[Title of piece]

R v Clancy [2012] EWCA Crim 8

Keywords (up to x 5 – indicate contents of case note without replicating the title or textual sub-headings)

The facts

At approximately 1am on the morning of 27th March 2010, the police were called to a dispute between a taxi driver and a woman, the Appellant. The Appellant was being driven in a taxi when it is alleged that she started swearing at the driver and generally being abusive towards him. The driver stopped his taxi and asked her to leave but she refused to get out, instead choosing to continue her abusive behaviour. The taxi driver drove her to the cab office, where he left the Appellant in his unlocked taxi and telephoned for the police. When the police arrived and spoke to the driver of the taxi, the Appellant again began to shout and swear, and then lunged towards the driver. She appeared to be drunk and claimed that she had been locked in the car. The police warned the Appellant about her behaviour and left the scene.

Shortly afterwards, police were called to the Appellant's home address. The call had been made by the Appellant's partner who said that she had returned home in a distressed state, claiming to have been sexually assaulted by her taxi driver. The Appellant had then taken a knife from the kitchen and was trying to leave the house to find the driver. When police arrived at the house, one officer saw the Appellant walking towards the cab office so he approached her. She refused to speak to him, telling him to "Fuck off". The officer explained that he knew she was carrying a knife and she replied, "They are in my handbag. They are not for you. They are for the cab driver". The officer asked for her handbag, which she handed to him, and inside he found two kitchen knives. After some time, the Appellant told police that when she was in the taxi, it had stopped in a side street and the driver had put his hand down the front of her trousers twice. The officers recorded the allegation of sexual assault and arrested the Appellant for possession of an offensive weapon. In interview on 27th March, the Appellant handed in a prepared statement and chose not to answer police questions. Two days later she made a statement to say that she remembered what had happened to her that night and feeling enraged at what had taken place, she had taken a knife and left the house with it. She said she had no specific intention in relation to the knife. She was subsequently charged with two offences of having a bladed article in a public place contrary to section 139(1) of the Criminal Justice Act 1988.

Section 139(4) of the Criminal Justice Act 1988 provides a defence for the accused if he can show, on the balance of probabilities, that he had "good reason" for being in possession of a prohibited article. At trial, in May 2011, the Appellant submitted that she had good reason as she believed she would be attacked by the taxi driver and so feared for her personal safety. In evidence, she stated that she had consumed several drinks that evening before deciding to go home just before midnight. She went to her usual cab station and got into the rear of the taxi. It appeared that the driver, who she did not recognise, was going the wrong way. He then pulled into a side street and switched off the engine. After sitting motionless for a minute or so, the driver turned to her and began to pull the zip on her jacket. She screamed but he ignored her and put his hand down the front of her jeans. After a short struggle, he stopped what he was doing, started the car again and headed towards the cab station. She made

several calls to the police and when they arrived at the cab office, she tried to explain what had happened but the officers would not listen. She said that when she got home, she wanted to get cigarettes so put a knife in her bag for her protection as she was afraid of being attacked by the taxi driver again.

Mr Recorder West, the trial judge at Kingston-upon-Thames Crown Court, directed the jury that the question of whether the Appellant had "good reason" was a question of fact for them to decide using their common sense and experience of the world. He suggested that they may not think it a good reason to carry a knife simply to ward off an attack from a known or unknown person, at some unknown time in the future, as members of a gang might. He invited them to consider whether there was a risk of an attack and if so, how imminent that risk was and how serious any likely attack would be.

During their deliberations, the jury sent a note to the trial Judge, asking:

"*When we consider whether the Appellant had good reason to have the knives and whether she feared an attack should we consider (A) or (B) - (A) whether in assessing the facts available to the Appellant at the time she was actually likely to be attacked or (B) whether in a confused and possibly irrational state she might have believed she might be attacked even if that was logically unlikely?*"

The Recorder directed the jury as follows:

"*You should consider all the facts alleged [by] the prosecution and the defence that are alleged to amount to good reason for having the knife in a public place. You should decide which of those have been proved to the standard I directed you about yesterday that is that the fact has been proved by the Defendant as being more likely. When you have identified those facts that you find proved, if any, you need to consider whether they amount to a good reason, this is a matter you need to consider objectively, that is, would an outside, independent observer consider that those facts amounted to a good reason for possession of the knife in a public place. You should not approach that question subjectively by taking the Defendant's state of mind, whatever you may think it was. The reason why the law does not permit that is perhaps obvious, for example, say a person allowed himself to get drunk and in that state formed some distorted view of a situation and behaviour in response to that imaginary situation he could not say afterwards 'I believed I had a good reason for doing what I did although I accept that there was in fact no good reason for doing so and I would not have done what I did if I had been sober*."

