

ENGLAND AND WALES / JUDGMENT

Paul v Humberside Police

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COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM Kingston upon Hull County Court Judge
Heppel QC Case No: B2/2003/1902 Royal Courts of Justice Strand, London, WC2A 2LL Wednesday
17th March 2004 Before : LORD JUSTICE BROOKE Vice-President of the Court of Appeal (Civil
Division) LORD JUSTICE CHADWICK and LORD JUSTICE MAURICE KAY

- ----- Between : JASON PAUL
- and – CHIEF CONSTABLE OF HUMBERSIDE POLICE
- ----- (Transcript of the Handed Down Judgment of Smith Bernal
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- ----- Claimant/ Appellant Defendant/ Respondent Patrick O'Connor QC &
Stephen Simblet (instructed by Hickman & Rose) for the Appellant Nicholas Wilcox
(instructed by Legal Services Unit, Humberside Police) for the Respondent
- ----- Judgment Lord Justice Brooke : 1. 2. 3. 4. 5. This is an appeal by the
claimant Jason Paul from an order of Judge Heppel QC sitting at Sheffield with a jury in an
action proceeding in the Kingston-upon-Hull County Court on 28th July 2003 whereby he
directed that judgment should be entered for the defendant. In the action Mr Paul claimed
damages for false imprisonment and malicious prosecution, and at the centre of this appeal
is his challenge to a ruling made by the judge in a long reasoned judgment at the end of the
trial to the effect that there were no factual issues to be left to the jury to decide. Against that
background the judge ruled that there was sufficient evidence available to the police to
arrest Mr Paul and thereafter to charge him and detain him in police custody until he was
released on conditional bail by magistrates the morning after he was charged, and that he
had failed to prove the absence of reasonable and probable cause in the initiation of his
prosecution. The judge therefore made the order which is now under appeal. The facts of
the matter were along the following lines. On the night of 31 st March 1998 Mr Paul attended
a function at the Waterfront Club in Hull. There were features of this function that were of
interest to the small black community in Hull, of which Mr Paul was a member. Mr Chris
Alder, who was also black, attended the same function. He was a former paratrooper in his
early 30s, and Mr Paul knew him quite well. In the early hours of the morning of 1st April
there was an altercation in the club between Mr Alder and a young man called Mr Ramm.
Mr Ramm was ejected from the club, and when the club closed at 2am Mr Paul saw Mr Alder

outside, when a fracas was developing again between the two men. Some of the incidents outside the club were recorded on closed circuit television. Mr Alder was filmed with his shirt off, anxious to get into more fights. Mr Paul consistently maintained that the only reason for his intervention at this stage was to stop Mr Alder from getting into further trouble. The film did not include everything that happened between Mr Paul and Mr Alder. Mr Paul's account of the matter was to the effect that when he intervened Mr Alder struck him twice, and he then hit back. In fact he appears to have hit Mr Alder so hard that he broke one of his teeth off at the root and loosened another and he also cut Mr Alder's lip. In the event Mr Alder fell to the ground, hit the back of his head against some cobblestones, and lost consciousness for a short while. An ambulance was called, and Mr Alder was taken to Hull Royal Infirmary, where he behaved very badly. He refused to co-operate with any examination or treatment, and he continually spat and urinated on the floor. The hospital authorities summoned the police, who arrested him and took him to Queen's Gardens Police Station, where he was laid on the floor in the custody suite. His hands were handcuffed behind his back, his trousers were down between his knees, and he was plainly in some distress. The judge and counsel watched a video of the events in the custody suite which was not shown to the jury. The first part of the video film showed the police officers doing little apart from discussing what charge, if any, they could levy against Mr Alder. There then came a time when one of the police officers, followed by the others, became concerned to discover whether Mr Alder was continuing to breathe. They made attempts to resuscitate him and called in paramedics to no effective purpose. The judge said that Mr Alder died in plainly distressing and unpleasant circumstances on the floor of the custody suite. About 11 6. 7. 8. 9. minutes appear to have elapsed between the time of his arrival in the police station and the time he stopped breathing. D/I Brookes was the senior detective on call that night. He was rung up at home at 4.55am, when he gave instructions that the scene of death should be preserved. He arrived at the police station half an hour later. That morning Mr Alder's death in custody was reported to the Police Complaints Authority, which commissioned the West Yorkshire police to institute an inquiry. So far as the events inside and outside the Waterfront Club were concerned D/Supt Bates was appointed the senior investigating officer. D/C/I Davison reported to him, and he led a team of officers which included D/I Brookes, Sgt Ralphs and a number of detective constables who worked in pairs. D/C Wade and D/C Mainland made up one of these pairs. All these police officers gave evidence at the trial apart from Supt Bates and D/C Wade (who had suffered second degree burns shortly before the trial, which he was too ill to attend). D/I Brookes and Sgt Ralphs were both based at the police station where Mr Alder's death occurred. The five police officers who were in the custody suite were suspended from duty about a month after Mr Alder's death,. More than two years later a very long inquest culminated in a verdict of "gross negligence" unlawful killing. A prosecution for manslaughter followed at the Teesside Crown Court in June 2002, but this came to an end when the judge ruled that there was no case to answer. Judge Heppel said that the cause of Mr Alder's death remained unclear, and that some of the medical witnesses at the inquest had changed their stance at the criminal trial. He added that these police officers were also acquitted of disciplinary offences. Just before 1pm on 1st April 1998

