Neutral Citation [2015] IEHC 642

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 67 J.R.]

BETWEEN

JOHN COX

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on 20th day of October, 2015.

1. The applicant is charged that he:-

> "On the 18/10/2013 at a place unknown between Newbridge and Naas Train Stations, Co. Kildare on board an Iarnród Éireann train a place in view of a public highway/street/road/a place of public resort in the said District Court area of Naas did wilfully, openly and lewdly expose your person with intent to insult a female. Contrary to section 4 of the Vagrancy Act 1824, as applied and amended by section 15 Prevention of Crimes Act, 1871, and section 7 of the Penal Servitude Act 1891."

2. The applicant was granted leave to apply for judicial review (Peart J.) on 3rd February, 2014 seeking declarations that s. 4 of the Vagrancy Act, 1824, as applied by s. 5 of the Prevention of Crimes Act, 1871, and amended by s. 7 of the Penal Servitude Act, 1891, did not survive the enactment of Bunreacht na hÉireann, 1937. An order by way of prohibition or an injunction preventing or restraining the further prosecution of the applicant in respect of the charge was also sought.

3. The applicant claims that the s. 4 offence, with which he is charged, embodies a number of concepts which are unknown to Irish criminal law and violate the principle of legal certainty. It is claimed that the provisions of s. 4 provide for an alteration of the status of the applicant, if convicted, such as would be inconsistent with the constitutional guarantees of personal liberty and equality before the law. In particular it is submitted, that insofar as the applicant, if convicted, would be deemed to be a "rogue and a vagabond, within the true intent and meaning of the Act", he would be liable to suffer the disability as referred to in ss. 5, 8, 9, 10, 13 and 20 of the Act.

4. The applicant relies upon the verifying affidavit of Mr. Simon Fleming, Solicitor, who states that he has found it impossible to advise the applicant concerning the elements of the offence with which he is charged and the consequences of the conviction under the section because of the vagueness and imprecision with which the offence charge is framed.

5. The background to the alleged offence is set out by Garda Shona Nolan in a verifying affidavit to the Statement of Opposition. It is alleged that on 18th October, 2013, when the applicant was travelling on a train between Newbridge and Naas/Sallins, Co. Kildare, he removed his penis from his trousers and masturbated in front of a little girl. On 20th October, 2013, Garda Nolan took a statement of evidence from the child's mother, upon whose testimony it is proposed to rely at the trial.

6. The child's mother states that she was travelling from Cork with her daughter who was then three years and eleven months old, intending to visit her family in Celbridge. When the train stopped at Kildare she saw a man shuffling from the top of the carriage who passed her. He muttered some obscenities while passing. He then returned to her carriage and sat two seats behind her. Her daughter moved down the carriage to look at a map of Ireland. When her mother turned to check on her she saw the man's reflection in a window staring at her daughter and masturbating. She could clearly see his penis in his hand and her daughter was sitting down and looking at him. She got up immediately and went over to him. She saw him place his penis back into his trousers. She retrieved her daughter and they returned to their seat until the train arrived at the Naas/Sallins stop. She gathered her daughter and walked to the end of the carriage, passing the man as she went. She said that she was in fear at this stage. The train was approaching Hazelhatch where she intended to disembark. She banged loudly on the driver's door who opened it straightaway. She informed him what had happened and that he should call the Gardaí. She was met at the station by her brother in-law in whose care she left her daughter. She returned to the station and met with Gardaí and station staff. She identified the applicant as the culprit.

7. Garda Nolan states that she arrested the applicant for an offence contrary to s. 4 of the Criminal Justice (Public Order) Act, 1994, as a result of the complaint made to her, that he had exposed himself on the train and that he was intoxicated.

8. Section 4 of the Vagrancy Act, 1824 provides that:-

> "Every person committing any of the offences herein-before mentioned, after having been convicted as an idle and disorderly person; every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of his Majesty's subjects; every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or wagon, not having any visible means of subsistence and not giving a good account of himself or herself; every person wilfully exposing to view, in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition; ***every person wilfully openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female;*** every person wandering abroad, and endeavouring by the exposure of wounds or deformities to obtain or gather alms; every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence; every person running away and leaving his wife or his or her child or

