

ENGLAND AND WALES / JUDGMENT

Dixon v Crown Prosecution Service

Source: caselaw.nationalarchives.gov.uk · Research copy typeset by Esheria. Not court-issued or certified.

Neutral Citation Number: [2018] EWHC 3154 (Admin) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION DIVISIONAL COURT Case No: CO/2592/2018 Royal Courts of Justice Strand, London, WC2A 2LL Date: 20/11/2018 Before: LORD JUSTICE LEGGATT and MR JUSTICE DINGEMANS

- ----- Between: COREY DIXON
- and - CROWN PROSECUTION SERVICE Appellant Respondent
- ----- Mr James Davis (instructed by Hollingsworth Edwards Solicitors) for the Appellant Mr Simon Heptonstall (instructed by the CPS Appeals and Review Unit) for the Respondent Hearing date: 13 November 2018
- -----

Judgment

Lord Justice Leggatt (giving the judgment of the court): 1. This appeal by case stated from the Crown Court raises a question about whether a police constable was acting in the execution of his duty when he was assaulted by the appellant. Findings of fact 2. 3. 4. The relevant findings of fact made by the Crown Court are that the appellant was cycling in the early hours of 26 March 2017 in Willesden, when he was spotted by three police constables who were on patrol in an unmarked vehicle. The appellant fitted the description of persons who, according to an earlier intelligence briefing, might be carrying drugs or weapons. PC Haroon got out of the vehicle and asked the appellant to stop. When the appellant failed to do so, PC Haroon took hold of his arm. He was not arresting the appellant nor exercising powers of stop and search. A fight ensued, and PC Haroon was joined by PC Bailey, who struggled to restrain the appellant. They were then joined by PC Dolling. PC Dolling went to restrain the appellant's arm because he believed that the appellant might be reaching for a weapon, or something to use as a weapon, in his waistband. PC Dolling understood that PC Haroon and PC Bailey were trying to detain the appellant. The appellant bit PC Dolling on the arm. He knew when doing so that he was biting a police officer. The proceedings below 5. 6. The appellant was charged with offences under section 89(1) of the Police Act 1996 of assaulting each of the three constables in the execution of his duty. Before the Willesden magistrates, the appellant was acquitted of the offences charged in relation to PC Haroon and PC Bailey but convicted of the offence in relation to PC Dolling. He appealed against his conviction to the Crown Court at Harrow. The appeal was heard on 8 March 2018 by Mr Recorder Hall QC sitting with two justices. They dismissed the appeal. They found it proved, first,