Mr Paul learned that there had been a death in police custody, and he soon realised that it was Mr Alder who had died. He appreciated that the police would want to speak to him about his dealings with Mr Alder the previous evening. He therefore consulted a local solicitor, Mr Cunnah, who arranged to meet him at a police station. Mr Cunnah phoned the police and told them that he would be attending with Mr Paul later that day. At 2pm D/C Wade and D/C Mainland attended a police briefing at Tower Grange police station, which had been chosen as the base for this inquiry. They then visited the outside of the club and went on to make inquiries locally. Once Mr Cunnah had told the police that Mr Paul had been involved in a fight with Mr Alder a decision was taken at a senior level that if he repeated this admission at the police station he would be arrested on suspicion of murder. It was not clear on the evidence who actually took this decision, although D/I Brookes said he would have been involved. At all events D/C Mainland told the jury that they were acting on this instruction when Mr Paul came to the station. He arrived at about 6.20pm with Mr Cunnah. There followed this exchange: D/C Wade What do you want to tell us? Mr Paul My mate was arguing with another man. I tried to separate them. The man started throwing punches at me and I hit him once. D/C Wade As a result of what you have said, I am arresting you for murder. 10. On this appeal no complaint is made of the fact that the police suspected Mr Paul of murder. Complaint is made, however, of the fact that there was no need to arrest him. He had come to the police station voluntarily, and he was willing to tell the police all he knew about the matter. In the event he was detained in custody without any further questioning, although D/C Wade and D/C Mainland would have interviewed him that evening if he had not been taken to hospital on the advice of a police doctor for treatment to an injury to his hand. Before going off duty that night the two detective constables had ascertained from the police national computer the information that Mr Paul had a record for violence, including the use of a weapon: the accuracy of this record was subsequently in issue at the trial. They had also visited the Waterfront Club in order to watch what was shown on video of the events outside the club. D/C Mainland told the jury that the person who showed it did not know how to operate it properly, and that he did not recall seeing the video working properly until after Mr Paul had left police custody. That evening he just saw segments of the relevant picture, which jumped from scene to scene.

11. While this was all going on, an autopsy had been conducted, and at 8pm the police were told that the pathologist's initial conclusion was that although Mr Alder had serious facial and head injuries consistent with a serious and violent assault, no causal link had been established between the injuries to his face and the back of his head and his eventual death. D/Supt Bates and D/C/I Davison therefore decided that nobody should be charged with murder or manslaughter in connection with Mr Alder's death until a definitive cause of his death was ascertained.
12. Mr Cunnah came back to the police station at 11.30am the following morning, where he saw D/C/I Davison and D/C Mainland before seeing his client. They told him that although the post-mortem revealed serious facial and head injuries, the punch had not been the cause of death. The pathologist had said that it was very unlikely that the punch was linked with the