> children, chargeable, or whereby she or they or any of them shall become chargeable to any parish, township, or place; … every person having in his or her custody or possession any picklock, key, crow, jack, bit, or other implement with intent feloniously to brake into any dwelling house, warehouse, coach-house, stable or outbuilding, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument, with intent to commit any felonious act, every person being found in or upon any dwelling house, warehouse, coach-house, stable, or outhouse, or in any enclosed yard, garden, or area, for any unlawful purpose; every suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, or any highway or any place adjacent, with intent to commit felony; and every person apprehended as an idle and disorderly person, and violently resisting any constable, or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended; ***shall be deemed a rogue and vagabond, within the true intent and meaning of this Act; and, it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses,) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months;*** and every such picklock key, crow, jack, bit, and other implement, and every such gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, and every such instrument as aforesaid, shall, by the conviction of the offender, become forfeited to the King's Majesty."

9. The part of the section quoted above which is highlighted in bold type is challenged in these proceedings.

10. It is submitted that the provision contravenes the principle *nullem crimen sine lege, nulla poena sine lege,* which requires that a criminal offence be as precisely defined as possible, so that it can be demonstrated with reasonable certainty before prosecution, what acts are deemed to be criminal. The *actus reus* and *mens rea* of the offence are said to be unclear. It is claimed that the impugned words in s. 4 lack precision, certainty and clarity and offend the principle of legality. It is submitted, on behalf of the applicant, that s. 4 criminalises acts done in public but also in private, if done within sight of the public road. It potentially criminalises acts done in private but in sight of a public place. The offence may only be committed with the intention of "insulting" a female whether the female is actually so insulted or not. The concept of whether an act is carried out "lewdly" and "obscenely" is said to be highly subjective and relative. It is submitted that there is no objective definition which may be applied to what is lewd or obscene by a criminal court because the concept is capable of such wide interpretation in a society that is now so diverse.

11. It is clear that the alleged actions of the applicant in this case may be prosecuted in other ways. For example, the applicant was arrested under s. 4 of the Criminal Justice (Public Order) Act 1994, due to his state of intoxication. He could have been prosecuted for an offence under that section. Furthermore, the applicant might have been prosecuted for an offence of sexual assault. In *R. v. Rolfe* [1952] 36 Crim. App. Rep. 4, the Court of Criminal Appeal in England and Wales held that a man was properly convicted of sexual assault, having entered a train compartment and exposed his penis to a female while making a sexual suggestion to her. The female had been put in fear of unlawful force. A conviction for indecent assault was upheld because there had been an assault which involved the threat of unlawful violence, even though there had been no actual battery, i.e. the application of unlawful force (See *Doolan v. Director of Public Prosecutions* [1993] ILRM 387 at 391 per O'Hanlon J.). It may be, that having regard to the words spoken and the overall threatening behaviour of the applicant at the time, his conduct might also encompass an allegation of sexual assault, although no battery is alleged. Instead, a charge was brought pursuant to s. 4.

Locus standi

12. The applicant claims that he has *locus standi* to challenge the constitutionality of s. 4 because he is the subject of a pending prosecution and open to conviction and sentence under its provisions. Reliance is placed upon *Norris v Attorney General* [1984] I.R. 36 and, in particular, the following extract from the judgment of O'Higgins C.J., at p. 59:-

> "However, I do not agree with the defendant's submission that the plaintiff lacks standing to complain merely because he has not been prosecuted nor has he had his way of life disturbed as a result of the legislation which he challenges. In my view, as long as the legislation stands and continues to proclaim as criminal the conduct which the plaintiff asserts he has a right to engage in, such right, if it exists, is threatened and the plaintiff has standing to seek the protection of the Court."

13. Consequently, it was accepted by the court that the plaintiff had *locus standi* to challenge the criminal provisions against homosexual activity even though he had never been prosecuted. However, the Supreme Court was also satisfied that the plaintiff could not rely on the effect of the provisions on the right to marital privacy because the plaintiff's evidence was that marriage was not an option open to him. O'Higgins C.J. stated in this regard at p. 58:-

> "This being so, it is *nihil ad rem* for the plaintiff to suggest, as a reason for alleviating his own predicament, a possible impact of the impugned legislation on a situation which is not his, and to point to a possible injury or prejudice which he has neither suffered nor is in imminent danger of suffering within the principles laid down by this Court in *Cahill v. Sutton* [1980] I.R. 269".