that the appellant had bitten PC Dolling on the arm and, second, that in doing so the appellant had not been acting in lawful self-defence. When asked by the court to indicate whether he was submitting that PC Dolling was not acting in the execution of his duty, the appellant's representative said that he was not making that submission. The court concluded that, although PC Haroon had not been acting lawfully when he attempted to detain the appellant, PC Dolling was nevertheless acting in the execution of his duty because he thought that the appellant might be reaching for a weapon in his waistband. 7. The Crown Court subsequently posed the following question for the opinion of this court: "Given that the grabbing of the appellant by PC Haroon was an unlawful use of force, were we nonetheless entitled to find on the facts found that PC Dolling was acting in the execution of his duty when he was bitten by the appellant?" Two preliminary issues 8. 9. 10. Two preliminary issues have been raised. The first is that the appellant's notice was filed with the court and served on the respondent 19 and 24 days respectively after the time for doing so had expired and (at least in relation to the late filing) the appellant requires relief from sanctions as well as an extension of time before the appeal can proceed. The second issue is whether the appeal should be entertained in circumstances where the point that the appellant is seeking to raise (that PC Dolling was not acting in the execution of his duty) was not taken below. Where an appeal is made by way of case stated the appellant is required by Practice Direction 52E, para 2.2, to file the notice of appeal at the appeal court within 10 days of the date of the case stated by the lower court. In this case the Crown Court stated the case on 4 June 2018. However, the appellant's solicitors requested two amendments to it, which the Crown Court notified them on 15 June 2018 that it was not prepared to make. There was then a delay before the appellant's solicitors succeeded in contacting the appellant on 25 June 2018 to obtain his instructions to lodge the appeal. The notice of appeal was filed on 3 July 2018 and an application was also made for an extension of time. Although there is no good excuse for this delay (nor for the further delay in serving the notice of appeal and the appellant's skeleton argument), there is no suggestion that the delay caused any significant inconvenience to the respondent (which did not actively oppose the application for an extension of time) nor that it had any significant effect on the overall progress of the appeal. In the circumstances we consider that it is appropriate to grant the necessary extensions of time. As for the fact that the appellant did not dispute in the Crown Court that PC Dolling was acting in the execution of his duty, that was nevertheless an element of the offence which the prosecution had to establish in order to justify the appellant's conviction. In principle and as confirmed by the case of *Kates v Jeffery* [1914] 3 KB 160, the correct approach in our view is this. If this court were to conclude that, on the facts found by the Crown Court and stated in the case, the Crown Court was not as a matter of law entitled to find that PC Dolling was acting in the execution of his duty when he was bitten by the appellant, then the appellant's conviction ought not to stand. It would not be right to leave in place a conviction which can be seen to be wrong in law because the point of law was overlooked by the defendant's representative in the Crown Court. If on the other hand this court does not so conclude, then the appeal must be dismissed. In particular, it would not be right to remit the case in order for further findings of fact to be made which could have been made if the point now taken had been raised below. Elements of the offence 11. Turning to the substance of the appeal, the offence of assaulting a constable in the execution of his duty has two elements. First, it must be established

that there was an assault and, second, it must be proved that the victim of the assault was a constable acting in the execution of his duty. 12. The conclusion of the Crown Court that the appellant committed an assault by biting PC Dolling is not challenged on this appeal. The issue is whether the Crown Court was entitled to find that the second element of the offence was made out in that PC Dolling was acting in the execution of his duty at the time of the assault. 13. In *Rice v Connolly* [1966] 2 QB 414 at 419 Lord Parker CJ observed that, although there is no exhaustive definition of the powers and obligations of the police: “it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury.” In *McCann v Director of Public Prosecutions* [2015] EWHC 2461 (Admin); [2016] 1 Cr App R 6, paras 14 and 15, it was accepted by counsel and agreed by the Divisional Court that in modern times the word “reasonably” should be inserted in this statement before the word “appear”. That is consistent with the decision of the House of Lords in *Albert v Lavin* [1982] AC 546, 564, which endorsed the proposition that: “a constable who reasonably believes that a breach of the peace is about to take place is entitled to detain any person without arrest to prevent that breach of the peace in circumstances which reasonably appear to him to be proper.” 14. In another leading case, *R v Waterfield* [1964] 1 QB 164 at 170, the Court of Appeal (Criminal Division) said: “In the judgment of this court it would be difficult ... to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was *prima facie* an unlawful interference with a person’s liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of the duty, involved an unjustifiable use of the powers associated with the duty.” 15. In *McCann*, at paras 19 and 26, Treacy LJ (who gave the judgment of the court) considered that “what needs to be examined is the actions and intentions of the officer actually involved” and, in particular, whether she was acting in a way which she reasonably believed would further a proper policing purpose of the kind described by Lord Parker CJ in *Rice v Connolly*. In addition, as indicated in *Waterfield*, the conduct of the officer must be a lawful exercise of the officer’s powers. Where the conduct involves the use of force for the prevention of crime, the use of force will be lawful only if it is reasonable: see section 3 of the Criminal Law Act 1967. Initial analysis of this case 16. Applying these principles to the present case, it is common ground that PC Haroon was acting unlawfully in seeking to detain the appellant and that PC Bailey was likewise acting unlawfully in assisting PC Haroon. A police officer who uses force to detain someone in circumstances where the act of detention is unlawful *prima facie* commits an assault and in assaulting the person whom he is seeking to detain is plainly not acting in the execution of his duty. The same applies to an officer who comes to the assistance of the first officer. The position is not altered by the fact that the person being detained uses reasonable force to resist his detention, as such resistance is itself lawful. Hence neither PC Haroon nor PC Bailey was acting in the execution of his duty. However, the Crown Court found that PC Dolling went to restrain the appellant because he believed that the appellant might be reaching for a weapon, or something to use as a weapon, in his waistband. The use of a weapon by the appellant would clearly have involved the use of more