death. (In due course the written post mortem report related that there was an obvious injury to his mouth and an abrasion on his right upper eyelid. There was also a large abrasion at the back of his head with accompanying swelling and bruising. The pathologist described the injury to the back of the head as a relatively minor one). Toxicology tests were being conducted in an effort to determine the true cause of death. Mr Cunah was also told that although the police were not prepared to give full disclosure of what was shown on the video, it showed Mr Alder, Mr Paul and three others who were to be treated as witnesses, and it looked as if Mr Paul was not the aggressor. 13. 14. After Mr Cunah had seen Mr Paul privately, there followed three long interviews in his presence which began at 1pm and finished at 3.19pm. At the outset the police told Mr Paul he was now going to be arrested on suspicion of causing grievous bodily harm, not murder. During the initial interviews Mr Paul gave his account of the matters and responded to police questioning. He also gave the police the names of people both inside and outside the club. He accepted that he had punched Mr Alder. In the third interview he said he could not describe the force with which he had hit him, but he thought it was only a tap. He had been very surprised when he had learned of the damage to Mr Alder's teeth. He did not think there was anything else he could have done. He had just tried to restrain Mr Alder and talk to him. Mr Alder had then attacked him, and Mr Paul was trying to stop him. When told he must have used considerable force to have caused Mr Alder's injuries, Mr Paul said that he did not know. 15. 16. 17. 18. 19. 20. At 5pm D/C/I Davison consulted D/Supt Bates, and a decision was made that Mr Paul should be charged with causing grievous bodily harm with intent. Their reasons went along the following lines. Mr Alder had received serious facial and head injuries as a result of a punch to the mouth. The cause of death had not been established, and it was therefore inappropriate to charge Mr Paul with homicide. However, sufficient evidence existed for him to be charged with a serious assault. At about 6pm Mr Cunah was told by D/C Mainland and D/C Wade that a witness called "Hyam" had told the police that he had pulled Mr Paul back after the punch because Mr Paul appeared likely to have another go. The two officers then interviewed Mr Paul for a fourth time when this evidence was put to him. Mr Paul said he did not know who pulled him back. All he knew was that he had walked back with Aimun (the witness in question). He denied that he had been in some kind of foul temper and had had to be restrained. His consistent account to the police was that he had intervened as a peacemaker and had acted in self-defence. D/C Mainland said that after this interview D/C Wade would have spoken to D/C/I Davison again. At 7.22pm that evening Mr Paul was charged with causing grievous bodily harm with intent. Sgt Nicholson, the custody sergeant, accepted the charge and decided to remand Mr Paul in custody. His recorded reasons for refusing bail were that there were reasonable grounds to believe that detention was necessary for the protection of the detained person because the deceased and the detained person lived in a close knit community, and the deceased had a relative with a history of mental illness. For this reason Sgt Nicholson authorised detention after charge. D/C Wade and D/C Mainland told Mr Paul the reasons why he was being detained. They also expressed some concern about the closeness of the community and the need to seek further witnesses. Although Mr Paul said nothing, his solicitor challenged the decision on the basis

that Mr Paul could go and live with his sister. He failed, however, to persuade Sgt Nicholson to change his decision. Sgt Nicholson appears to have thought that Mr Paul's sister lived in Leeds, whereas in fact she lived in London. D/C Wade and D/C Mainland then completed three documents. The first, drafted by D/C Mainland, was an initial remand application form. This communicated to the prosecutor the police view that the prosecution should seek either a remand in custody or stringent bail conditions. It was stated that Mr Paul had a previous conviction for failing to surrender to bail. The fear was expressed that he would interfere with witnesses and obstruct justice. It was said he had minimised his involvement in the offence, and there were other people the police wished to see. It was added that Mr Alder's brother, who was an informal patient at a local psychiatric hospital, was aggressive and unstable, and the police feared that he might seek revenge on Mr Paul. The second of these documents was a case summary. This described the altercation outside the club, and how the post-mortem had revealed that Mr Alder had had two front teeth knocked clean out. He had a cut through his top lip and another cut in his lower lip, and a large excised swelling at the rear of his head. The post-mortem had not been certain as to the cause of death. Mr Alder did not die directly from his injuries. Mr Paul's voluntary attendance at the police station was recorded, and a brief account was given of his police interviews. 21. The third document, also drafted by D/C Mainland, was a form containing confidential information for the prosecutor. It contained much that was recorded elsewhere, but it ended in this way: "There is currently an investigation under way by the [Police Complaints Authority] regarding the death in custody. It is requested that details of the death in custody are not divulged to the court." D/C Mainland was unable to explain to the jury why these words were written. 22. 23. 24. 25. 26. After Mr Paul had been charged, details of his name, address and date of birth were released to the media, together with information about the charge he faced and the court at which he would be appearing. D/C/I Davison said that this routinely happened in every case of this type. The following morning the CPS prosecutor told the magistrates that it was still possible that Mr Paul would face a homicide charge. D/I Brookes said that he did not know why this was said, and the prosecutor then corrected himself on police advice. In the face of police objection, the magistrates granted Mr Paul bail on condition that he resided in a bail hostel in York. On 3rd April the two senior officers in the team decided that D/C/I Davison and one of the detective constables should meet the chairman and other members of the local Race Equality Council. Their professed purpose was to provide background information, promote racial harmony and reduce the tension they perceived to be growing because a black male had died in police custody. They also wished to ensure that the council provided support to Mr Alder's family. The rest of the history, so far as Mr Paul is concerned, can be briefly told. On 1 st May 1998 the magistrates granted him unconditional bail. On 30th June the CPS told Mr Paul that the proceedings against him would be discontinued. On 10th July the proceedings were indeed formally discontinued. He maintained, however, a long standing grievance about the way he had been treated by the police, and this grievance was articulated in the present proceedings. A number of complaints had either been dropped or no longer raised live issues by the time Mr Patrick O'Connor QC came to reformulate Mr Paul's case on this appeal. His principal

complaint, which had always been a feature of his client's case, was that the police had been activated in their dealings with his client by an improper motive, namely that they wished to distract public attention from the fact that a young black man had died while lying on the floor in a police custody suite with his hands handcuffed behind his back. The fact that the conduct of the police was in question in relation to the events surrounding Mr Alder's death had induced them to take decisions they would not have taken in the way they did if there had not been this background, and these decisions had redounded to Mr Paul's manifest disadvantage.

