Oraki v Director of Public Prosecutions

CO/4718/2017

High Court of Justice Queen's Bench Division The Divisional Court

17 January 2018

[2018] EWHC 115 (Admin)

Before: Lord Justice Singh and Sir David Calvert-Smith

Wednesday, 17th January 2018

Representation

Ms C Mawer (instructed by McMillan Williams) appeared on behalf of the Appellant.
Mr M Bisgrove (instructed by the Crown Prosecution Service) appeared on behalf of the Respondent.

Judgment

Lord Justice Singh:

Introduction

1 This is an appeal by way of case stated from the Crown Court at Isleworth, which on 4th August 2017 dismissed, so far as relevant, the appellant's appeal against his conviction for obstruction of a police officer in the execution of his duty, contrary to s.89(2) of the Police Act 1996 ("the 1996 Act") at Hammersmith Magistrates' Court on 21st July 2016.

2 The question which has been stated for the opinion of this court is: "Is self-defence or defence of another a defence available to a charge of obstructing a police officer under s.89(2) of the 1996 Act?"

3 I will refer to the defence as "self-defence" or simply as "the defence" although it should be understood that I include in that concept the defence of another person.

Factual background

4 The factual background can be gleaned from the findings made by the Crown Court at paras.9-25 of the case stated. The alleged offence occurred on 11th September 2014. The appellant was driving a Mercedes car. His mother, Dr Oraki, was in the passenger seat. The appellant did not have valid insurance to drive at the material time.

5 PC Harding and PC Nash were genuine police officers. The appellant did not believe otherwise, and even if he had believed otherwise, his belief would not have been reasonable. The two police officers were wearing uniforms. The appellant was requested to pull over by the police officers, and he did so. The appellant and his mother subsequently got out of the car. The insurance position was investigated and the officers reasonably suspected that the appellant was driving without insurance, as indeed was the case.

6 The officers were entitled to, and did, detain the Mercedes car, pursuant to their powers under s.165A of the Road Traffic Act 1988 . This detention was communicated to Dr Oraki and the appellant, who reacted angrily and emotionally. Dr Oraki leant over and took the keys out of the ignition. Although this was denied by her, the Court preferred the evidence of PC Harding on his point. Following the communication of the decision to detain the car, Dr Oraki returned to the car and got into the driver's seat. She was seen by PC Nash inserting the keys into the ignition, and putting her hand on the keys with a view to driving off. Dr Oraki denied this but the Court preferred the evidence of PC Nash on this point. PC Nash then put his hand on the arm of Dr Oraki with a view to restraining her from starting the engine and driving off. The court found the actions of PC Nash were reasonable and proportionate, and that he was acting in the course of the execution of his duty in so acting in seeking to prevent removal of the car following its detention. The actions of PC Nash in putting his hand on her arm caused Dr Oraki to scream loudly and vociferously. The appellant, who was nearby, came over to pull PC Nash away because he was alarmed at what was happening to his mother.

7 PC Harding then intervened. The appellant alleged that he had acted in self-defence in trying to pull PC Nash away, as he said he was concerned for the safety of his mother. The Court found that the appellant's conduct "was not unreasonable" given that it is clear that Dr Oraki was screaming at the time and the appellant was reacting to those screams. However, the Court held that a defence of self-defence was not available to the appellant to the offence charged under s.89(2) of the 1996 Act in the light of what was said by the Court of Appeal (in fact that should have been a reference to the Divisional Court) in *Kenlin v Gardiner [1967] 2 QB 510* at 518G (see para.27 of the case stated).

8 The court further held that if, contrary to the above, the defence had been available as a matter of law, it would have allowed the appeal from the conviction of obstructing PC Nash in the course of the execution of his duty (see para. 28).

9 In the Magistrates' Court, the appellant was convicted of 4 offences: (1) obstructing a police officer, namely PC Nash in the execution of his duty; (2) assaulting a police officer, PC Harding, in the course of the execution of his duty, contrary to s.89(1) of the 1996 Act; (3) obstructing a police officer, PC Harding, in the course of the execution of his duty; and (4) driving without insurance.

10 The appellant did not pursue his appeal from the conviction of that last matter, the offence of driving without insurance, but he did appeal to the Crown Court in respect of the other three matters. The appeal was heard by the Crown Court which comprised Recorder Hill-Smith sitting with two lay justices. The Crown Court allowed the appeal in relation to matters (2) and (3) above. However, it dismissed the appeal in relation to matter (1) above. The court gave its reasons orally at the end of the hearing and subsequently put them in writing when it was asked to state a case for the opinion of this court.