force than was reasonable to resist his detention and would therefore have amounted to the commission of a crime of violence against one or both of the officers detaining him. Hence the effect of the finding made by the Crown Court is that PC Dolling acted in a way which appeared to him necessary to prevent crime and to defend a fellow officer. Although the Crown Court did not expressly find that the beliefs of PC Dolling that the appellant might be reaching for a weapon and that it was necessary to restrain the appellant's arm to prevent its use were reasonable, the court did not suggest otherwise. Applying the approach indicated at paragraph 10 above, in the absence of a contrary finding the reasonableness of those beliefs must be assumed against the appellant. If PC Dolling had used excessive force or had continued to use force to restrain the appellant after he realised that the appellant did not have a weapon, that would have taken his actions outside the execution of his duty again. But there is no such finding. It therefore provisionally seems to us that, on the facts found, at the time when he was bitten by the appellant PC Dolling was acting in the execution of his duty in attempting to prevent a fellow constable from being unlawfully assaulted. 17. 18. The appellant's submissions 19. On behalf of the appellant, Mr Davis (who did not appear below) took issue with this analysis. He submitted that a police constable who knowingly assists in the detention of a person acts unlawfully and outside the exercise of his powers if the detention is unlawful, even if the constable's proximate purpose in using force is to prevent a breach of the peace or the commission of a crime. Mr Davis submitted that it would be wholly artificial to draw a distinction between PC Dolling and the other officers, and that to do so would considerably erode the right of a subject to defend his liberty from unlawful interference. He argued that, in practical terms, the appellant cannot have been expected to distinguish between PC Haroon and PC Bailey on the one hand and PC Dolling on the other and that, in terms of principle, the appellant was defending his rightful liberty. Accordingly, the Crown Court was wrong in law to hold that PC Dolling was acting in the execution of his duty when he was bitten by the appellant. Cumberbatch and Ali 20. In support of these submissions, Mr Davis relied strongly on the decision of this court in the cases of Cumberbatch v Crown Prosecution Service; Ali v Director of Public Prosecutions [2009] EWHC 3353 (Admin). In the case of Ali, two police officers came to the assistance of a fellow officer (PC Kenney) who, unknown to them, was acting unlawfully in trying to detain Mr Ali. Mr Ali was subsequently charged under section 89(2) of the Police Act 1996 with three offences of resisting a constable in the execution of his duty. He was acquitted of the offence in relation to PC Kenney but convicted of the offences of resisting each of the other two officers. The Divisional Court allowed his appeal. Lloyd Jones J (with whose judgment Laws LJ agreed) said (at para 13): "The arrest by officer Kenney was unlawful and Mr Ali was entitled to resist it. He could not be in a position whereby he was entitled to resist one officer but not others who arrived to assist the first officer in the arrest. He could not be expected to distinguish between them; he could not possibly distinguish between the actual arresting officer and those officers who merely assisted in that arrest. In my judgement, he did not need to do so in the circumstances of this case. He was simply entitled to resist arrest. Were this not the case, the right of any citizen to resist an unlawful attempted arrest would be defeated." 21. Addressing a submission that the two officers who went to assist PC Kenney were under a duty to prevent a breach of the peace, Lloyd Jones J said (at para 16): "the submission overlooks the fact that the situation involving Mr Ali which