14. In the normal course, a plaintiff seeking to challenge laws inconsistent with the Constitution must establish that the impact of the impugned law on his/her personal situation discloses an injury or prejudice which he/she has either suffered or is in imminent danger of suffering. In *Cahill v. Sutton*, the plaintiff failed to establish *locus standi* because the challenge to s. 11(2)(b) of the Statue of Limitations, 1957, was based on the proposition that it did not contain a saver for those whose claims might become statute-barred, despite their non-culpable ignorance of crucial facts. However, the plaintiff's difficulty was that she was not ignorant of crucial facts and could not have benefited from any such saver and therefore, could not maintain that the alleged unconstitutionality had caused her personally any actual or threatened prejudice.

15. In *King v. Director of Public Prosecutions* [1981] I.R. 233, the Supreme Court ruled that the plaintiff only had *locus standi* to challenge those parts of s. 4 of the Vagrancy Act, 1824 (as amended) under which he had been charged and convicted (per O'Higgins C.J. at p. 250; Henchy J. at p. 256; Griffin, Kenny and Parke JJ. concurring).

16. The respondent argues that the basis upon which the charge is laid is clear when one considers the facts as stated by the child's mother and the particulars of the charge. Arguments outside these facts which rely upon the interpretation of s. 4 are said not to be open to the applicant, particularly when the claimed interpretation is based on a hypothesis which may affect another person's rights, but has no relevance to the actual facts on which the charge in this case is based. The respondent, therefore, submits that the applicant has no *locus standi* to argue that s. 4, to the extent that it provides for an offence of "wilfully, openly, and lewdly" exposing his person "with intent to insult a female" could be applied to behaviour that is borderline in nature, or conduct of a trivial nature, and the criminalisation of which would violate another person's constitutional rights. It is also submitted that, quite apart from any alleged

vagueness or lack of specificity in the words impugned, the facts related to the plaintiff's case are clearly within the plain meaning of the offence defined by the section. It is submitted that the applicant has been charged with specific misbehaviour in that he allegedly exposed his penis and was masturbating in public in front of a little girl and her mother, and that this misbehaviour is clearly the focus of the charge laid against him which encapsulates it precisely.

17. In *Douglas v. Director of Public Prosecution* [2013] IEHC 343 (Unreported, High Court, Hogan J., 26th July, 2013), a challenge was made to the provisions of s. 18 of the Criminal Law (Amendment) Act 1935 (as amended) which provided that any person who committed "at or near and inside any place along which the public habitually pass…any act in such a way as to offend modesty or cause scandal or injure the morals of the community shall be guilty of an offence". The particulars of the offence alleged that the accused had "massage(d) his genital area in such a way as to cause scandal and injure the morals of the community". The question was whether the concepts of causing scandal or injuring the morals of the community were sufficiently clear and precise and passed the test of certainty required in the formulation of criminal offences under the Constitution. Hogan J. held that the mere fact that the plaintiff had been charged with two offences under s. 18 was sufficient, in itself, to confer a general standing to challenge the constitutionality of the relevant parts of the section. However, the learned judge also rejected the proposition that the plaintiff did not have standing because irrespective of any vagueness or uncertainty attaching to the section, the plaintiff's conduct necessarily fitted any definition of the offence relating to causing scandal or injury to the morals of the community. He considered that the plaintiff's constitutional entitlements, including the right to a level of certainty in the criminal law were "actually or potentially" affected by the operation of s. 18 because he had been charged with these offences. A similar approach was adopted by Hogan J. in *McInerney and Curtis v. Director of Public Prosecutions* [2014] IEHC 181 (Unreported, High Court, Hogan J., 9th April, 2014).

18. The case made by the applicant is that the precise definition of the terms "wilfully, openly and lewdly and with intent to insult a female" and the word "person" are so vague as to fail the standard to be expected under existing constitutional principles for the precise definition of a criminal offence. I do not regard the applicant as falling into the same category as the plaintiff in *Cahill v. Sutton* [1980] I.R. 269. That case was clearly based on the potential prejudice that might be caused to a hypothetical third party under the challenged section: nor do I consider that the decision in *Maloney v. Ireland & Ors* [2009] IEHC 291 (Unreported, High Court, Laffoy J., 25th June, 2009), in which similar considerations arose, determines the matter. I am satisfied that the applicant, in this case, is entitled to challenge the section on the basis that he is charged with an offence under s. 4, the terms of which, he claims, are so vague and ambiguous as to lack the precision necessary for the proper formulation of a criminal offence in accordance with the provisions of the Constitution. In that sense, I am satisfied that he has met, what Laffoy J. characterised in *Maloney,* as "the threshold qualification of being in a position to argue, personally or vicariously, a live issue of prejudice…." (at p. 15) and that he has the requisite *locus standi*.

