Neutral Citation Number: [2013] IEHC 343

THE HIGH COURT

[2010 No. 4603 P]

BETWEEN

DAVID DOUGLAS

PLAINTIFF

AND

DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND

AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on 26th July, 2013

1. Is a statutory offence of causing scandal or injuring the morals of the community sufficiently precise and certain as to meet the test for legal certainty in criminal matters articulated by the Supreme Court in *King v. Attorney General* [1981] I.R. 233? This, is essence, is the issue which is raised in these proceedings in which the plaintiff challenges the constitutionality of s. 18 of the Criminal Law (Amendment) Act 1935 ("the 1935 Act"), as amended by s. 18 of the Criminal Law (Rape)(Amendment) Act 1990 ("the 1990 Act"). Section 18 of the 1935 Act provides:-

> "Every person who shall commit, at or near and inside of any place along which the public habitually pass as of right or by permission 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 under this section and shall on summary conviction thereof be liable to a fine not exceeding [IR£500] or, at the discretion of the court to imprisonment for any term not exceeding [six months]."

There words in square brackets were inserted by s. 18 of the 1990 Act. It is also important to note at the outset that s. 18 provides for summary disposal only and that there is no entitlement at all to jury trial.

2. The plaintiff has been charged with the latter two offences created by s. 18 of the 1935 Act, *i.e.,* causing scandal and injuring the morals of the community. The case against him is that on two separate days in January 2009 he was observed by security staff stroking and massaging his penis through his clothes in a café attached to a shopping centre in Dublin city centre. It is important to stress that it has never been alleged that the plaintiff had ever exposed his penis. The prosecution contend, however, that the conduct was done in a public place and that on both occasions he was seated just a few metres from adult females and teenage girls, although there is no suggestion that they witnessed or were even aware of this conduct. It is also contended that the plaintiff either desisted from these activities or disguised them when others approached. Nor has it been suggested that the plaintiff massaged his penis through his clothes to the point of sexual climax.

3. The specific charge is that on the days and place in question:

> "at or near and in sight of a place along which the public habitually pass as of right or by permission, did commit an act, to wit, massage your genital area in such a way as to cause scandal and injure the morals of the community."

4. There is no question but that the shopping centre café is a "place along which the public habitually pass as of right or by permission" within the meaning of the section. The only question, therefore, for the present purposes is whether the offences of causing scandal or injuring the morals of the community contain sufficiently clear criteria for the purposes of this constitutional challenge. It is also important to recall that the plaintiff has not been charged with any offence against modesty within the meaning of the section, a fact which, as we shall presently see, delimits slightly the scope of the constitutional challenge.

Does S. 18 of the 1935 Act enjoy the presumption of constitutionality?

5. The first question is a highly technical one: should s. 18 of the 1935 Act be treated as if it were a post-1937 statute and thus enjoy a presumption of constitutionality? Counsel for the State, Ms Donnelly S.C., argued that the effect of the changes in the penalty provisions contained in the 1990 Act was that s. 18 of the 1935 Act should be deemed now to have been re-enacted by a post-Constitution statute. She argued that in those circumstances the section should be treated for all purposes as if it were post-Constitution statute so that, in particular, it enjoys the presumption of constitutionality.

6. Given that it is common case that the onus of proof to demonstrate constitutional incompatibility rests with the plaintiff irrespective of whether the statute is treated as being a pre- or post-Constitution enactment, I am not convinced that this issue is really of fundamental importance, at least so far as the issues in this case are concerned. At most, some marginally higher burden may attach itself to a post-1937 statute (or, at least, a statute deemed to have been effectively re-enacted after date), since such legislation would be enacted by the very Oireachtas which was familiar with the terms of the Constitution itself. In this respect, the present case is very different from *ZS v. Director of Public Prosecutions* [2011] IESC 49. This, however, was a case with exceptional facts and circumstances and where, as we shall shortly see, the existence of the presumption of constitutionality was dispositive in those very special circumstances.