27. Mr O'Connor put his case under three heads: (i) (ii) although he did not now contend that it was unreasonable of the police to suspect Mr Paul of murder when he attended the police station on 1st April, their decision to arrest him and detain him in custody that evening was vitiated by their improper wish to draw people's attention away from their own misconduct; although he did not now make any complaint about the level of the assault charge the police chose to levy against Mr Paul the following evening, their decision to charge him at all was vitiated by their ulterior motive to distract attention from their own misconduct; (iii) the decision to refuse him bail that evening on terms that he went to live with his sister well away from Kingston-upon-Hull was similarly vitiated. It was an important part of his argument on the appeal that in relation to all three of these matters there were findings of fact which ought to have been left to the jury to decide, and that the judge had been wrong to withdraw them from the jury. 28. In fairness to the judge, the way Mr O'Connor presented these matters to us on the appeal was rather different from the way in which the judge thought Mr Simblet was presenting them at the trial. This is evident from paragraph 38 of his judgment, in which he endeavoured to draw together the threads of Mr Paul's case: "Mr Paul, as I have said, submits that there were no grounds for arrest on suspicion of murder, that there were no reasonable grounds for charging the section 18 offence [causing grievous bodily harm with intent] and that the refusal of bail by the custody sergeant Mr Nicholson was therefore unlawful." 29. 30. It will be convenient to consider each aspect of Mr O'Connor's case on the appeal separately. As I have said, the central thrust of Mr O'Connor's challenge to the police's conduct on the evening of 1st April were that the police were motivated by an improper motive when they decided to arrest him and to detain him overnight without first hearing what he had to say (other than his admission that he had punched Mr Alder). The law on false imprisonment is reasonably familiar. Any proven detention must be justified in law, for its full duration, on the balance of probabilities (*R v Governor of Brockhill Prison ex p Evans (No 2)* [2001] AC 19, 32, 35 and 42. Section 24(6) of the Police and Criminal Evidence Act ("PACE") 1984 created a power or discretion, not a duty, to arrest, and this discretion is subject to judicial control (see *Hussein v Chong Fook Kam*

- [1970] AC 942, 948). This judicial control is exercised on conventional administrative law principles (*Mohammed-Holgate v Duke* [1984] AC 437, 443; *Cumming v Chief Constable of Northumbria Police* [2003] EWCA Civ 1844 at [43] – [44]). The discretion is that of the individual arresting officer (*O’Hara v Chief Constable of the Royal Ulster Constabulary*
- [1987] AC 286). It must be exercised in good faith (*Mohammed-Holgate* at p 443). In *Cumming* Latham LJ observed at para 44 that although Article 5 of the European Convention of Human Rights does not require the court to evaluate the exercise of discretion in any different way as it evaluates the exercise of any other executive discretion, it must do so in the light of the important right to liberty which is at stake. 31. In his submissions Mr O’Connor drew our attention to certain features of the evidence relating to D/I Brookes, who was the third senior member of the police inquiry team into the events at the Waterfront Club. He reminded us that D/I Brookes had been the senior officer on call at the police station where Mr Alder died, and he suggested that he would feel a natural loyalty towards the officers at that station whose conduct was being impugned. We were shown how D/C/I Davison and Sgt Ralphs had readily admitted that there would be natural concern about Mr Alder’s death in police custody, captured as it would have been by a CCTV camera in the custody suite. D/I Brookes, on the other hand, had told the jury that he had no reason to believe that any police officer would be likely to face criticism, even though he had personally visited the custody suite while Mr Alder’s dead body was still lying on the floor. We were also shown how D/I Brookes had vigorously contested the decision of CPS officials at Manchester not to proceed with Mr Paul’s prosecution in the face of overwhelming evidence from witnesses that he was or might have been acting reasonably in self-defence. (D/I Brookes maintained that the ferocity of Mr Paul’s punch indicated a case of excessive force which should have been left to a jury).
32. Mr O’Connor also showed us strands of the evidence before the jury which could have led them to conclude that (in so far as he exercised any discretion at all) D/C Wade’s discretion in arresting Mr Paul when he arrived at the police station was not exercised in good faith. One such strand was the part of D/C Mainland’s confidential memo to the CPS the following evening, which he was wholly unable to explain to the jury, in which he asked that details of the death in custody should not be divulged to the court. Another was the decision of the custody sergeant, Sgt Nicholson, to detain Mr Paul in custody for his own safety the following evening without making any effective inquiries at all as to whether there was some safe place where he could stay at which Mr Alder’s brother would be unlikely to find him. A third was the direction of senior officers that Mr Paul should be arrested as soon as he admitted punching Mr Alder without making any inquiry at all into how this attack came about.
33. When dealing with this part of the case the judge reminded himself (at para 40 of his judgment) that he should not be too ready to withdraw an issue from the jury. He mentioned two recent decisions of this court to this effect. On this first issue, however, he considered that the police had proved that there were reasonable grounds to arrest Mr Paul on