No presumption of constitutionality
19. The challenged provision is not entitled to a presumption of constitutionality as a pre-1937 statute. However, the onus remains on the applicant to demonstrate that it is inconsistent with the provisions of the Constitution and was not, therefore, to be regarded as of full force and effect under Article 50.1 (*Educational Company of Ireland Limited v. Fitzpatrick (No. 2)* [1961] I.R. 345, per Budd J. at p. 368; *The State (Sheerin) v. Kennedy* [1966] I.R. 379; and *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26).

The challenge
20. It is submitted by the applicant, that the offence charged, lacks the essential attributes of legality, which require that an offence be precisely defined so that it may be known with reasonable certainty what acts are criminal.

21. In *King v. Director of Public Prosecutions* [1981] I.R. 233, the plaintiff was convicted in the District Court of three offences under the Vagrancy Act, as amended. Two of those offences were in respect of "loitering with intent". He was charged that on two separate occasions, "being a suspected person", he was found loitering in a public place with intent to steal. The Supreme Court held that the provisions of that part of s. 4, which imposed criminal liability upon "every suspected person or reputed thief" who frequents named places were inconsistent with the provisions of the Constitution and had not continued in force following the enactment of the 1937 Constitution, under Article 50.1. The constitutional inconsistency arose from the fact that the quoted words were incompatible with the rights of the accused under Article 38.1, which provides that no person shall be tried on a criminal charge save in due course of law, Article 40.4.1 that no person shall be deprived of his liberty save in accordance with law, the principle of equality before the law declared in Article 40.1 and the guarantee to defend and vindicate the personal rights of the citizen under Article 40.3. The convictions were therefore declared invalid.

22. McWilliam J., in delivering judgment at first instance addressed the proofs that might be advanced to support the proposition that the accused might be a suspected person, or reputed thief, and loitering in a public place with an intention to commit a felony i.e. to steal, as follows (at p. 240):-

> "But no proof of any act showing an intent to commit a felony was necessary as the statute provides that such intent may be established from the bad character of the plaintiff in the circumstances of the case. I may observe that the expression 'loitering' is somewhat indefinite and that, without the other ingredients, it could not possibly constitute an offence in any way; so that doing something which is a perfectly lawful act on the part of any other citizen may be the foundation of an offence on the part of a suspected person or reputed thief. As no proof of any act showing intent to commit a felony is necessary, a person could be convicted for doing an otherwise lawful act mainly because he was a suspected person or reputed thief."

The learned judge concluded (at pp. 242-3) that:-

> "There are two ways in which that part of s. 4 of the Act of 1824, as amended, offends against the provisions of the Constitution. First, the provisions that evidence may be given of the known character of the accused and that no evidence need be given of any act showing, or tending to show, intent are contrary to the concept of justice which is implicit in the Constitution. Secondly, that part of the section offends against the provision that all citizens shall be held equal before the law, since a suspected person or a previously convicted person can be prevented from doing what it is perfectly lawful for any other citizen to do i.e. walk slowly, dawdle or stop altogether in a public street".

23. These conclusions were upheld on appeal though the wide ranging declaration in respect of s. 4 granted by the High Court was limited by the Supreme Court to that part of the section which was impugned. Henchy J. stated (at p 257) :-

> "In my opinion, the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become lawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so

> indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance."

24. Though this well known extract is often quoted, it essentially embodies the conclusions reached by McWilliam J. at first instance. Henchy J. found that the offence, both in its essential ingredients and mode of proof, violated the requirements of Article 38.1, Article 40.4.1, Article 40.1 and Article 40.3.

25. The lack of precision evident in the formulation of the offence, under s. 4, was addressed by Kenny J. (at p. 263):-

> "It is a fundamental feature of our system of government by law (and not by decree or diktat) that citizens may be convicted only of offences which have been specified with precision by the judges who made the common law, or of offences which, created by statute, are expressed without ambiguity. But what does 'suspected person' mean? Suspected of what? What does 'reputed thief' mean? Reputed by whom? It does not mean a person who has been convicted of theft, for then 'convicted thief' would have been the appropriate words. So one is driven back to the conclusion that it is impossible to ascertain the meaning of the expressions. In my opinion, both governing phrases 'suspected person' and 'reputed thief' are so uncertain that they cannot form the foundation for a criminal offence."