11 There has been some suggestion in the background to this case, which was mentioned again towards the end of the hearing before this Court, that the appellant was never in fact convicted by the Magistrates' Court of the offence of obstructing PC Nash in the execution of his duty, and that the Crown Court never had that matter properly before it. We cannot concern ourselves with such suggestions. We have a case stated before this court, and we must deal with it and only with that case stated. Whether other procedures might have been available to the appellant or may still be available is a matter for him and his legal advisers.

Grounds of appeal

12 On behalf of the appellant, it is submitted by Ms Claire Mawer that the Crown Court erred in law in holding that self-defence and defence of another person are not available to a charge of obstruction of a police officer in the execution of this duty. It is submitted that as the Crown Court itself made clear, if that defence were available as a matter of law, the appeal from the Magistrates' Court would have been allowed, and accordingly his conviction should be quashed.

Material legislation

13 Section 89 of the 1996 Act, so far as material, provides:

> "(1) Any person who assaults a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

(2) Any person who resists or wilfully obstructs a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding one month or to a fine not exceeding level 3 on the standard scale, or to both…"

14 The predecessor provisions were contained in s.51 of the Police Act 1964 ("the 1964 Act"). That section was the subject of consideration by the divisional court in *Kenlin v Gardiner* , to which I will turn later.

15 So far as relevant, the following provisions are to be found in s.76 of the Criminal Justice and Immigration Act 2008 :

"(1) This section applies where in proceedings for an offence—

(a) an issue arises as to whether a person charged with the offence ('D') is entitled to rely on a defence within subsection (2), and

(b) the question arises whether the degree of force used by D against a person ('V') was reasonable in the circumstances.

(2) The defences are—

(a) the common law defence of self-defence…

(b) the defences provided by section 3(1) of the Criminal Law Act 1967 …(use of force in prevention of crime or making arrest).

(3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.

(4) If D claims to have held a particular belief as regards the existence of any circumstances—

(a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but

(b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—

(i) it was mistaken, or

(ii) (if it was mistaken) the mistake was a reasonable one to have made…

(10) In this section…

(b) references to self-defence include acting in defence of another person;…"

Kenlin v Gardiner

16 In *Kenlin v Gardiner* the Divisional Court comprised Lord Parker CJ, Winn LJ and Widgery J. The main judgment was given by Winn LJ. The facts concerned two schoolboys aged 14 who were in fact innocently visiting a number of premises for the purpose of reminding certain members of their school rugby team of a forthcoming match. They aroused the suspicions of two police officers who were on duty but were in plain clothes. One of the officers produced his warrant card and said: "We are police officers. Here is my warrant card. What are you calling at houses for?" But the boys did not read nor comprehend the nature of the warrant card, and they did not believe them to be genuine police officers. One boy made as if to run away, and one of the police constables caught hold of his arm and said: "Now look son, we are police officers. What have you been up to?" and cautioned him. The boy started to struggle violently, punching and kicking the officer. The other officer came to his assistance and the boy asked for his warrant card. That was not produced owing to the struggle.

17 Each boy was charged with assaulting a police constable in the execution of his duty contrary to s.51(1) of the 1964 Act. The boys were convicted by the Magistrates' Court. On appeal by way of case stated, this Court allowed the appeal and quashed the convictions. This was on the ground that since there had been a technical assault by the police officer who took hold of the arm one of the boys, the defence of self-defence was available to them.

18 At p.518 E-G Win LJ said:

"Of course, in the case of a charge of assault under section 51(1) of the Police Act, 1964 , as in the case of any charge of assault, the defence or

> justification - I prefer to call it a justification, because it must always be borne in mind that it is for the prosecution to exclude justification and not for the defendant to establish it - the justification of self-defence is available just as it is in the case of any other assault. That is subject to this, that if the self-defence, in this case self-defence by the two boys against a prior assault such as had been committed, in a technical sense, by the police officers taking hold of an arm of each of these boys, was self-defence against an assault which was justified in law, as, for instance, a lawful arrest, then in law self-defence cannot afford justification for assault in resistance to justified assault by police officers."

19 The reason why in the circumstances of that case the touching of the boys' arms was unlawful was that the police officers had not done anything purporting to make an arrest of either of the boys, even if there had been grounds for arresting them. As Winn LJ put it at p.519 C-D:

> "What was done was not done as an integral step in the process of arresting, but was done in order to secure an opportunity, by detaining the boys escape, to put to them or to either of them the question which was regarded as the test question to satisfy the officers whether or not it would be right in the circumstances, and having regard to the answer obtained from that question, if any, to arrest them."