suspicion of murder on 1st April because: (i) (ii) (iii) (iv) (v) They knew that Mr Alder had been struck a blow sufficient to knock him to the ground and to render him unconscious; They were entitled to come to the provisional view that the blow and the death were in some way causally connected; They knew, as a result of Mr Cunnah's telephone call, that Mr Paul has something to say about the incident; More importantly, Mr Paul admitted striking Mr Alder when he arrived at the police station; The police would have been liable to criticism if they had continued to speak to Mr Paul without his being arrested if in due course he subsequently came to be charged with murder or any other offence in connection with the injuries sustained by Mr Alder. 34. So far as the last of these matters was concerned, Mr O'Connor had little difficulty in satisfying us that it would have been open to the police to have interviewed Mr Paul under caution without first arresting him. They could always have arrested him later if he had shown a disposition to leave the station in the course of an interview while they still suspected that he had committed an arrestable offence. Although D/C Mainland asserted that an arrest enabled the police to exercise a certain amount of control of the situation, and that it would have been very unusual not to have arrested Mr Paul, Mr O'Connor complained that there was no evidence that D/C Wade, the arresting officer, had exercised any discretion at all. He had simply done what his superior officers had told him to do, and in those circumstances it was wrong to withdraw from the jury the question whether the discretion to arrest had been exercised in good faith.

35. Mr O'Connor suggested that because there was still a live question before the judge (not pursued on the appeal) as to whether the police had reasonable grounds to suspect Mr Paul of murder, the judge lost sight of the equally live issue (which was a matter for the jury and not for him) as to whether the discretion to arrest was exercised in good faith. He said that this was particularly worrying because the critical evidence in these cases always comes from the arresting officer himself (*Siddique v Swain* [1979] RTR 454, 457; *Chapman v DPP* (1989) 89 Cr App R 190, 196-7), and there was not even a witness statement from D/C Wade in evidence before the jury. 36. 37. 38. I do not find this an easy point to determine, particularly as the point, though clearly taken in Mr Simblet's argument before the trial, was not revisited in his final submissions. If the judge had made a considered ruling that there was no evidence to go to the jury on the question of the police's good faith, then it would probably have been impossible for this court to interfere since he saw and heard the witnesses. But he did not take this course, and he wrongly excluded the possibility that it would have been open to the police to have interviewed Mr Paul under caution without first arresting him. After all, it was evident that Mr Paul was perfectly willing to co-operate with the police when he voluntarily attended the police station that night. D/C Mainland conceded that it was a "massive lead and assistance" that he should have done so, and D/I Brookes, for his part, said that it was "particularly helpful" that he had attended voluntarily. All that the police wished to do in relation to Mr Paul (in terms of interviewing him or taking his clothing or intimate samples) could have been achieved with his consent, as Sgt Nicholson accepted. In my judgment, there was evidence to go to the jury in this case in the issue of the police's good faith in deciding to arrest Mr Paul rather than