7. It is clear from the decision of the Supreme Court in *Gormley v. Electricity Supply Board* [1985] I.R. 129 that the mere fact that a pre-1937 statute is incidentally amended by a post-1937 statute will not in itself "give to that pre-Constitution statute a presumption of validity": see [1985] I.R. 129, 147, *per* Finlay C.J. If, on the other hand, the nature of the amendment provided for by the post-1937 amendment statute is such that it extends and expands the scope of the original pre-1937 statute, then as the judgment of Finlay C.J. in *Gormley* makes clear, the legislation must be deemed to have been effectively re-enacted as post-1937 statute.

8. This issue was considered in some detail by the Supreme Court in *ZS v. Director of Public Prosecutions* [2011] IESC 49. As it happens, this case concerned the constitutionality of another provision of the 1935 Act, namely, s. 2. As originally enacted the 1935 created what was in essence the absolute offence of unlawful carnal knowledge of young females between 15 and 17. That offence was itself amended by s. 13 of the Criminal Law Act 1997 which deleted the requirement that the girl be over 15 years of age. As thus amended, s. 2 then created the offence of unlawful carnal knowledge with any female under 17.

9. In *CC v. Ireland (No.1)* [2006] 4 I.R. 1 the Supreme Court held that the parallel section, s. 1, which created the absolute offence of unlawful carnal knowledge with a female under 15 was unconstitutional by reason of the fact that it excluded the defence of *mens rea.* In *ZS* the argument was whether the amendments effected by the 1997 Act had significantly changed the scope of the parallel offence so, that, in particular, it should be presumed that the Oireachtas had not intended to negative the defence of *mens rea*.

10. A majority of the Supreme Court (with Denham C.J. and Murray J. dissenting) held that in these circumstances the amendments effected by the 1997 Act had not substantially re-enacted s. 2(1) of the 1935 Act. It followed, therefore, that the sub-section could not be treated as if it were a post-Constitution statute and in those circumstances the issue was whether this pre-Constitution statute was carried over by Article 50.1 of the Constitution.

11. As Fennelly J. explained:

> "Because of the unique circumstance that, so far as the availability of a defence of honest mistake is concerned, it is indistinguishable from s. 1(1) on which the Court has already pronounced [in *CC (No.1)*], s. 2(1) was not continued in effect by Article 50.1 of the Constitution. Expressed otherwise, being inconsistent with the Constitution, it ceased to have any effect in law from the time of coming into operation of the Constitution. Hence, it had no force in law at the date of the passing of the Criminal Law Act, 1997 and its purported amendment by that Act had no legal effect. Put simply, there was no provision in force capable of being amended by item number 7 of the First Schedule of the Act. The Oireachtas did not in 1997 purport to re-enact s. 2(1). It mistakenly assumed that it was still in force. The amendment of 1997 took the form of the deletion of the words "of or over the age of fifteen years and" from s. 2(1) of the Act of 1935. The Oireachtas did not purport to re-enact section 2(1) as it had done, in the case of s. 29 of the Courts of Justice Act, 1924, by s. 48 of the Courts (Supplemental Provisions) Act, 1961, considered in *People (Attorney General) v. Conmey*.
>
> This is, of course, a highly unusual, even unique, situation. It is the consequence of the existence at this point in time of a judgment of this Court declaring inconsistent with the Constitution a materially identical provision. The decision in *C.C. v Ireland* is crucial. The situation is quite different from the legislative provision at issue in *ESB v Gormley*, cited above. In that case, there were two provisions in force, which were amended in a way which the Court found to amount to effective re-enactment.
>
> Section 2(1) of the Act of 1935 was, for the same reason as was held in relation to s. 1(1) in C.C., inconsistent with the Constitution. It did not survive the entry into force of the Constitution. It was not in force in 1997 and could not be amended by the Criminal Law Act of that year."

12. As Fennelly J. explained, *ZS* must be regarded as an exceptional – perhaps even unique - case. The Court appears to have regarded it as a case where by reason of the invalidation of the "materially identical" provision contained in s. 1 of the 1935 Act in *CC,* s. 2 had simply ceased to exist on the enactment of the Constitution and so that there was nothing left to amend at the time of the 1997 Act. Yet even though s. 18 is contained in the very same enactment as both ss. 1 and 2, it cannot be said that a materially identical provision has already been found to be unconstitutional. In these circumstances, the approach in *ZS* would seem to have no application to the present case.