20 For that reason, the police officer had committed what Winn LJ called "a technical assault" on the boys.

21 It will be noted that the decision of this court in *Kenlin v Gardiner* concerned only the offence of assaulting a constable in the execution of his duty, in other words the offence under ss.(1) of s.51 of the 1964 Act corresponding to the offence which now exists under s.89(1) of the 1996 Act. Importantly, this court did not say anything about the offence of obstructing a police officer under ss. (2) .

The parties' submissions

22 On behalf of the appellant, Ms Claire Mawer submits that the Crown Court erred in law in holding that the defence was not available to a charge under s. 89(2) of the 1996 Act. She submits that the Court erred in regarding the issue as having been determined by the decision of this court in *Kenlin v Gardiner* . She reminds this Court that that case in fact did not concern the offence of obstruction, but rather the offence of assault. She also submits that it would be contrary

to principle and would make no sense if the defence is available to the charge of assault (which is common ground) but not available to the charge of obstruction. The very same incident (as the present case perhaps illustrates) may involve actions which could be charged as either or both.

23 On behalf of the respondent, Mr Michael Bisgrove, as I understand his submissions, has not sought to uphold the reasoning of the Crown Court as such. In particular, he has not sought to maintain the distinction apparently drawn by the Crown Court between offences of assault, including assaulting a constable in the execution of his duty, and the offence of obstruction of a constable in the execution of his duty. Mr Bisgrove submits that while it is accepted that the decision in *Kenlin v Gardiner* is not the key authority in this context, nevertheless the proposition of law that self-defence was not available, where the actions of the defendant were to resist the lawful action of a police officer, is correct. Mr Bisgrove submits that the true principle is that a defendant cannot rely on self-defence where the use of force by the complainant is lawful, whether or not the defendant believes it to be lawful.

24 He accepts that the proposition formulated so broadly has to be read subject to glosses. The first is where an act may not be unlawful in the strict sense (because, for example, it was done by a child who is below the age of criminal responsibility) but is unjustified. That is not material in the present case. The second is a more important gloss relating to mistakes of fact. Mr Bisgrove submits that while a mistaken belief as to the facts may lay the foundation for the defence, a mistake as to the law cannot do so. The crucial question, he submits, is whether what the constables in this case were doing was lawful or not. Since there was no finding by the Crown Court that it was unlawful, the appellant could not invoke the defence in any event.

25 Mr Bisgrove accepts, as I have said, that his proposition of law is subject to the gloss that if the appellant had a mistaken belief as to the facts which, if true, would have rendered the action of the police unlawful, then he would, in principle, have been entitled to invoke the defence. However, he submits, those were not the facts of this case as found by the Crown Court. He submits that on the facts as found by that Court and as set out in the case stated, the defence was not available to this appellant in any event. Accordingly, he invites this Court to dismiss the appeal.

Discussion

26 I start with the ruling of law which the Crown Court made in this case, before I turn to the alternative way in which Mr Bisgrove has sought to uphold the conviction on appeal. In my view, there is no reason in principle or authority why the defence should not be available in relation to the offence of obstructing a constable. It is a general defence known to the criminal law, unlike some

defences which are available in relation to specific offences. The ones that come readily to mind are the partial defences of diminished responsibility and loss of control, which are available only in relation to a charge and murder and, if established, will reduce the offence to one of manslaughter.

27 I should note in this context what is said by one of the leading works in the field of criminal law, Smith and Hogan , 14th edition, 2015, at p.450. In answer to the question: "To what offence is public or private defence an answer?" it is said:

> "These defences are most naturally relied on as answers to charges of homicide, assault, false imprisonment, and other offences against the person. It is not clear to what extent public or privates defence may be invoked as defences to other crimes."

28 It might be said, although I stress this is not the way in which Mr Bisgrove has framed his submissions before this Court, that the defence is restricted to cases of the use of force. However, I do not think that is right as a matter of principle. For example, if a person does not touch a police officer but gets in his way, perhaps by blocking a police car by driving his own car in front of it, which enables a third party to get away, I can see no reason in principle why the defence of protection of another person should not be available. Depending on the facts, the defence may or may not be a good one, and much will depend on the state of mind of the defendant, for example, if he believes that the police are in fact thugs who are chasing an innocent person. There is no authority which supports the view of the law which was taken by the Crown Court in the present case. The decision of this court in *Kenlin v Gardiner* is certainly not authority for that proposition. That case was not concerned with the offence of obstructing a constable at all. Furthermore, on its facts, the case was one in which the defence was made out because the police in that case were not acting lawfully, and so the convictions of the two boys were quashed.