to permit him to help them voluntarily, and the judge should not have withdrawn this issue from the jury. He would have had to direct them to consider this question unless, as I have said, he had ruled that there was no evidence to support Mr Paul's case on the point. The second and third issues turn on the events of the following evening. By this time the police had interviewed Mr Paul four times, and he had consistently maintained that he had acted reasonably in self-defence. The police now knew that there was no evidence to show a causative link between Mr Paul's punch and Mr Alder's death. They had viewed the video film of events outside the club, which led them to tell Mr Cunnah's solicitor that it looked as if Mr Paul was not the aggressor. They had also interviewed the witness Aimun Freigoun (although they had not yet taken a witness statement from him), and his evidence of the events leading up to the punch supported what Mr Paul had told them. 39. On the second issue, Mr O'Connor submitted that the judge should not have withheld from the jury a decision on the police's motives in charging Mr Paul on the evening of April 2nd. Again, the relevant principles of law are well-known. In *Martin v Watson* [1996] AC 74, 80 Lord Keith of Kinkel set out the four ingredients of the tort of malicious prosecution, each one of which the claimant must prove. This case raised no questions on the first two. Mr Paul was prosecuted by the police, and the prosecution was determined in his favour. What was in dispute was whether the prosecution was without reasonable and probable cause and whether it was malicious. 40. In *Glinski v McIver* [1962] AC 726, 754, Lord Radcliffe said that it was well settled that "mere belief in the truth of his charge does not protect an unsuccessful prosecutor, given, of course, malice, if the circumstances before him would not have led 'an ordinarily prudent and cautious man' to conclude that the person charged was probably guilty of the offence ... [W]hile the state of the prosecutor's mind or belief or opinion, if a disputed issue, is a question of fact properly to be left to the jury, the question whether the circumstances reasonably justified a belief in the truth of the charge is a question for the judge himself." 41. In the same case Lord Devlin said at pp 776-7: "A century-and-a-half ago, when this branch of the law was being formed and there was no police organisation as there is today, the law was anxious to encourage the private prosecutor to come forward and recognised that his motives would not always be disinterested. But it did, I think, demand that such a man should at least believe on reasonable grounds in the case he put forward, and on the strength of which another might lose for the time being his liberty, be put to expense and be caused distress. I do not see why any less should be demanded of a police officer. Although he may be more exposed to attack from persons he has mistakenly prosecuted, he should not stand in need of as high a degree of protection as the private individual, for there can be no occasion on which in his case a mixture of motives could be accepted as excusable." 42. In *Glinski v McIvor* the House of Lords reaffirmed that there is an objective and a subjective element to "lack of reasonable and probable cause": (i) Objective: would the facts honestly believed by the accuser reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed? (ii) Subjective: did the prosecutor believe these facts, and did he have an honest belief in the guilt of the accused, or in the charges levied? 43. The objective

questions are of course for the judge to answer. Provided that there is sufficient evidence to support the claimant's case, the subjective questions are for the jury to decide (*Dallison v Caffery* [1965] 1 QB 348, 371-2). For the importance of leaving to the jury the matters that are for them to decide see *Balchin v Chief Constable of Hampshire*

[2001] EWCA Civ 538 at [12] – [14]. 44. In *Gibbs v Rea* [1998] AC 786 it was common ground between the majority and the minority of the members of the Judicial Committee of the Privy Council that a claimant may rely on circumstantial evidence in support of his case on malice and the absence of reasonable and probable cause. Where they differed was on the application of this principle to the facts of that case. For the majority, who included Lord Steyn and Lord Hutton, Gault J cited a passage from the judgment of Lord Tenterden CJ in *Taylor v Willans* 2 B & Ad 845, 847: “The motives of parties can only be ascertained by inference drawn from facts. The want of probable cause is, in some degree, a negative, and the plaintiff can only be called upon to give some ... slight evidence of such want ...” *Gibbs v Rea* turned on the significance of the decision by the defence to call no evidence at the trial, but it is a useful reminder of the fact that a claimant cannot ordinarily be expected to produce direct evidence on these matters. 45. 46. On this part of the case, in addition to the strands of evidence I have mentioned already, Mr O'Connor relied on the following matters. There was a steadily growing volume of evidence supportive of Mr Paul's story that he was acting in reasonable self-defence. By the time the papers reached the CPS, 12 different witnesses supported his story, and although it was not clear on the evidence given at the trial which witnesses had described the incident to the police in the first 27 hours of their inquiries, they certainly had the evidence from the CCTV camera and the oral evidence of Aimun Freigoun before them when they decided to charge Mr Paul with criminal assault. So far as the CCTV evidence was concerned, there was evidence which might have tended to suggest to the jury that the police were seeking to downplay the extent to which it showed that it was Mr Alder who was playing an aggressive role outside the club. D/C Mainland, for instance, had maintained in his witness statement that the tapes could not be found on the evening of 1st April. In his evidence at the trial he said that the operator had not understood how to work the machine properly when they had tried to view the video at 7.30pm that evening, and he was critical of the value of what they saw. D/C/I Davison gave similar evidence about the quality of the video, but he was later to appear to admit that although the film had later been “enhanced” by cutting out irrelevant matter, the image quality of what they originally saw was “not far off” what the jury had seen. None of this evidence could gainsay what the police told Mr Cunnah at 11.30am on 2nd April was the effect of what they had seen so far. Mr O'Connor's point was that the police may have appeared evasive to the jury in relation to the film. 47. Similarly, the police appeared to have concentrated on one piece of Mr Freigoun's evidence – to the effect that he had had to restrain Mr Paul after he had punched Mr Alder – without disclosing to Mr Cunnah and Mr Paul, or otherwise taking into account, the main thrust of that witness's evidence which appeared to have been completely supportive of what Mr Paul had been telling the police about his need to act in self-defence. 48. There