13. The question accordingly remains whether the amendments effected by the 1990 Act can be regarded as so material that the original section was effectively re-enacted. Here the test has been most helpfully enunciated by Finlay C.J. in *Gormley*:

> "It is equally clear that the mere fact of an amendment of a pre-Constitution statute contained in a statute passed after the coming into force of the Constitution does not of itself give to that pre-Constitution statute a presumption of validity. With regard to s. 53 of the Act of 1927, however, and the amendment made in it by s. 46 of the Act of 1945, the view of the Court is that the nature and terms of that amendment, which extends and expands the nature of the works to which s. 53 originally applied, and the terms of the amendment, which not only made that extension but deemed the meaning of "electric line" in s. 53 of the Act of 1927 to have always had this extended or expanded meaning, effectively re-enacted s. 53 as part of a post-Constitution statute. Similar considerations apply to the amendment of s. 98 of the Act of 1927 contained in s. 5 of the Act of 1941 which, though less extensive than that contained in s. 46 of the 1945 Act, expressly extends the powers of the Board contained in s. 98 to a new event or category of case, namely, its requirement to make a survey only, as distinct from the placing of a line."

14. Applying this test to the present case it can be seen that the offence remains entirely unaltered, save for the question of penalty. Unlike the situation in *Gormley*, it cannot be said that the offence applies to new events or categories of cases. At least in a case where the plaintiff is challenging the nature of the offence – as distinct, perhaps, from the nature of the penalty – the strengthening of the penalty provisions would not seem to have the effect of re-enacting a pre-Constitution statute such as s. 18 of the 1935 Act so as to the treat it for present purposes as if it were a statute enacted after the enactment of the Constitution.

15. In these circumstances, the statute must be treated as a pre-1937 statute which does not enjoy any formal presumption of constitutionality. The plaintiff must nonetheless establish and prove that the section is inconsistent with the Constitution and was thus not carried over by Article 50.1 of the Constitution. As I have already hinted, one must however doubt whether the onus of proof which rests on the plaintiff in such cases is materially different even if the case falls to be treated for constitutional consistency under Article 50.1 (in the case of a pre-1937 statute) as distinct from Article 15.4 and Article 34.3.2 (in the case of a post-1937 statute).

Does the plaintiff have standing to challenge the constitutionality of the section?

16. It is clear that the mere fact that the plaintiff has been charged with two offences under s. 18 of the 1935 Act is sufficient in itself to give him general standing to challenge the constitutionality of the relevant parts of the section: see, e.g., the Supreme Court's decisions in *CC v. Ireland (No.1)* [2005] IESC 48, [2006] 4 I.R. 1 and *Osmanovic v. Director of Public Prosecutions* [2006] IESC 50, [2006] 3 I.R 504.

17. It is equally clear that the plaintiff does not have standing to challenge the constitutionality of the offending modesty offence in respect of which he has not been charged. This conclusion can be justified on the basis that he is not imminently prejudiced by the operation of that part of the section: see, *e.g., Cahill v. Sutton* [1980] I.R. 269, 282 per Henchy J. Or one can just as easily defend that restriction on the basis that the plaintiff would in essence be here advancing on a hypothetical basis the right of a putative third party who might be so charged with the offence of offending modesty: see again *Cahill v. Sutton* [1980] I.R. 269, 282-283, per Henchy J. It was on this basis that, for example, Laffoy J. held in *Maloney v. Ireland* [2009] IEHC 291 that the plaintiff in that case – who had been arrested under s. 30(1) of the Offences against the State Act 1939 on the basis that he was suspected of having committed a scheduled offence – had no standing to challenge the constitutionality of that sub-section inasmuch as it allows for the arrest of persons "merely suspected of being in possession of information relating to the commission or intended commission of an offence".

18. So much of this is not really in dispute between the parties. The defendant contends, however, the plaintiff does not have standing to challenge the constitutionality of the section because, irrespective of any vagueness or uncertainty which attaches to the section, the conduct of the plaintiff necessarily fits into any definition of the offence of causing scandal or injuring the morals of the community. For my part, however, I would reject that argument for two principal reasons.