29 I turn to the alternative submission made by Mr Bisgrove on behalf of the respondent. He drew our attention to a number of cases to which I will turn as briefly as I may. The first case is the decision of the Court of Criminal Appeal of Northern Ireland in R v Browne [1973] NILR 96 in which the judgment of the court was delivered by Lowry LCJ, in particular at p.107. In subpara.(3) he said:

> "Where a police officer is acting lawfully and using only such force as is reasonable in the circumstances in the prevention of crime or in effecting the lawful arrest of offenders or suspected offenders, self-defence against him is not an available defence."

30 I will return briefly to Browne later. The second case is the decision of the

Divisional Court in *DPP v Bayer and others [2003] EWHC 2567 (Admin)* in which the judgment of the court was delivered by Brooke LJ. In particular, at para.21 it was said:

> "It is a principle of the common law that a person may use a proportionate degree of force to defend himself, or others, from attack or the threat of imminent attack, or to defend his property or the property of others in the same circumstances…"

31 At para.22 it was said:

> "A hundred years later, in the second edition of his Textbook of Criminal Law (1983) Professor Glanville Williams said pithily at p.501 that 'protective force' can be used to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention…"

32 Mr Bisgrove emphasises the reference there to the use of force being "unlawful".

33 Thirdly, reference was made to the decision of the Court of Appeal (Criminal Division) in *R v Owen Fennell (1970) 54 Cr App R 451* in which the judgment of the court was given by Widgery LJ. In particular, at p.453 it was said:

> "…Mr Bain then contended that by a parity of reasoning a father who used force to effect the release of his son from custody was justified in so doing if he honestly believed on reasonable grounds that (contrary to the fact) the arrest was unlawful. We do not accept that submission. The law jealously scrutinises all claims to justify the use of force and will not readily recognise new ones. Where a person honestly and reasonably believes that he or his child is in imminent danger of injury, it would be unjust if he were deprived of the right to use reasonable force by way of defence merely because he had made some genuine mistake of fact. On the other hand, if the child is in police custody and not in imminent danger of injury there is no urgency of the kind which requires an immediate decision and a father who forcibly releases the child does so at his peril. If in fact the arrest proves to be lawful, the father's use of force cannot be justified…"

34 Fourthly, reference was made to the decision of the Court of Appeal (Criminal Division) in *R v McKoy [2002] EWCA Crim 1628* in which the judgment was given by Kay LJ (see paras.6-7) where the CACD approved a direction which had been given by the trial judge to the jury in the following terms:

> "…If a person is properly and lawfully arrested, then use of force to free himself is unlawful. But in this case as a matter of law, it is my responsibility to decide matters of law, I direct you that Police Constable Parker had not, in fact, lawfully arrested McKoy at that stage…"

35 That was described by Kay LJ at para.7 of his judgment as "a perfectly proper direction". Indeed, it was described as "a model direction of what was needed in the circumstances."

36 Finally, for present purposes, Mr Bisgrove drew our attention to the decision of the Divisional Court in *Cresswell v DPP [2006] EWHC 3379 (Admin)* in which the judgment of this court was given by Keene LJ, in particular, at paras.30-31. Mr Bisgrove submits that *Kenlin* was not the only authority for the principle of law which was set out at p.518 at letter G in the judgment of Winn LJ although he accepts that that was *obiter* on the facts of that case. He submits that the other cases on which he relies, in particular, decisions of the Court of Appeal (Criminal Division) in this jurisdiction, are authority for the proposition on which he relies. He also submits that applying that principle to the facts of the present case, there was no relevant mistake of fact, only, at most, a mistake of law as to whether the appellant believed that the police officers had the lawful right to act as they did.

37 Before I address those submissions, I should return to the case of Browne and note that it has been the subject of some academic commentary. In Smith and Hogan , which I have already cited, at p.447, after setting out the material passage which I have already quoted, the authors of that work state:

> "… It may be respectfully suggested this proposition is too wide. If D, an innocent person, is attacked by the police who mistakenly believe him to be a gunman and the police attack is such that it would be reasonable if D were the gunman, does the law rely deny the right to resist?"