The jury convicted the Appellant of both counts of possession of a bladed article. On 6th July 2011, she was sentenced to a 12 month community order imposing an unpaid work requirement of 80 hours and a condition not to attend or contact the cab office at which the driver worked. The Appellant appealed her conviction on the basis that the Recorder was wrong to direct the jury that the question of whether she had good reason to possess the knife should be considered wholly objectively, and that they should not take into account her state of mind and her fear that she would be attacked by the taxi driver (assuming they accepted her evidence in this regard).

HELD, ALLOWING THE APPEAL, the authorities supported fear of attack as potentially constituting a good reason within the meaning of s 139(4) of the 1988 Act. As a result, an Appellant's state of mind was not wholly irrelevant and it was for the jury to decide whether

the defence had been made out having regard to all the evidence. Further, the term 'good reason' did not require judicial explanation. The case of *R v Bown* [2003] EWCA Crim 1989, considered the difference between what amounted to a good reason (a jury question) and what was actually capable of amounting to good reason (a matter for the Judge). While in some cases, a trial Judge may rule that certain facts were incapable in law of constituting a good reason, the court should be slow to interfere, and should only be adopted if it would be perverse in the circumstances to find that a good reason existed. The Judge should simply direct the jury that having agreed upon the facts, including the accused's state of mind, they should decide whether those facts amounted to a good reason to possess the article in a public place. It was not necessary in law for a Defendant to show that his or her belief was reasonable as that would impose an unjustifiable limitation on the meaning of that expression. However, if an Appellant could not show that his belief was reasonable, that could be taken into account and the jury may find that the defence was not made out. In this case, the Recorder's direction to the jury was unsatisfactory as it suggested that the Appellant's state of mind was not relevant to their decision on whether she had a good reason for the purposes of her defence. They should have been told simply to find the facts, including any facts relating to her state of mind and her reasoning, and use those facts to decide whether the defence was made out. By stating that the jury should not approach the question subjectively, the Recorder had incorrectly implied that the Appellant's state of mind should be disregarded entirely from their decision making process. While it was unclear whether a proper direction would have resulted in a different verdict from the jury, it was open to them to have done so and thus the conviction was quashed as being unsafe.

COMMENTARY

Three issues raised in this case – (1) whether self protection capable of amounting to good reason (2) whether the issue of whether good reason should be considered subjectively or objectively (honestly or reasonably) and (3) whether the issue of good reason is a matter that requires judicial interpretation for directing the jury.

The question of what constitutes "good reason" for the purpose of section 139(4) Criminal Justice Act 1988 has generated a great deal of case law. Issues such as forgetfulness (*R v Jolie* [2003] EWCA Crim 1543; [2004] 1 Cr. App. R. 3; (2003) 167 J.P. 313; [2003] Crim. L.R. 730) self-harm (*R v Bown* [2003] EWCA Crim 1989; [2004] 1 Cr. App. R. 13; (2003) 167 J.P. 429; [2004] Crim. L.R. 67), habit (*R v Giles* [2003] EWCA Crim 1287) and work use (*Mohammad v Chief Constable for South Yorkshire* [2002] EWHC 406 (Admin)) have all been judicially considered, but this is the first of the many cases to consider whether the question of what constitutes a "good reason" involves a subjective or objective analysis of the facts (or whether the accused's state of mind is relevant consideration). In determining this case, the Court of Appeal reviewed a number of key authorities on the matter, utilising the decision of *Evans v Hughes* [1972] 3 All ER 412, 136 JP 725, 56 Cr App Rep 813, a case involving possession of an offensive weapon under the Prevention of Crime Act 1953, as its starting point. In that case, the Divisional Court held that the expectation of an imminent attack by an accused could be a "reasonable excuse" for carrying an offensive weapon for self defence. While the term "reasonable excuse" for the purposes of the Prevention of Crime Act 1953 and the term "good reason" within the Criminal Justice Act 1988 are not precisely the same, they have been considered as being the same for all practical purposes (see *R v Jolie* ante) and thus the authorities are interchangeable. In *R v McAuley* [2009] EWCA Crim