19. First, there is no doubt but that any conduct of an overt sexual nature in public is liable to cause considerable offence and annoyance and, depending on the precise circumstances and the nature of the conduct in question, perhaps even shock and disgust to the average member of the public. But it does not necessarily follow that no matter how objectionable or even reprehensible such conduct would be regarded by the average member of the public that it would be necessarily regarded as the equivalent of causing scandal or as injuring the morals of the community. This is really a function of the inherent vagueness of the offences. After all, a scandal is generally a much publicized event involving moral turpitude which exercises members of the community generally, although in practice it often is regarded as effectively synonymous with objectionable conduct. Moreover, how could the question of whether the morals of the community have in fact been injured be objectively ascertained?

20. Second, the plaintiff is, in any event, entitled to know the nature of the *offence* (as distinct from *the nature of the conduct alleged*) with which he has been charged. This is perhaps just another way of saying that the plaintiff has a constitutional entitlement to legal certainty in the sphere of criminal offences. If, however, the offences are themselves so hopelessly vague that they cease to have any real meaning, then it matters not that the conduct alleged would be regarded by most as quite deplorable or that it should otherwise come within the scope of the criminal law.

21. Here it must be recalled that the standing rules are but rules of practice designed to conserve the exercise of the power of judicial review of legislation and guard against the improvident exercise of that power. If I might venture to repeat what I said on the related topic of mootness in *Salaja v. Minister for Justice* [2011] IEHC 51:

> "The mootness doctrine is a rule of judicial practice which is designed to ensure the proper and efficient administration of justice. It thus shares a close affinity with other judicially created rules of practice, such as the rules relating to *locus standi*, the rule of avoidance and the doctrine of justicability. These doctrines and rules of practice may all said to be constitutionally inspired - in particular, by the doctrine of separation of powers reflected in Articles 6, 15, 28 and 34 of the Constitution - even if they are not actually constitutionally mandated in express terms. As Article 34.1 of the Constitution provides that the administration of justice is committed to the courts, the courts must endeavour to fulfil that mandate by confining themselves to the resolution of actual legal controversies. If they were to do otherwise, then the courts would stray beyond that proper constitutional role of administering justice as between parties to a legal dispute, inasmuch as such decisions would amount to purely "advisory opinions on abstract propositions of law": see *Hall v. Beals* 396 U.S. 45 (1969)(*per curiam*). Outside of the special confines of Article 26 (which, in any event, provides for a binding decision - and not merely an advisory opinion - by the Supreme Court on the constitutionality of a Bill following a reference by the President), the provision by judges of such advisory opinions would not, at least generally speaking, serve the proper functioning of the administration of justice, since if unchecked or not kept within clearly defined limits, it would involve the judicial branch giving gratuitous advice on legal issues to the Oireachtas and the Government, a function which was never conferred on it by the Constitution. The mootness doctrine further serves the interests of the proper administration of justice by conserving scarce judicial resources."

22. But just as the standing rules are designed to guard against the improvident exercise of judicial power in the sphere of constitutional adjudication, the courts must equally set their face against any tendency towards over-refined *locus standi* rules. If it were otherwise, then there would be a real danger that pedantry, formalism and rigid characterisations would obscure the very purpose of these rules at the expense of the meritorious plaintiff.

23. Here it is perhaps sufficient to say that the plaintiff's constitutional entitlements – one of which is the right to legal certainty in the sphere of criminal law – is actually or potentially affected by the operation of the relevant parts of s. 18 simply by reason of the fact that he has been charged with these offences. This is in itself enough to confer upon him the standing to challenge the constitutionality of these statutory offences.

Legal certainty and the operation of the criminal law

24. At the heart of the plaintiff's challenge is that the offences created by s. 18 are so vague and uncertain in their remit and potential application that they are contrary to the fundamental principle of legal certainty in criminal matters which is at the heart of Article 38.1. This principle was articulated thus by Kenny J. in *King v. Attorney General* [1981] I.R. 233, 264:

> "Article 38.1 of the Constitution provides 'no person shall be tried on any criminal charge save in due course of law.' If the ingredients of the offence charge are vague and uncertain, the trial of the alleged offence based on those ingredients is not in due course of law."