confronted these two officers was one of a citizen resisting an unlawful arrest, and had been brought about through the unlawful conduct of their colleague. There is no indication in the case stated that at the point of resisting the officers Mr Ali was posing a threat to anyone else.” The judge went on to say (at para 17): “In the present case, it is established that PC Kenney was acting unlawfully in his attempt to arrest Mr Ali. I accept that the situation would be different if Mr Ali had used unreasonable force. He would then be acting unlawfully and the consequence of that would be that officers acting to restrain and arrest him would be acting, once again, in the execution of their duties. However, there is no suggestion in this case that the degree of force used by Mr Ali was unreasonable.” 22. In the second case of *Cumberbatch* the appellant had reacted to what was assumed by the Divisional Court to have been the unlawful detention of her father by shouting and behaving aggressively. A police officer (PC Richardson) intervened to restrain the appellant (Miss Cumberbatch), who scratched the officer’s neck. As in the present case, Miss Cumberbatch was charged with an offence of assaulting a constable in the execution of the constable’s duty and was convicted of the offence. The Crown Court found that she was behaving in such a way as to present a clear risk of violence being inflicted, or a breach of the peace being occasioned, and that in these circumstances PC Richardson was acting in the course of her duty in taking hold of her arm. The Divisional Court allowed the appeal. Lloyd Jones J said (at para 34): “Here, any actual or threatened violence, or breach of the peace by Miss Cumberbatch, was indissolubly linked with her protest at the treatment of her father, which for present purposes must be taken to be unlawful, and not in the course of the duty of the police officers. Miss Cumberbatch’s conduct was not directed at anyone else. There is no indication in the case stated that there was anyone else present who might be affected by it. Furthermore, in this case, PC Richardson’s conduct is so bound up with the arrest and continuing detention of Mr Cumberbatch that it is not possible, in my judgement, to say that she was acting in the course of her duty for the distinct reason that she was preventing an actual or threatened act of breach of the peace. If Miss Cumberbatch had assaulted one of the officers who actually carried out the arrest, as opposed to PC Richardson, she would not have been guilty of an assault on an officer in the execution of his duty. I am unable to see that the position is any different if she assaults an accompanying officer who tries to prevent her from interfering with or protesting against the unlawful arrest. I readily accept that if there had been an independent, free-standing breach of the peace, the position would be different, but that was not the case here.” 23. Lloyd Jones J added (at para 36): “The position would have been different if Miss Cumberbatch had acted in a way which exceeded a reasonable response to the unlawful arrest of her father. In those circumstances it seems to me that PC Richardson would have been acting in the execution of her duties in restraining her. However, there is no suggestion that that is what occurred in this case.” *Joyce v Hertfordshire Constabulary* 24. The case of *Ali* is not easy to distinguish from *Joyce v Hertfordshire Constabulary*

- (1985) 80 Cr App R 298, where a fight occurred at a football match and a police officer came upon the defendant struggling with another officer. The second constable intervened and detained the defendant, despite the defendant’s violent attempts to resist. The defendant was convicted of assaulting the second constable in the execution of his duty. Although the