2130; 173 JP 585; [2010] 1 Cr App Rep 148, a case under the 1988 Act, the Court referred to the judgement in *Evans v Hughes* for guidance. In *McAuley*, the Appellant had been found in possession of a knife which he claimed to be carrying to protect himself from attack by a man who had attacked him four months earlier and who had threatened him five days earlier. The trial judge determined that fear of attack in such circumstances could not amount to good reason but the Court of Appeal quashed the conviction, stating that the defence should have been left to the jury. The Court held that carrying a knife for personal protection could amount to a good reason if the defendant could show on the balance of probabilities that he was in fear of an imminent attack. It was a matter for the jury to decide how imminent, soon, likely and serious an anticipated attack had to be in order to constitute good reason thus the judge had been wrong to deprive the defendant the opportunity to leave the matter to the jury in his case. In *N v DPP* [2011] EWHC 1807 (Admin); 175 JP 337, a case under the 1953 Act, the Appellant had been found in possession of a metal bar. He had been threatened five minutes earlier by a group of young men in a car and had run off when the group had started to get out of the vehicle. The Appellant claimed to have picked up the mental bar for protection in case he was located and attacked by the group. The District Judge determined that this did not constitute a "reasonable excuse" because even if the Appellant had believed that he was at risk of an imminent attack, his belief was not a reasonable one in the circumstances. On appeal by way of case stated, the Appellant used the law on self-defence to argue his case, stating that by analogy, the question of reasonable excuse was to be judged by reference to the facts as the defendant believed them to be, even if this belief was a mistaken one. The Divisional Court held that each case must be determined on its own facts and that the District Judge had not erred in his judgement. It rejected the submission that reasonable excuse was a matter to be determined by reference to the defendant's own perception of the facts. Supperstone, J ruled that when a defendant claims that he had reasonable excuse for possession of an offensive weapon due to his belief that he was at risk of an imminent attack, it is for the defendant to prove both the belief and the reasonableness of that belief on the balance of probabilities. Pitchford, J agreed with this view and also rejected the suggestion that the question was to be determined solely with reference to the Defendant's state of mind. The tribunal of fact is entitled to assess the matter by reference to all the circumstances of the case. The Court of Appeal in this case rejected the submission that Supperstone's judgement was incorrect, claiming that self defence and good reason are not analogous due to the differences in legal principles and the burden of proof.

It is suggested that the analogy with self defence is potentially a useful one. Taking any of the common criminal law defences, they all possess at least an element of subjectiveness in the approach to be taken in determining whether the defence is made out. Self-defence is the obvious analogy in this case given the links between the circumstances of carrying an item for personal safety, i.e. the fear of imminent attack. In determining self defence, the triers of fact must first determine whether the defendant believed that the use of force was necessary, normally due to an attack or imminent attack. The defendant's belief must be an honestly held belief, thus indicated a subjective element to the test. If the defendant is under a mistaken belief that he is under attack, then he is judged on the facts as he believed them to be (subjective view) even if the mistake was an unreasonable one (objective view) (*R v Beckford* [1987] 3 All ER 425). Notably however a mistaken belief induced by voluntary intoxication cannot be relied upon (s.76(5) Criminal Justice & Immigration Act 2008). Irrespective, that is a matter of fact for the jury to consider and still requires the jury to consider the defendant's state of mind. Secondly, a defendant must only use such force as is reasonable in the circumstances. This requires the jury to put themselves in the circumstances as the defendant believed them to be (a subjective view) and determine

whether the force used was reasonable in those circumstances (objective view). Even if we were to set self-defence aside on the basis that the burden of proof differentiates it from the defence of "good reason", the defence of insanity, with a similar reverse burden of proof, also requires a subjective consideration of the facts. A defendant claiming insanity must be labouring under a defect of reason (i.e. deprived of the power of reasoning (R v Clarke)) (a subjective view) arising from a disease of the mind so as not to know the nature and quality of the act he was doing was wrong, ir if he did know it, that he did not know what he was doing was wrong (again a subjective test). The burden of proof requires the defendant to prove these on the balance of probabilities.