25. Similar sentiments are to be found in the more recent judgment of Hardiman J. in *The People (Director of Public Prosecutions) v. Cagney* [2008] 2 I.R. 111, 121-122:

> "From a legal and constitutional point of view, it is a fundamental value that a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful."

26. It must be here acknowledged, however, that in a common law system such as ours, absolute precision is not possible. One may therefore have perfectly general laws which can be adapted to new sets of facts within certain defined parameters, provided that the laws themselves articulate clear and objective standards. By analogy with what was stated by the Supreme Court in *Cagney*, it must

also be clear that any judicial development in the sphere of criminal law must be largely incremental in nature, based on parameters which are obvious from earlier legal doctrine and jurisprudence. I would accordingly adopt in this context that which was stated by Lord Bingham in *R. v. Rimmington* [2005] UKHL 63, [2006] 1 A.C. 459 in the context of Article 7 ECHR. (Article 7 is the ECHR provision which corresponds to Article 15.5.1 of the Constitution, which later provision is itself discussed below)([2006] 1 A.C. 459, 483):

> "The starting point is the old rule *nullum crimen, nulla poena sine lege (Kokkinakis v Greece* (1993) 17 EHRR 397, para 52; *SW and CR v United Kingdom* (1995) 21 EHRR 363, para. 35/33): only the law can define a crime and prescribe a penalty. An offence must be clearly defined in law (*SW and CR v United Kingdom*), and a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, the consequences which a given course of conduct may entail (*Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49; *G v Federal Republic of Germany* (1989) 60 DR 256, 261, para 1; *SW and CR v United Kingdom,* para 34/32). It is accepted that absolute certainty is unattainable, and might entail excessive rigidity since the law must be able to keep pace with changing circumstances, some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts (*Sunday Times v United Kingdom*, para 49; *X Ltd and Y v United Kingdom* (1982) 28 DR 77, 81, para. 9; *SW and CR v United Kingdom*, para 36-34). But the law-making function of the courts must remain within reasonable limits (*X Ltd and Y v United Kingdom*, para. 9). Article 7 precludes the punishment of acts not previously punishable, and existing offences may not be extended to cover facts which did not previously constitute a criminal offence. The law may be clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence (*X Ltd and Y v United Kingdom*, para. 9; *G v Federal Republic of Germany*, pp 261-262). But any development must be consistent with the essence of the offence and be reasonably foreseeable (*SW and CR v United Kingdom*, para. 36-34), and the criminal law must not be extensively construed to the detriment of an accused, for instance by analogy (*Kokkinakis v Greece*, para 52)."

27. But in addition to Article 38.1 (and, of course, the corresponding protection of personal liberty in Article 40.4.1) there are, in truth, a number of other inter-locking constitutional provisions which also re-inforce this conclusion and which may be briefly mentioned at this juncture before returning to examine the constitutionality of the section.

The importance of Article 5 and Article 15.2.1

28. First, Article 5 describes the State as a democracy and Article 15.2.1 vests the Oireachtas with exclusive legislative powers. This means that the Oireachtas must take care when enacting legislation to identify and specify the relevant principles and policies which define and map out the contours of any offence: see, *e.g.,* the judgment of O'Higgins C.J. in *City View Press Ltd. v. AnCO* [1980] I.R. 381 and that of O'Donnell J. in *McGowan v. Labour Court* [2013] IESC 23. This requirement is a cornerstone of democratic control of the executive and judicial branches by the legislative branch pre-supposed by Article 5. A law which did not articulate such principles and policies would, more often than not, also be regarded as impermissibly vague for Article 38.1 purposes in addition to offending a basic requirement of Article 15.2.1.

29. There is, accordingly, a clear connection between the duty of the Oireachtas to articulate such principles and policies in legislation creating criminal offences in order to satisfy the requirements of Article 15.2.1 and the vagueness doctrine. A vague law "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application": *Grayned v. City of Rockford* 408 US 104, per Marshall J. But, of course, as the judgment of O'Donnell J. in *McGowan* itself powerfully illustrates, this is precisely what the Oireachtas may *not* do. It is rather the duty of the legislative branch to articulate clear standards in legislation which will lend themselves to the fair, consistent and even-handed application of the law. Rigorous adherence to this requirement is especially important in the context of the criminal law, not least given that the subjective, arbitrary and inconsistent application of that law represents the very antithesis of Article 40.1 and its commitment to fundamental equality of all before the law.