38 The footnote to that passage makes reference to a number of cases, most of which have been referred to already in this judgment. They also make reference to *Albert v Lavin [1982] AC 546* , referring to the decision of the Divisional Court, which was reversed by the House of Lords but on another point, which is said to support the view of the text, and also the decision of the Crown Court at Lewis in *Ansell v Swift [1987] Crim LR 194* .

39 The commentary (by Professor Diane Birch) in the Criminal Law Review to that ruling in the Crown Court is also of some interest in this context. It states:

> "…If the constable is acting lawfully there is no reason why a person should be deprived of the defence of self-defence if he genuinely believes

> in the existence of facts which, if true, would make the use of force by him lawful. Thus, if he mistakenly supposes that a person that has just grabbed him from behind is a robber or a thug, he may use the degree of force necessary to repel a robber or a thug, and it matters not that his assailant is in fact a police officer acting in the execution of his duty. This follows from Gladstone Williams …It should not matter that the crime of assaulting a police officer is a crime of strict liability so far as the status of the victim is concerned…because the offence still requires proof of an assault and the defence of self-defence affords the justification which prevents that element of the crime from being made out…"

40 As will be well known, contrary to some of the earlier cases to which I have referred, the law was subsequently clarified in *Gladstone Williams* and is now as set out by Parliament in s.76 of the 2008 Act. In other words, the reasonable-ness of a mistaken belief on the part of a defendant is relevant to the question of whether it is a genuinely held belief but if it is a genuinely held belief, it does not matter that the belief is an unreasonable one. The law of self-defence then applies in accordance with the state of mind of the defendant, albeit mistaken and perhaps unreasonable.

41 Returning to the submissions which have been made in this court by Mr Bisgrove in support of his alternative argument, I am unable to accept that submission. In the end, I come back to where I began, with the case stated itself. The fact is that the Crown Court made certain findings of fact which they said would have led them to acquit the appellant of the relevant offence if as a matter of law the defence had been available. They held that it was not available for reasons which were wrong in law and by reference to a decision of this Court which does not hold what they said it held.

42 In my view, Ms Mawer is correct to submit that what the Crown Court's findings of fact amounted to was that the appellant's state of mind was that his mother was being assaulted by the police officers, and he intervened in order to prevent that taking place. If what he believed had been true, the defence would have been available to him. His mistake was not one simply as to law.

Conclusion

43 For the reasons I have given I would answer the question posed for the opinion of this Court in the case stated in the affirmative. The defence of self-defence or defence of another person is, as a matter of law, available in relation to the offence of obstructing a constable in the execution of his duty under s. 89(2) of the Police Act 1996 . Since, in the circumstances of the present case the Crown Court was of the view that if that defence had been available as a matter

of law, it would have succeeded on the facts. I would allow this appeal, and quash the conviction in this case.

44 SIR DAVID CALVERT-SMITH: I agree.

LORD JUSTICE SINGH: Now, is there anything else? Ms Mawer?

MS MAWER: No, thank you, my Lord.

LORD JUSTICE SINGH: Thank you very much for your assistance, to both of you.

MS MAWER: My Lord, forgive me. I simply ask, the defendant is publicly funded.

LORD JUSTICE SINGH: Yes.

MS MAWER: And so I ask for those costs to be taxed.

LORD JUSTICE SINGH: Yes. Yes, that will be noted. Yes.

MS MAWER: My Lord, my attention is drawn to the fact that the defendant incurred costs in the Crown Court as a result of his conviction for the charge being dealt with today. And I presume that as a result of this court's findings he will be entitled to expect remuneration of those funds.

LORD JUSTICE SINGH: Is that right, Mr Bisgrove?

MR BISGROVE: My Lord, referring to the transcript, it seems that this was the only offence in the Crown Court for which he was convicted. I understand he may have been ordered to pay costs.

LORD JUSTICE SINGH: Right.

MR BISGROVE: And so any costs that he was ordered to pay would fall away as a result of the quashing order of conviction.

LORD JUSTICE SINGH: With the order of the court, yes. Alright.

MR BISGROVE: If he incurred his own costs in relation to those, had been acquitted at, on the appeal, he would have been entitled to apply for those costs again from central funds. And that may well have followed.

LORD JUSTICE SINGH: Yes. I am afraid I don't think we can say any more unless you show us that we have powers to do any more.

MS MAWER: My Lord, I think that is the extent of my Lord's powers.

LORD JUSTICE SINGH: Alright. Thank you very much. Thank you both very much.