[20] The authorities, in particular *Manning* and *Jolie*, also establish that the expression "good reason" is not one that calls for judicial explanation, being an ordinary phrase in common use. In those circumstances it would be wrong for judges to hedge it around with rules of law designed to limit its scope or meaning. In some cases the court may be justified in ruling that certain facts are incapable of constituting a good reason, but it should be slow to do so. Such a course can be justified only if a finding that a good reason existed would be perverse. Normally, therefore, judges should simply direct the jury that, having found the facts, including, if appropriate, the facts as to the accused's state of mind, they should decide whether they amount to a good reason. No further elaboration is required. In our view *Gregson* must be understood as a decision to the effect that mere forgetfulness, not allied to other circumstances, is incapable in law of amounting to good reason. Whether correctly decided or not, that appears to be the view of it taken in the later authorities. The distinction between what *does* amount to a good reason (a matter for the jury) and what is *capable* of amounting to a good reason (a matter for the judge) was explained in the case of *R v Bown*, but we would reiterate the observation made in that case that the court should be very slow to rule that a particular state of facts cannot as a matter of law constitute a good reason.

[21] These principles were applied in *N v DPP*, in which the court accepted that the existence of a reasonable excuse within s 1 of the 1953 Act is a decision to be made by the tribunal of fact in the light of the evidence as a whole. Insofar as the Defendant relies on his own perception of the facts, we do not understand the court in that case to have held that it is necessary as a matter of law for him to show that his belief is reasonable. That would involve imposing an unjustifiable limitation on the meaning of that expression. All the court was doing was pointing out that if the Defendant cannot show that his belief was reasonable, that too is a matter to be taken into account and the tribunal of fact may find that the defence is not made out.

[22] Miss Lee invited us to hold that *N v DPP* was wrongly decided and that, by analogy with the law on self-defence, the jury in this case should have been directed to reach their decision relying on the Appellant's own view of the situation facing her. We are unable to accept that submission. As Supperstone J pointed out, there is no true analogy between self-defence and the defences of reasonable excuse and good reason because the legal principles and the burden of proof are different. Quite apart from that, however, if, as the authorities show, the question is simply one of fact, there can be no justification for making a decision otherwise than on the basis of the evidence as a whole.

Leave issue to jury without putting gloss on it: [13] In *Manning* the Appellant was found in possession of a knife which he said he had used to repair his car radiator earlier that day. He argued that he had it for use at work within the meaning of s 139(5)(a) or for a good reason within the meaning of s 139(4) and so a question arose as to the meaning of those two expressions. Henry LJ giving the judgment of the court observed that where a statute uses ordinary everyday language judges should not put their own gloss on it but leave it to the jury to make their own decision, citing as authority the decision of the House of Lords in *Brutus v Cozens* [1973] AC 854, [1972] 2 All ER 1297, 136 JP 636. He held that since the expressions were not used in any unusual sense, the judge was entitled to leave the matter to the jury and tell them that it was for them to decide what they meant in the context of the case.

[14] *Manning* and *Gregson* were both considered in *R v Jolie* [2003] EWCA Crim 1543, 167 JP 313, [2004] 1 Cr App Rep 44, another case under the 1988 Act. The Appellant was found in possession of a kitchen knife which was hidden under the driver's seat of his car. He said that he had not known it was there. There were no keys to the car and he and others had been using the knife to start the car, but had later mislaid it. The court held that if the knife had been brought into the car simply to start and stop the engine, it ought to be open to the jury to find that the statutory defence was made out. The court noted what had been said in *Brutus v Cozens* and cast doubt on the reasoning in *Gregson* which had led the court in that case to the conclusion that forgetfulness could not amount to a good reason. Having referred to *Manning*, it held that that case was authority for the proposition that the words “good reason” did not require any judicial gloss. Kennedy LJ said in para 17 “Once the facts are known the tribunal of fact can

safely be left to decide for itself whether the statutory defence, which is formulated in simple words, has been made out."

between 1,500 and 2,500 words

Evans v Hughes [1972] 3 All ER 412 applied; *R v Manning* [1998] Crim LR 198 applied; *R v Jolie* [2003] All ER (D) 356 (May) applied; *R v Bown* [2003] All ER (D) 299 (Jun) applied; *N v DPP* [2011] All ER (D) 04 (Jul) applied; *DPP v Gregson* 96 Cr App Rep 240 considered; *R v McAuley* [2010] 1 Cr App Rep 148 considered.