officer who first tried to detain the defendant could not be identified and it could not be established whether or not the initial detention was lawful, the magistrates found that the constable who intervened was entitled to do so to prevent a breach of the peace. The Divisional Court held that the magistrates were entitled to convict the defendant on this basis. 25. The case stated by the magistrates in Joyce contained the following passage: "It was agreed that the presiding magistrate when announcing the decision of the Court used the following or similar words 'We have no reason to believe that the first detention was illegal.' This was a spontaneous reaction to the defence submission as to the legality of the initial apprehension and was announced without careful consideration or the benefit of legal advice. It was not supported by the evidence nor does it represent the considered views of the Bench as a whole." In the report of Joyce in the Criminal Appeal Reports (which appears to be the only report of the case), Kerr LJ after quoting the above passage is reported at (1985) 80 Cr App R 298, 303, as saying this: "Undoubtedly ... that ground for the decision cannot be justified, because in the absence of any evidence the justices could not assume that the first detention, during which [the second constable] intervened, was illegal. On the contrary, they were bound to assume that it may have been legal. But ..., for the reasons which I have explained, that makes no difference. What was going on was in fact a struggle and a breach of the peace and the rights and wrongs do not matter. It is unfortunate that the chairman should have said what he did. However, the case we now have to deal with presents what is, in my view, a correct analysis and a correct rationalisation of the conviction, although the reason first given spontaneously could not have been supported." 26. 27. It seems to us that either in the original judgment or in the law report the words "illegal" and "legal" must have been erroneously transposed. The ground for the decision which Kerr LJ was saying could not be justified was the ground first given spontaneously by the chairman of the bench that they had no reason to believe that the first detention was illegal – and therefore by implication were entitled to assume that it was legal. Clearly that was not a proper approach to adopt as the burden of proof lay on the prosecution to prove that the detention was lawful. The reasoning of Kerr LJ – including his remarks that "the reason first given spontaneously could not have been supported" and that it was "unfortunate that the chairman should have said what he did" before the magistrates corrected their analysis – only makes sense if what Kerr LJ in fact said or meant at the start of the passage quoted above was: "Undoubtedly ... that ground for the decision cannot be justified, because in the absence of any evidence the justices could not assume that the first detention, during which [the second constable] intervened, was legal. On the contrary, they were bound to assume that it may have been illegal." (our emphasis) It appears to us that the court in Ali may have been misled by this error in the report of Joyce when they suggested (at para 17) that Joyce was distinguishable on the basis that "there the court was prepared to assume that the first officer, who was subsequently assisted by another officer, was acting lawfully," whereas it had been established that PC Kenney was acting unlawfully in his attempt to arrest Mr Ali. In fact, as we believe, the assumption made in Joyce was that the first officer was acting unlawfully, so that the facts were on all fours with those in Ali. In any event what the Divisional Court

held in Joyce was that it made no difference whether the initial detention was unlawful because when the second officer intervened “[w]hat was going on was in fact a struggle and a breach of the peace and the rights and wrongs do not matter.” That approach seems to us, with respect, to be realistic. At some point it may be necessary for a court to decide whether the decisions of this court in Joyce and Ali are capable of being reconciled with each other and, if not, which is to be preferred. Further discussion of this case 28. 29. 30. It is not necessary, however, to decide this question in the present case. Even if Ali was correctly decided, it is in our view clearly distinguishable from the present case, as on the assumption that the attempted detention of Mr Ali was unlawful the officers who went to assist PC Kenney had no reason to believe that Mr Ali was using, or was about to use, more than reasonable force to resist his detention. They therefore had no reason to believe that Mr Ali was acting, or was about to act, unlawfully. By contrast, on the facts found in the present case PC Dolling reasonably believed that the appellant might be about to use force which was excessive and which would constitute an unlawful assault even if the attempt to detain him was itself unlawful. There was therefore an independent justification for PC Dolling’s intervention. In Cumberbatch it is again a material distinction that, at the time when PC Richardson intervened to restrain her, Miss Cumberbatch was not acting or threatening to act unlawfully. The Divisional Court expressly recognised (at para 36) that, had Miss Cumberbatch been acting in a way in which exceeded a reasonable response to the unlawful arrest of her father, then PC Richardson would have been acting in the execution of her duties in restraining her. In principle what matters for this purpose, as the Divisional Court also recognised at para 33, is whether the officer had a reasonable belief to that effect. Accordingly, if PC Richardson had reasonably believed that Miss Cumberbatch was acting or about to act in a way which would be unlawful even if the attempt to arrest her father was itself unlawful, there would on the approach taken by the Divisional Court have been an independent reason for PC Richardson to use reasonable force to prevent such criminal behaviour. By analogy, there was such an independent reason for PC Dolling in the present case to use reasonable force to prevent the appellant from unlawfully attacking with a weapon the officers who were attempting to detain him. Returning to the submissions made by Mr Davis, there is in our opinion nothing artificial or untoward in holding that a constable who acts reasonably to protect a fellow officer from unjustified assault is acting lawfully and in the execution of his duty even if this involves assisting an officer who is acting unlawfully. We agree that the appellant cannot have been expected to distinguish between PC Haroon and PC Bailey on the one hand and PC Dolling on the other. The points made in Ali, para 13, (quoted at paragraph 20 above) seem to us compelling in this respect. But in our view the relevance of those points is to whether the defendant is acting lawfully in resisting restraint, and not to whether each of the individual officers is acting lawfully in trying to restrain him. Whether a police officer is acting lawfully and in the execution of his duty depends on the reasonable beliefs and intentions of the officer. It does not depend on the knowledge or beliefs of the defendant. It would be illogical to reason that because the defendant could not be expected to distinguish between an officer who is acting unlawfully in trying to detain him and