It is submitted that the language of the charge laid under s. 4 in this case suffers from a similar lack of precision.

The offence

26. The offence charged is separate from the other offences contained in section 4. Therefore, the comprehensive critique of the offence considered in *King v. Attorney General & DPP* [1981] 1 I.R. 233, which is of assistance in respect of the general principles to be applied, does not, of itself, determine this case. The meaning of the impugned words must be considered and the court may not simply assume that the offence charged is subject to the same constitutional defects. For example, there is a clear mental element or *mens rea* contained in the definition of the offence. The prosecution must establish that the acts of the accused were "wilfully" done. To do something "wilfully" involves an intention or recklessness (see *R v. Sheppard* [1981] A.C. 394; *Newington* [1990] 91 Cr. App. R. 247; *O'Reilly v. East Coast Cinemas* [1968] 1 I.R. 56 and *the Incorporated Law Society of Ireland v. Carroll* [1995] 3 I.R. 145 per Murphy J. at pages 160 to 161). Certain elements of the *King* decision are of no relevance. There is no suggestion in this case that the conduct described above, if committed by another person in similar circumstances, would be free of the taint of criminality. The criminalisation of the applicant's behaviour does not impinge upon his rights to freely move about the streets or avail of public transport. It poses no threat to his right to free movement under article 40.3. The fact that the applicant's behaviour is subject to the criminal law while travelling, could not be said, in any respect, to engage the protection of article 40.1. It does not, in any sense, infringe his entitlement to avail of lawful access to a public area, such as a railway carriage. Indeed, the conduct which is the subject matter of this charge, was considered to be "self evidently and… notoriously criminal in nature" in a slightly different context by Kearns P. in *The Director of Public Prosecutions v Fitzsimons* [2015] IEHC 403 (Unreported, High Court, Kearns P., 26th July, 2015). The court must, therefore, focus on the reality of this case and the plain and ordinary meaning of the impugned words when viewed in their proper context.

27. The *actus reus* of the offence, or the conduct that is criminalised and must be established by the prosecution is clear. It must be proven that the accused exposed his "person" and did so "in any street, and/or public highway or in view thereof or in any place of public resort". It is not disputed that a railway carriage is a "place of public resort". However, it is submitted that the word "person" in s. 4 is unclear.

28. In *Evans v. Ewels* [1972] 1 W.L.R. 671, the defendant walked past the female complainant in the street with his trousers unfastened at the front, exposing a "v" shaped patch of skin low down on his abdomen. This was done deliberately and in a manner intended to insult the complainant. He was convicted of an offence under s. 4 and appealed against the conviction on the basis that "person" in s. 4 meant "penis" and no other part of the body. The court at Quarter Sessions dismissed his appeal, but on a case stated, it was held, allowing the appeal, that the submission was correct. Ashworth J. (Melford Stevenson and Forbes JJ. concurring) held that it was established on existing case law that "person" bore that restricted meaning (*Reg. v. Orchard and Thurtle* [1848] 3 Cox C.C. 248; and *Reg. v. Holmes* [1853] 22 L.J.M.C. 122). Reliance was also placed on a passage in *Smith and Hogan on Criminal Law (2nd Ed.) (1969)* (at p. 319), in respect of s. 4, in which the authors stated:-

> "Unlike the common law offence this crime is limited to exposure by a male to a female and requires a specific intent to insult. It has been suggested, though there is no authority on the point, that there is another limitation on this offence which is not applicable to the common law offence – that is, that 'person' means 'genital organ' and 'however deliberate be the intent to insult the female, and however great the insult she feels, the exposure of the backside is not within the section'."

The internal quotation in the above extract came from a work edited by *Professor Radzinowicz, Sexual Offences*. Quite apart from the authorities cited, the court was satisfied:-

> "that the mischief to which the section was directed was the mischief of the kind, exposing his penis with intent to insult a female, and did not include the variety of occasions when other parts of his body may be exposed, even though on those occasions there was indeed an intent to insult a female".

