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IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
ADMINISTRATIVE COURT  
**[2018] EWHC 3616 (Admin)**

CO/2936/2018

Royal Courts of Justice Tuesday, 4 December 2018

Before:

LORD JUSTICE HOLROYDE

MR JUSTICE NICOL

BETWEEN :

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

- and -

YOUNG

Respondent

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**JUDGMENT**

## **APPEARANCES**

MR S HEPTONSTALL (instructed by Government Legal Department) appeared on behalf of the Appellant.

MR C S DIGBY (instructed by Gerald Armstrong & Co) appeared on behalf of the Respondent.

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OPUS 2 DIGITAL TRANSCRIPTION

LORD JUSTICE HOLROYDE:

- 1 This is an appeal by way of Case Stated against a decision of lay justices sitting at the Sunderland Magistrates' Court on 10 April 2018 whereby the justices allowed a submission of no case to answer and dismissed a charge of battery against the respondent.
- 2 The justices have exhibited to the Case Stated two recordings. The first recording is an audio recording of a 999 call which the complainant Angela Robertshaw made to the police on the night of 19 January 2018. The second recording is a video recording of footage from the body-worn camera of one of the police officers who promptly attended Ms Robertshaw's home in response to that call. Relying on the decision of the Divisional Court in *Director of Public Prosecutions v Jobling* [2016] EWHC 2707 Admin, Mr Heptonstall, for the appellant, submits that in these circumstances the

exhibited recordings properly form part of the Case Stated. Mr Digby, for the respondent, does not resist that submission which, in my view, is clearly correct. The facts of the case are therefore to be gathered from the contents of the written Case Stated and the recordings.

3 In summary, the principal facts are these:

- (1) Early in the 999 call, Ms Robertshaw gave her address and told the call handler that her partner was going berserk. When she was asked whether her partner was hurting her, Ms Robertshaw replied, "Not yet."
- (2) After a short period of conversation between Ms Robertshaw and the call handler, the call handler had directed police officers to the scene but thereafter kept the line open. Thus, the audio recording continues for several minutes. It continues, indeed, for a short time after the police officers had arrived with the result that that part of the audio recording can be married up with the video footage from a police body-worn camera. It is therefore entirely clear that the persons whose voices can be heard in the earlier parts of the 999 call recording were Ms Robertshaw and the respondent.
- (3) Whilst the audio recording of the 999 call is not of perfect quality, in part because it appears that the television is playing in the same room, the male and female voices can very clearly be heard. The male voice, undoubtedly that of the respondent, is slurred but he can be heard swearing at and abusing Ms Robertshaw. There are clear sounds of physical exertion, including some sounds which, in my view, are entirely consistent with some form of impacts taking place. These sounds are accompanied by cries of pain from Ms Robertshaw.
- (4) For my part, I accept the appellant's submission that, amongst other things, the following remarks can be heard on the recording of the 999 call. Ms Robertshaw can be heard saying, "You always take it out on me." There is then an aggressive response from the respondent, after which Ms Robertshaw can be heard crying. The respondent can then be heard to ask whether she "wants more" followed by further cries of pain. About two minutes further into the call Ms Robertshaw can be heard saying, "Please don't stamp on us," followed by further cries of apparent pain in which the respondent can be heard saying that she was "getting what was coming to her". Ms Robertshaw can be heard crying out again and saying, "Please don't hit me."
- (5) Police Constable Cowley, whose body-worn camera was activated, and Police Constable Lithgow entered the house. They heard a female voice shouting "help" and went towards the location of that voice. As he was doing so, Police Constable Cowley found the

respondent crouching on the kitchen floor. He handcuffed the respondent and told him that he was under arrest on suspicion of assault.

(6) The footage from the body-worn camera shows the police officers taking the respondent to a police vehicle and then waiting until a different police vehicle arrived. During the footage, the respondent can be heard at times questioning why he has been arrested and at other times speaking aggressively. At one point he can be heard telling the police officers that he will "fucking have you". There was also audible on the body-worn camera an exchange in which the respondent can be heard asking, "What is this about?" followed by a female voice - clearly that of Ms Robertshaw - calling out, "You bashing the fuck out of me." Mr Heptonstall initially sought to rely on that as part of the evidence which was before the justices. Mr Digby, who was taking specific instructions on the point from the solicitor advocate who represented the respondent in the court below, tells us that that part of the evidence was not admitted by the justices. In those circumstances Mr Heptonstall, very properly, did not press the point and for my part I find this appeal can be resolved without taking any account of that disputed aspect of the evidence.