was evidence before the jury that CPS officials were available to give advice to the police over the telephone on a 24-hour basis, and the jury may have been unimpressed by the fact that in such a sensitive case the police had made no attempt at all to seek such advice before charging Mr Paul. When the CPS were eventually consulted, one CPS officer expressed the opinion that it was unfortunate that the police had charged Mr Paul already, and when all the evidence had been submitted to the CPS for their consideration, the responsible officer expressed his opinion on the viability of a successful prosecution in robust terms: “[I]t is clear in my view that Paul can rely upon self-defence to justify his action ... Paul was being punched by a muscular and aggressive man, with whom he did not appear to want to fight, and has sought to protect himself by punching back ... Therefore I have come to the conclusion that in punching Alder to protect himself Paul was acting in self-defence ... There is little doubt in my mind that Paul, in the heat of the moment, has reacted instinctively to a violent attack ... I can hardly see that he should be criticised for trying to calm the situation down ... I am firmly of the opinion that there is insufficient evidence to show that the force used was unlawful and therefore the defence of self- defence is most likely to succeed ...” 49. On this issue the judge concentrated almost exclusively on the question whether objectively speaking there was reasonable and probable cause for charging Mr Paul with the most serious offence available, and he did not address the question whether the police were swayed in their decision to charge Mr Paul at all at such an early stage of their inquiries by their improper motive of seeking to distract attention from the events in the custody suite. Thus paragraphs 44-52 of the judgment were entirely taken up with the judge’s assessment of the objective state of the evidence before the police. He placed particular emphasis in this regard on: (i) (ii) (iii) D/C Mainland’s evidence that as soon as there was in his view evidence to justify a charge against an accused person the police should levy that charge; Mr Alder’s injuries, and the fact that although he was bigger than Mr Paul he had been knocked sufficiently hard to fall backwards to bang his head against the cobblestones; Evidence before the police that Mr Paul had got himself involved in an altercation between Mr Alder and a third party when he need not have done, and that he had failed to withdraw when he could have done. 50. The judge added that in the light of the failure to prove the absence of reasonable and probable cause for the initiation of this prosecution, the question of malice did not arise. He added, however, that for his part, he could see no direct evidence of malice and precious little evidence that would, if it came to it, entitle a jury properly to infer that there was any malice in this case at all. This was not, it should be noted, a conclusion that there was no evidence of malice to go to the jury. (There is a useful discussion of proof of malice in a case of this kind in the opinions in *Gibbs v Rea* [1998] AC 786 at pp 797-8 and, more particularly at pp 804-6).

51. Mr O’Connor made it clear, as I have said, that Mr Paul’s case no longer related to the level of charge which the police had selected in this case. It was that with the growing volume of supportive evidence that he had, or might have been, acting in reasonable self-defence, and the evidence of the way in which the police were ignoring or downplaying the effect of this