29. Ashworth J. also considered that in modern usage, and certainly by 1824, the word "person", in connection with sexual matters, had acquired a meaning of its own which made it a synonym for "penis", though he acknowledged that its use in that sense may have been "the forerunner of Victorian gentility which prevented people calling a penis a penis".

30. As noted by Professor O'Malley in *Sexual Offences* (2nd Edition, 2013) (paragraphs 10-20 to 10-22) similar offences created by other statutes, such as the Town Police Clauses Act, 1847 (s. 28) and the Summary Jurisdiction (Ireland) Amendment Act, 1871 (s. 5) refer to the exposure of the "person". The decision in *Evans v. Ewels* [1972] 1 W.L.R. 671 is persuasive, particularly having regard to the repeated use of the word "person" in these subsequent statutory provisions and I am satisfied that the same meaning applies in this jurisdiction to the word "person". In any event, the applicant's case is not that he is charged with exposing some other part of his body, but that he exposed his "penis" in the manner alleged. I am satisfied that the use of the word "person", in the framing of

the offence, carries sufficient clarity and precision to convey that the exposure by the applicant of his penis in a place of public resort, in the circumstances, and with the intention set out in the section rendered him liable to criminal sanction.

31. The other ingredients of the offence require the prosecution to prove that the exposure by the applicant of his penis was done "openly, lewdly and obscenely". If the evidence of the child's mother is accepted, the act was done "openly", a word that is not in any way unclear in its meaning. It must also be done "lewdly and obscenely" in the sense of the ordinary and natural meaning of those words.

32. The *Shorter Oxford English Dictionary* (2002) (2nd Ed.) defines "lewd" as "indecent, obscene, lascivious, unchaste, low, vulgar": "obscene" is defined as "highly offensive, morally repugnant, repulsive, foul, loathsome". The description of the conduct described by the child's mother in this case clearly satisfies the ordinary meaning of the words lewd and obscene. However, it is submitted that the words may attract an overly broad interpretation and incorporate conduct which, though offending against modesty, may not be regarded by reasonable people as "lewd" or "obscene".

33. The actions of the accused criminalised under s.4 are clear and specific, as are the elements of wilfulness and openness with which they are carried out. These elements must be considered in conjunction with whether they were carried out "lewdly or obscenely" and with the further intention "to insult any female". The *Shorter Oxford English Dictionary* (2002) (2nd Ed.) defines "insult" when used as a transitive verb as meaning to "treat with scornful abuse: subject to indignity: (of a person or thing) offend the modesty or self respect of…". It is the wilful exposure of the penis openly with intent to offend the modesty, or self respect, of any female in a place to which the public have access, that provides the specific context in which the words "lewdly and obscenely" must be considered. The prosecution does not have to establish that any particular female was so insulted. It is for the trial judge to determine, in the particular circumstances, whether the prosecution has established the charge on the basis of the evidence adduced (including all circumstantial evidence) beyond reasonable doubt.

34. There is a degree of overlap in the meaning to be ascribed to "lewdly and obscenely". Furthermore, the two adverbs qualify conduct of a very limited and specific kind. To that extent, this case is entirely distinguishable from the decisions of Hogan J. in *Douglas v Director Public Prosecutions* [2013] IEHC 343 (Unreported, High Court, Hogan J., 26th July, 2013) and *McInerney v Director of Public Prosecutions* [2014] IEHC 181 (Unreported, High Court, Hogan J., 9th April, 2014).

35. In *Douglas*, the applicant was charged under s.18 of the Criminal Law (Amendment) Act, 1935 (as amended), with committing an act in a public place such as to cause scandal or injure the morals of the community. Douglas had allegedly been observed stroking and massaging his penis through his clothes in a café in a Dublin shopping centre. He did not expose his penis. Though the acts were conducted in public view, there was no evidence that a number of adult females and teenage girls seated nearby had observed this behaviour. The only question for determination was whether the offences of causing scandal or injuring the morals of the community provided a sufficiently precise definition that complied with the requirements of legal certainty in the framing of criminal offences under articles 5, 15.5.1 and 38.1 of the Constitution. Hogan J. held, applying the principles set out in *King* that "by a wide margin" the section failed to comply with the Constitution because the *actus reus* of the two offences of acting in a public place in such a way as to cause scandal or injure community morals was unclear and had no specific legal meaning. The section was susceptible to a variety of different, inconsistent and arbitrary applications by the courts. However, Hogan J. recognised the clear distinction between the offence as framed under s.18 and the provisions of s.4 as follows:-