another officer who is acting in the execution of his duty in doing so, it follows that the second officer must be treated as also acting unlawfully. 31. 32. Difficulties would arise if the right of the defendant to resist detention depended on whether the individual police officer seeking to detain him is, on a true view of the facts, acting lawfully. There are dicta which suggest that, where a police officer is acting lawfully and using only such force as is reasonable, a person who resists the officer cannot rely on the justification of self-defence: see e.g. *Kenlin v Gardiner*

[1967] 2 QB 510, 518. However, recent decisions of this court in *Oraki v Director of Public Prosecutions* [2018] EWHC 115 (Admin); [2018] 2 WLR 1725 and *Wheeldon v Crown Prosecution Service* [2018] EWHC 249 (Admin), paras 31-32, have made it clear that there is no such rule and that in principle self-defence is available as a defence if the force used was justified in the circumstances as the defendant honestly believed them to be. The fact that, unknown to the defendant, one officer is acting for a lawful purpose although other officers are not does not therefore undermine the right of the subject to defend his liberty. Assuming that the appellant believed that PC Dolling was simply assisting the other officers in trying to detain him, he was entitled to use reasonable force to try to free himself from PC Dolling as well as from the others. 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. When he used unreasonable force, by biting PC Dolling in the arm, he committed an assault. As already mentioned, the fact that the appellant did not know when he assaulted PC Dolling that that officer was acting in the execution of his duty does not provide any defence in law to the charge.

Conclusion

33. For these reasons, we are satisfied that on the facts found the Crown Court was entitled to conclude that PC Dolling was acting in the execution of his duty when he was bitten by the appellant. We therefore dismiss the appeal.
34. We add that this discussion nevertheless illustrates the fact that difficult problems may arise in identifying whether a police officer is acting in the execution of his duty. This underlines the importance of the point made by Donaldson LJ in *Bentley v Brudzinski* (1982) 75 Cr App R 217, 226, that prosecutors should consider making an alternative charge of common assault when they have reason to think that there may be an issue as to whether a police constable was acting in the execution of his duty but that the defendant may nevertheless be guilty of a common assault by reason of having used unjustified force. Unlike on a trial on indictment, magistrates at a summary trial have no power unless provided specifically by statute (e.g. section 24 of the Road Traffic Offenders Act 1988) to find an accused not guilty as charged but guilty of a lesser offence, even if (as in the case of common assault and assaulting a constable in the execution of his duty) the lesser offence is wholly encompassed within the offence charged. Unless, therefore, there is an alternative charge of common assault, a finding that a constable was not acting in the execution of his duty when assaulted

by the defendant must lead to the defendant's complete acquittal if the only offence charged is an offence under section 89(1) of the Police Act 1996.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://caselaw.nationalarchives.gov.uk/ewhc/admin/2018/3154>

CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/dixon-v-crown-prosecution-service-2018>

Prepared on 24 October 2026 · Esheria