evidence, there was indeed a case to go to the jury to the effect that the police did not honestly believe that he had hit Mr Alder unlawfully. He repeated that it was Mr Paul's case that the police had moved precipitately into charging him in their determination (evidenced by D/C Mainland's confidential note) to distract attention from the events in the custody suite which cast a poor light on police behaviour. 52. 53. Again, it is not for this court to guess what verdict the jury would have reached on all this material if the judge had not withheld from them their task of assessing the police's motivation in the light of all the evidence which Mr O'Connor has showed to us. But I am satisfied that on this matter, too, there was evidence to go to the jury, and that the judge was wrong not to allow them to decide the matters that were in their province, not his. Needless to say, if the jury's verdict had favoured the claimant on the second issue, there would not be much left of the defence on the third issue, which again raises an issue of false imprisonment. In addition to all the other matters I have mentioned in this judgment, Mr O'Connor fastened on the fact that Sgt Nicholson's only justification for directing Mr Paul's detention on the night of 2nd-3rd April fell under section 38(1)(a)(vi) of PACE, which prescribes that a custody officer in these circumstances shall, subject to section 25 of the Criminal Justice and Public Order Act 1994, order the release of the arrested person from police detention unless "... the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary for his own protection." In other words (like the justices the following morning), he did not state that a case was made out under sub-section (v) which provides an exception if "... the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from interfering with the administration of justice or with the investigation of offences or of a particular offence." 54. Although Sgt Nicholson recorded in the custody record that "there is also some concern re closeness of community and the need to seek further witnesses (yet not known)" it is clear from that record that this was not the reason why he decided to deny bail. Of these other matters he merely said that "there were a number of other matters that could have applied". 55. In deciding not to allow this issue to go to the jury, the judge said (at para 55 of his judgment) "It is an unchallenged matter of fact that Mr Alder had a brother who was albeit an informal patient at a local psychiatric hospital, and that in my judgment was sufficient to justify Sergeant Nicholson taking the decision that the question of the protection of Mr Paul was a factor in justifying refusing bail. It is also a matter of fact that Mr Paul does come from a community which is close knit. It is close knit in the circumstances because it is a black community but that in my judgment is beside the point. The decision was taken on the basis that there was the possibility of Mr Paul interfering with witnesses, many of whom were known to him, and indeed his own evidence to this court was that a large number of those in the Waterfront Club were indeed known to him. In my judgment, there was nothing unlawful in this decision taken by Sergeant Nicholson on the information which Mr Wade and Mr Mainland gave to him, which I find was given in perfectly good faith. There was no reason to come to the conclusion that Sergeant Nicholson acted unlawfully in refusing bail." 56. It was common ground that if a jury's verdict led to a finding of malicious prosecution, Mr Paul's overnight detention would sound in damages recoverable for that tort unless the jury

considered that it would have been reasonable for the police to continue detaining Mr Paul a little longer without charging him. But even if one considers the judge's conclusions on this issue as a free-standing issue it is evident that he misinterpreted the evidence which showed that the express reason for the detention sanctioned by Sgt Nicholson related only to Mr Paul's own safety and that he trespassed on the function of the jury by making a positive finding that Sgt Nicholson acted in perfectly good faith. 57. On this aspect of the case Mr O'Connor made the following powerful submissions: "The main reason upheld by the judge as reasonable was that Mr Paul should be in custody because of a danger of violence from a mentally unstable brother of Mr Alder. This bears all the hallmarks of a cynical rationalisation ... No attempt was made to discuss this with Mr Paul, and advise him for example to keep clear of this brother. Further, there was no attempt to discuss this with Mr Alder's brother to ascertain what risk, if any existed. The police themselves gratuitously released Mr Paul's name and address to the press when he was charged, without even leaving it to the normal reporting of any court appearance ... The police then knew that Mr Paul had a pregnant girlfriend at that address. A suggestion that Mr Paul could then be bailed to stay away from Hull was ignored ..." 58. In my judgment, there was evidence here, too, which should have been left to a jury to decide. Mr Paul's liberty was at stake, and the way in which the custody sergeant took a decision in the interests of Mr Paul's own safety without considering the possible options with Mr Paul or his solicitor (who was present) raised issues which were clearly for the jury, not the judge, to decide. 59. 60. I should make it clear that I do not place any weight on the fact that Mr Paul was black as a reason for the view I have formed. Although there is some evidence of stereotyping, and although more culturally sensitive officers than D/C Mainland and D/C Wade might have had a clearer understanding of the reasons Mr Paul gave them for trying to persuade Mr Alder to quieten down and go home (because he feared that his conduct was simply reinforcing a public perception of stereotypically violent young black men), I do not consider that the evidence supports a contention that he was being differentially treated because he was black, and this accusation was not put to any of the police witnesses. If he had been a member of what the Hull police perceived to be a close-knit community of people from a white minority culture their reaction would no doubt have been the same. What is important is that the motivation for the detention ought to have been left to the jury to decide. I have reached the conclusion that there must be a retrial with great regret because six years have now nearly passed since Mr Paul's arrest and detention and there has already been one expensive trial, with both parties supported by the taxpayer. The need to avoid an outcome like this was vividly described by Simon Brown LJ in *McPhilemy v Times Newspapers Ltd*

[2001] EWCA Civ 871 at [31] – [33], in a passage drawn to the judge's attention. The judge's task was not made any the easier by Mr Simblet taking points which Mr O'Connor has wisely jettisoned for the purposes of the appeal, but I am satisfied that the matters I have considered in this judgment were live issues before the judge, and that he ought to have allowed them to go to the jury. 61. For these reasons I would allow this appeal and direct that the action be retried. Lord Justice Chadwick: 62. I agree. Lord Justice Maurice Kay: 63.

I also agree. Order: Appeal allowed; the matter to be remitted to the Kingston Upon Hull County Court for trial before a judge and jury; the defendant to pay the claimant's costs of the appeal; the costs in the court below to be claimant's costs in the case. (Order does not form part of the approved judgment)

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