> "43. In this context there is no true analogy between the scope of s.18 of the 1935 Act and other sexual offences relied on by the State. These latter offences are in a distinctly different category. It is true that these offences are often expressed in general terms, but one will largely find that they either have a definite meaning (or, at least, have acquired it over time) in relation to specifically prohibited conduct or else that the relevant statute is expressed by reference either to defined conduct or its effects on reasonable people or that the judgment as to appropriate community standards of behaviour is left to a jury.
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> 44. An example of the former category of statutory provision is provided by s.4 of the Vagrancy Act, 1824 which provides that it is an offence for any male "openly and lewdly" to expose his person to a female with the intent of insulting her. In *Evans v Ewels* [1972] 2 All E.R. 22 the accused exposed part of "bare skin low down on his stomach" close to his pubic hair and was convicted of the offence by magistrates. The English High Court quashed the conviction, rejecting the argument that the offence referred to any part of the male body other than the penis…
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> 45. The same can be said with regard to the offence of sexual assault (as the former offence indecent assault was so named by s.2 (1) of the Criminal Law (Rape) (Amendment) Act 1990, if even there has been no statutory definition of the offence and even it actual offence still remains a common law offence. Here the parameters of the offence are not only tightly hemmed in by decades of established case-law, but the *actus reus* has clearly defined elements. There has, after all, to be an assault with a sexual element on another party by the accused."

In addition, Hogan J. laid emphasis on the existence of a victim, or potential victim, in the framing of a criminal offence with particular regard to the provisions of the European Convention on Human Rights and the decision in *Hashman and Harrup v. The United Kingdom* [1999] ECHR 133; (2000) 30 EHRR 241. It is clear that the s.4 offence is framed precisely with a view to considering the effect of the applicant's behaviour on others i.e. "any female" .

36. In *McInerney*, the applicants were accused of offences under the third limb of s.18 involving masturbation in a car in public view in a public place in such a way as to offend modesty. Hogan J. concluded that the *actus reus* of the offence was "hopelessly unclear". He observed that "the offence is couched at a purely abstract level and there is, in particular, no requirement that the accused must have engaged in conduct which is calculated to give offence to those who happened to witness it." I am not satisfied that the applicant has demonstrated a similar lack of clarity in this case.

Rogue and vagabond

37. The court is satisfied that there is no basis for the claim that any adverse consequences will be suffered by the applicant if he is convicted of the offence under s.4 by reason of being considered a "rogue and vagabond". The section provides that on conviction he shall be "deemed to be a rogue and vagabond, within the true intent and meaning of this act". The consequences of such a finding are set out in ss. 5, 8, 9, 10, 13 and 20 of the 1824 Act. Section 15 of the Prevention of Crimes Act, 1871 applied s.4 to Ireland and Scotland, but not the other provisions of the Act. I am not satisfied that the element of s.4, that deems a person convicted of the offence to be a "rogue and vagabond", may be regarded as an additional form of penalty so vague and indeterminate as to be inconsistent with the provisions of the Constitution. The words were shorn of any legal purpose, meaning or consequence in Ireland by the failure to extend the balance of the provisions of the 1824 Act to this country. The words only derive significance "within the true extent and meaning" of the Act from the inoperative sections. Therefore, if convicted, there is no legal purpose to be served by

deeming the applicant to be a "rogue and vagabond", and I am satisfied that it was not intended that such a finding would be made in this jurisdiction. The words are not contrary to the provisions of articles 5, 15 and/or 38.1 of the Constitution, or an affront in some way to his right to equality under article 40.1, his dignity or any other personal rights under article 40.3; the words have been rendered legally inert.

Conclusion

39. I am satisfied that the impugned words in s.4 create an offence which has a definite and precise meaning. It simply provides that a male should not wilfully and openly expose his penis in a public place with intent to insult a female. It is calculated to protect females and young girls from the insult which often derives from the threatening element, sexual harassment and intimidation involved in this act and clearly constitutes anti-social behaviour. The words "lewdly and obscenely" aptly and clearly qualify the circumstances which attract criminal liability. They must be construed in the context of the narrow definition of the behaviour which is addressed in the section. I am not satisfied that the offence charged is one about which the applicant cannot be adequately and professionally advised. The applicant has not established that this offence is contrary to the provisions of the Constitution. The application is dismissed.