The relevance of Article 15.5.1

30. Article 15.5.1 provides that:

> "The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission."

31. The relevance of this provision in the context of vague and uncertain criminal laws is really self-evident. Article 15.5.1 complements the requirement of trial "in due course of law" in Article 38.1 by prohibiting the retrospective creation of either a criminal offence or the imposition of civil liability. The object of these provisions is to bring clarity in the sphere of criminal law so that citizens can order their affairs to ensure that they do not transgress any such law. Laws which purport to create vague offences invariably also breach Article 15.5.1 as it is impossible even with appropriate advice to foresee the proper scope and application of such a law and because this very vagueness further makes it impossible to ascertain whether the law in question retrospectively criminalises conduct not clearly prohibited by the law.

32. The Supreme Court's decision in *Cagney* provides a good illustration of these difficulties. Here the accused had been charged with the new offence of endangerment provided for by s. 13 of the Non-Fatal Offences against the Person Act 1861:

> "A person shall be guilty of an offence who intentionally or recklessly engages in conduct which creates a substantial risk of death or serious harm to another."

33. The Supreme Court expressed anxiety that the very generality of this statutory language might expose the citizen to retrospective criminalisation. As Hardiman J. put it ([2008] 2 I.R. 111, 120, 121):

> "It will be seen that the offence is general in scope and not specific, so that it may be applied after the event to events which are not obviously criminal in themselves and whose legality or otherwise cannot be accurately assessed in advance. For example, would the terms of the statute extend to an omission to assist an individual in circumstances which, perhaps, would involve some risk to an intervener? Does it extend to actions done with the alleged victim's consent as in the context of extreme sports? These are important questions and the fact that the answers to them are not immediately apparent indicates just how radically the law has (or, at least, may have been) altered by s. 13…
>
> There is, however, a possibility that the section might be interpreted over-broadly so as to cover circumstances which the legislature had not considered, and to criminalise certain things which are not and were not intended to be the subject of prohibition. I have given an example earlier in this judgment, relating to a possibly criminal

> omission to act in particular circumstances. Equally, the question may arise of whether the consent of the person allegedly endangered to run a risk, if established, is of any relevance: this could clearly be a crucial matter if a person is killed while engaging voluntarily in a dangerous sport. This question is not addressed in the statute….
>
> In the present case, there was no root and branch attack on the section by suggesting that it was inconsistent with the Constitution, and it is, of course, entitled to the benefit of a presumption of constitutionality. Nevertheless the obvious potential for conflict with the fundamental value that crimes must be defined with precision and without ambiguity so that the criminal law is "certain and specific" require that this notably open ended section be carefully, and indeed strictly, construed in accordance with fundamental principles of law and of construction."

34. It is against the background of these general constitutional considerations that we can now proceed to examine the constitutionality of the statute.

The constitutionality of s. 18

35. The leading authorities on the principle of legal certainty in the sphere of criminal offences are, of course, *King v. Attorney General* [1981] I.R. 233 and *Dokie v. Director of Public Prosecutions* [2011] IEHC 110, [2011] 1 I.R. 805. In *King* the plaintiff successfully challenged the constitutionality of part of s. 4 of the Vagrancy Act 1824 which had created the offence of loitering with intent to commit a felony, a constituent element of which was the frequenting by "every suspected person or reputed thief" of any of the places listed in the Act with the intention of committing a felony. The Supreme Court held that this section was unconstitutionally vague for reasons memorably articulated by thus by Henchy J. ([1981] I.R. 233, 257):

> "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 unlawful 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."

36. The Supreme Court accordingly held that the portion relating to the offence committed by "every suspected person or reputed thief" was unconstitutional as at variance with various constitutional requirements including Article 38.1, Article 40.3.1 and Article 40.4.1.

