision in *Mearns* assists Mr McLaughlin's argument. The magistrate here was asked to replace the charge of assault contrary to section 47 with a charge contrary to section 42 of the Offences against the Person Act. In our opinion, the power to substitute this charge exists independently of the power to convict under article 46 (3) of the 1981 Order. There is an argument that the magistrate should not have acceded to an application to substitute the charge because of the effect of article 19 of the 1981 Order which provides for a time limit of six months in cases such as the present for the making of a complaint. This issue did not feature in the written submissions of the parties and was not wholly developed in the oral argument before us. It is unnecessary for us to express a final opinion on it and we will defer doing so until the opportunity arises to consider it rather more fully.

The defences available to the respondent

[22] It appears to us that the defences available to the police inspector in this case were self defence and those adumbrated in section 3 of the Criminal Law Act (Northern Ireland) 1967. Subsection (1) of that section provides: -

> "3. - (1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

[23] The resident magistrate appears to have been exercised by two considerations in reaching his conclusion that a direction should be given. The first was that the blows struck by the police officer were delivered in the due execution of his duty. The second was that there was no *mens rea* on his part. It is not clear whether these issues were interlinked.

[24] We accept Mr McAlister's argument that the matter on which the magistrate ought to have concentrated was the lawfulness of the force used rather than the intention of the inspector or whether the blows were struck in the exercise of his duty. Excessive force cannot be transformed to lawful force simply because it is delivered in purported exercise of a police officer's duty. Likewise *mens rea* was not an issue here. There was never a dispute about the respondent's intention. It was to strike Mr Allen. The only issues for the magistrate therefore were whether any or all of the defences that we have outlined above were available to the respondent and whether, if they were, such was the state of the evidence that a direction had to be given.

The circumstances in which a direction should be given in a non jury trial

[25] In *Chief Constable v LO* [2006] NICA 3 the Court of Appeal gave guidance as to the circumstances in which it would be appropriate for a magistrate to accede to an application of no case to answer. At paragraph [14] the court said: -

> "The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in *Galbraith*. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not ask himself the question, at the close of the prosecution case, 'do I have a reasonable doubt?'. The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict."

[26] In the present case the police inspector was faced with an extremely fraught situation. His efforts to effect an arrest were, on the findings made by the magistrate, significantly hindered by the behaviour of Allen. The defence of the use of reasonable force to carry out the arrest was therefore in issue. We consider that he was plainly entitled to use reasonable force to prevent Allen from impeding the arrest further. Mr McAlister did not seek to argue otherwise. It was for the prosecution to establish to the customary criminal standard of proof that the inspector had used more force than was reasonable to ensure that McGuigan was arrested. He explained why it was impossible for him to use his CS canister or to wield his baton. The question on which the magistrate should have focused, therefore, was whether there were any circumstances in which he could have concluded that the force used was other than reasonable.

[27] We have concluded that, if the magistrate had addressed the issue in this way, he is bound to have determined that there were no circumstances in which he could have found that the defence available to the inspector under section 3 of the 1967 Act had been or could be nullified. On that basis (rather than that on which he made his finding) the magistrate should have given a direction of no case to answer.

Conclusions

[28] Section 18(5) of the Judicature (Northern Ireland) Act 1978 provides: -

> "(5) Without prejudice to section 25 of this Act or to [Article 159 of the Magistrates' Courts (Northern Ireland) Order 1981], where, on an application for judicial review, the court finds that—
>
> (a) the sole ground of relief established is a defect in form or a technical irregularity; and
> (b) no substantial wrong and no miscarriage of justice has occurred or no remedial advantage could accrue to the applicant,
>
> the court may refuse relief and, where a lower deciding authority has exercised jurisdiction, may make an order, having effect from such time and on such terms as the court thinks just, validating any decision or determination of the lower deciding authority or any act done in consequence thereof notwithstanding that defect or irregularity."

[29] Mr Dunlop argued that it was open to this court to have recourse to this provision in order to dismiss the application. We do not consider, however, that the magistrate's approach to the question of whether a direction should be given can be characterised as a 'defect in form or technical irregularity'. His failure to apply the correct legal test is a matter of substance rather than form.

[30] The relief sought in a judicial review application is discretionary in nature, however. We consider that since the respondent would have been entitled to a direction of no case to answer if the magistrate had applied the proper test, we should exercise our discretion to refuse the application for judicial review of his decision and we so order.