- 4 On the following day, 20 January 2018, the respondent was charged with an offence contrary to section 39 of the Criminal Justice Act 1988 of assaulting Ms Robertshaw by beating her. The case came before a magistrates' court on 22 January when the respondent pleaded not guilty and the case was adjourned for trial on 15 March. On that date, both Ms Robertshaw and the respondent were present but unfortunately the trial could not proceed because of lack of court time. The trial was, accordingly, adjourned until 10 April 2018.
- 5 On that date, Ms Robertshaw did not attend. An application was made by the prosecuting advocate to adduce by way of hearsay evidence the body-worn camera recording of her initial account given to the police officers at the scene and her subsequent witness statement. The application was made on the basis that Ms Robertshaw was unfit because of her bodily or medical condition to attend the trial. There was no medical evidence in support of that application, and the justices understandably refused it.
- 6 The trial, therefore, proceeded without any evidence as to the accounts given to the police by Ms Robertshaw. There was, in the event, no challenge to the admissibility of the 999 call or the footage from the body-worn camera. Those were relied upon by the prosecution as real evidence. The prosecution evidence at trial accordingly comprised, as the Case Stated records, the playing of the 999 call, live evidence from Police Constable Cowley, the playing of the bodycam footage, the reading of statements from Police Constable Lithgow and another police officer who attended and the reading of a summary of the respondent's "no comment" interview. The evidence of Police Constable Lithgow, which was read, included evidence that Ms Robertshaw had told the officer that the respondent had punched, kicked and slapped her and had tried to strangle and stamp on her. The police officers did not, however, see any visible injuries to Ms Robertshaw.
- 7 At the conclusion of the prosecution evidence, the advocate representing the respondent made a submission of no case to answer. She relied on the second limb of the familiar test in *Galbraith*, namely that although there was some evidence it was of a tenuous character and was such that, taken at its highest, magistrates, properly advised, could not properly convict. The Case Stated records that the advocate argued that the evidence adduced by the appellant was tenuous in character, weak and vague. The advocate submitted that in the absence of any evidence from Ms Robertshaw herself, in the absence of any visible injuries and having regard to the vagueness of the 999 call, the submission should succeed.

8 In response, the prosecution advocate submitted that a reasonable bench of magistrates, properly directed, could properly convict on the evidence and that, accordingly, there was a case to answer. The prosecution advocate submitted that the 999 call was a recording of the assault actually taking place. She pointed out that police officers attended the address very soon after that call had been made and found the only persons present were Ms Robertshaw and the respondent. The prosecution advocate also relied on the demeanour of the respondent both when the police first arrived and following his arrest, including his appearing to be drunk and behaving aggressively and abusively towards the police. Taking the evidence as a whole, she submitted, there was sufficient for a reasonable tribunal properly to convict.

9 The Case Stated records the advice given to the justices by their legal adviser as to the test which they must apply. The advice was clearly correct and no criticism is or could be made of it.

10 The Case Stated concludes with the following paragraphs:

"30 Having considered the representations of the appellant and the respondent and the advice given to us by our legal adviser, we upheld the defence submission of no case to answer and dismissed the case against the defendant.

31 We found that the appellant's evidence was such that magistrates, properly advised, could not properly convict.

32 The reason for our decision was the tenuous nature and vagueness of the appellant's evidence; the 999 telephone call was vague; the other evidence presented was weak and there was not sufficient to support the allegation."

11 The Case Stated poses two questions for the opinion of this court:

"1 Were we correct to determine the evidence of Ms Robertshaw was not admissible as hearsay based on the representations we heard?

2 Were we right to uphold the submission of no case to answer based on the evidence that we had heard?"

12 In this court, Mr Heptonstall does not invite the court to consider the first of those questions. No challenge is made now to the decision of the justices as to the inadmissibility of hearsay evidence as to what Ms Robertshaw told the police in her first account or in her witness statement.