37. The decision of Kearns P. in *Dokie* is in much the same vein. In this case the applicant successfully challenged, on *King* grounds, the constitutionality of s. 12 of the Immigration Act 2004. This section provided that:

> "(1) Every non-national shall produce on demand, *unless he or she gives a satisfactory explanation* of the circumstances which prevent him or her from so doing-
>
> (a) a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality, and
>
> (b) in case he or she is registered or deemed to be registered under this Act, his or her registration certificate.
>
> (2) A non-national who contravenes this section shall be guilty of an offence. (Emphasis supplied)."

Kearns P. held that the words "satisfactory explanation" did not prescribe an objective test and lent itself to potentially arbitrary application ([2011] 1 I.R. 805, 818-819):

> "I am of the view that the failure to define the term 'satisfactory explanation' within s. 12 of the Act does give rise to vagueness and uncertainty. The section as worded has considerable potential for arbitrariness in its application by any individual member of An Garda Síochána. There is no requirement in s.12 that the demanding officer should have formed any reasonable suspicion that the non-national has committed a crime, is about to commit a crime or is otherwise behaving unlawfully before he or she can require the non-national to provide a 'satisfactory' explanation for the absent documents….In my view s. 12 is not sufficiently precise to reasonably enable an individual to foresee the consequences of his or her acts or omissions or to anticipate what form of explanation might suffice to avoid prosecution. Furthermore, there is no requirement in the section to warn of the possible consequences of any failure to provide a 'satisfactory' explanation. As a result, the offence purportedly created by s. 12 is ambiguous and imprecise. In my view it lacks the clarity necessary to legitimately create a criminal offence."

38. Judged by the standards articulated in *King* and in *Dokie*, it is plain that s. 18 fails these tests by a wide margin. It would have to be acknowledged that the *actus reus* of the two offences, public scandal and injuring the morals of the community, are totally unclear. As already noted, these terms have no defined legal meaning and no clear legal principles and policies are thereby articulated. The term "scandal" is perhaps an overused word, not least in this country. But it is highly subjective in its application and meaning. The passer-by who, for example, happened to encounter an adult couple engaged in overt sexual activity in a public park might well find the conduct objectionable and perhaps even highly offensive without necessarily thinking that any scandal was thereby created. Others might think that the word "scandal" was really a synonym for conduct deemed by them to be objectionable and unacceptable.

39. As has again been already noted, the reference to "morals of the community" is equally unclear. How are these to be determined and by whom? Even if, moreover, these community morals could be ascertained, how could one determine whether they have been injured?

40. There is furthermore no doubt but that, as O'Malley has pointed out in his great work, *Sexual Offences: Law, Policy and Punishment* (Dublin, 1996)(at 164-166), even by the early days of the section it had become clear that it was susceptible to a

variety of differing, inconsistent and arbitrary applications throughout the State. A correspondent writing in the Irish Law Times and Solicitors' Journal presciently commented shortly after the enactment of the section ((1936) 70 I.L.T.S.J. 70) that s. 18 was:

> "an extremely wide and vague section and a great deal of commonsense will be required in its interpretation to make it properly and appropriately effective."

41. That commonsense was, however, not always present. A year later the *Irish Law Times and Solicitor's Journal* carried a report of where a couple were charged under s. 18 where the impropriety alleged was that the couple had been seen embracing and kissing in a pass used by the public which led to Church grounds: see (1937) 71 I.L.T.S.J. 298-299. Noting that the offence was aggravated by the fact that the offending behaviour occurred on Church property, District Justice Goff sentenced the woman in question to one months' imprisonment. A more distinctly more liberal approach was evinced by District Justice Flood in Limerick where a £1 was imposed on a young couple "for acts offensive to public decency in a motor car". District Justice Flood observed that he was not prepared to "impose penalties on young people for embracing and kissing", but "the facts disclosed in the present case were of a very different nature": see (1937) 71 I.L.T.S.J. at 299. Contemporary sensibilities were, however, spared as the learned District Justice did not, in fact, specify the exact nature of the conduct which had brought about this doubtless egregious violation of the criminal law.

42. Even if the crusading zeal which underlies these early prosecutions under s. 18 of the 1935 Act would be regarded by later generations with incredulity and astonishment, the fact remains that these early prosecutions graphically show the potential for arbitrariness, subjective application and the downright unfairness which is inherent in the section.