13 As to the second question, Mr Heptonstall submits that the recording of the 999 call is, in itself, sufficient to establish a case to answer. He points out that it records the complainant calling for the help of the police, and the respondent behaving aggressively. He submits that although the 999 call is an audio recording with no visual content, it is nonetheless capable of providing sufficient evidence of the assault. He contends that the justices were wrong to conclude that the evidence, taken at its highest, was not capable of being sufficient to support a conviction.

- 14 For the respondent, Mr Digby submits that the justices were entitled and correct to reach the decision they did and to allow the submission of no case to answer. In his written submissions he contended that there was no evidence that Ms Robertshaw had actually been beaten at all. He acknowledges that proof of injury is not a necessary ingredient of the offence charged but argues that in the absence of any visible injury and in the absence of any evidence from Ms Robertshaw no bench, properly directed, could be sure that an assault had taken place. In his written submissions he also contended that there was no evidence that any assault had been committed by the respondent. That submission was not pursued in oral argument, in my view rightly so given the overlap to which I have referred between the 999 call recording and the footage from the body-worn camera.
- 15 Mr Digby submits that whilst a visual recording of the assault taking place might be sufficient in the absence of evidence from the complainant, the audio recording alone could not be sufficient. It could not, for example, assist the court at all to determine how any physical altercation began, nor could it enable the court to be sure that remarks made by the person claiming to be a victim were, in fact, an accurate representation of the events taking place.
- 16 As will be apparent from the passage which I have quoted, the justices (in paragraph 32 of the Case Stated) expressed the reason for their decision very briefly. It is, in my view, somewhat unfortunate that in paragraph 32 they described the 999 call as "vague" without making any specific finding of fact as to whether a particular word relied on by the prosecution could or could not be heard on the audio recording. In fairness to the justices, it may be that they felt it sufficient to draft the written Case Stated as succinctly as they did because they were exhibiting the two recordings in order to inform this court as to the full extent of evidence which was available. As I have indicated, I have no doubt that by exhibiting those recordings the justices made them part of the Case Stated and this court can properly consider their content.
- 17 I accept Mr Heptonstall's submission that no bright line can be drawn between an audio recording and a video recording in circumstances such as this.
- 18 The question for the bench on the submission of no case to answer being made is whether the evidence, taken at its highest, was such that on one view of it a reasonable bench, properly directed, could properly convict.
- 19 Having considered the evidence which was before the justices, for my part, I have no doubt that the evidence was sufficient to support a conviction and that the submission of no case to answer should have been rejected. Indeed, I very much doubt whether the submission should ever have been made. There was before the justices clear evidence that Ms Robertshaw made a 999 call to the effect that a man was going berserk at her home. Given the speed with which the police officers arrived on the scene and the overlap of recordings to which I have referred, there could be no realistic doubt but that the man concerned was the respondent. There was then a clear audio recording from which, in my view, a reasonable bench, properly directed, undoubtedly could find that the 999 call recorded an assault actually taking place with the victim of that assault uttering cries of pain against a background of sounds of physical exertion by the respondent. In those circumstances it was, in my judgment, not properly open to the justices to allow the submission of no case to answer. Whether at the conclusion of all the evidence they would have convicted is of course a separate matter. The issue they had to determine, and in respect of which in my

judgment they fell into error, was whether a reasonable bench, properly directed, could properly convict.

- 20 I would, therefore, answer the second question posed by the Case Stated in the negative.
- 21 If my Lord, Nicol J, agrees, I would quash the decision of the justices dismissing the charge and direct that the case be listed for a fresh trial. In the circumstances, with no disrespect to the justices whom I have indicated previously, the fresh trial should be heard by a differently constituted bench.
- 22 MR JUSTICE NICOL: I agree.

LORD JUSTICE HOLROYDE: Thank you, gentlemen. Is there any consequential matter?

MR HEPTONSTALL: I do not make an application for costs in this case.

LORD JUSTICE HOLROYDE: Mr Digby, you are content with that, no doubt.

MR DIGBY: Yes. The respondent was legally aided on both occasions.

LORD JUSTICE HOLROYDE: Do you need an order for assessment of legal aid costs?

MR DIGBY: If I do, I seek it.

LORD JUSTICE HOLROYDE: Yes. I think you do. You should certainly have it.

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This transcript has been approved by the Judge.