No true analogy between s. 18 of the 1935 Act and other sexual offences

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.

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. Ewals* [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. Ashworth J. said that ([1972] 2 All E.R. 22, 24):

> "It seems to me that at any rate today, and indeed by 1824, the word 'person' in connection with sexual matters had acquired a meaning of its own, a meaning which made it a synonym for 'penis'. It may be…that it was forerunner of Victorian gentility which prevented people calling a penis a penis, but however that may be that I am satisfied in my own mind that it has now acquired an established meaning to the effect already stated."

45. The same can be said with regard to the offence of sexual assault (as the former offence of indecent assault was so *named* by s. 2(1) of the Criminal Law (Rape)(Amendment) Act 1990), even if there has been no statutory definition of the offence and even if 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.

46. As O'Hanlon J. explained in *Doolan v. Director of Public Prosecutions* [1993] I.L.R.M. 387, 391:

> "Assault in the strict sense merely involved the threat to inflict unlawful force, however slight, on another person, making some movements which caused the other person to believe that such unlawful physical contact was imminent. A battery consists in the actual application of unlawful force, but the word 'assault' has been quite commonly used to include what should, more strictly, be called a 'battery'.

47. This is why, for example, the conduct of a man in entering a train compartment and exposing his penis to a female in the compartment and making a sexual suggestion to her has been held to constitute the offence of sexual (formerly indecent) assault. Given these circumstances the female was naturally put in fear of unlawful force and the conviction for indecent assault was upheld in such circumstances by the English Court of Criminal Appeal on the basis that there had been an assault (*i.e.,* the threat of unlawful violence), even if there had been no actual battery (*i.e.,* the application of that unlawful force): see *R. v. Rolfe* (1952) 36 Crim. App. Rep. 4.

48. The offence of offensive conduct in a public place created by s. 5(1) of the Criminal Justice (Public Order) Act 1994 ("the 1994 Act") may be regarded as an example of a provision which is couched in general terms but which still articulates clear and objective standards, as the term "offensive conduct" is defined by s. 5(3) as meaning:

> "any unreasonable behaviour which, having regard to all the circumstances, is likely to cause serious offence or serious annoyance to any person who is, or might reasonably be expected to be, aware of such behaviour."

49. Here it may be observed that the behaviour must not only be unreasonable, but it must also be likely to cause serious offence or serious annoyance to a victim or potential victim. This latter consideration has proved to be an important consideration for the European Court of Human Rights when considering somewhat analogous issues.

50. In *Chorherr v. Austria* (1993) the applicant and a friend distributed leaflets at a military parade calling for a referendum on the planned purchased by Austria of fighter jets. He was arrested for the administrative offence of causing a "breach of the peace by conduct likely to cause annoyance". The legality of this arrest was upheld by the European Court on the ground that this prescribed a sufficiently objective standard which was measured by the impact of the conduct on others.

51. This point was further elaborated upon by the European Court in *Hashman and Harrup v. United Kingdom* [1999] ECHR 133, (2000) 30 EHRR 241. In this case the applicants had sought to sabotage a hunt by blowing hunting horns and by bellowing at hounds in order to distract them. The Crown Court found that no violence had been used by the applicants, so no question of a breach of the peace arose. It did find, however, that the applicants would repeat their behaviour unless checked by some form of sanction. They were bound over to keep the peace and to be of good behaviour (*contra bonos mores*). The European Court of Human Rights held that the *contra bonos mores* requirement did not satisfy the requirements of legal certainty for the purposes of accepting any restriction on the right of free speech must be prescribed by law for the purposes of Article 10(2) ECHR:

> "The Court next notes that conduct *contra bonos* mores is defined as behaviour which is "wrong rather than right in the judgment of the majority of contemporary fellow citizens" (see paragraph 13 above). It cannot agree with the Government that this definition has the same objective element as conduct "likely to cause annoyance", which was at issue in the *Chorherr* case….. The Court considers that the question of whether conduct is "likely to cause annoyance" is a question which goes to the very heart of the nature of the conduct proscribed: it is conduct whose likely consequence is the annoyance of others. Similarly, the definition of breach of the peace given in the case of *Percy v. Director of Public Prosecutions* [1995] 1 W.L.R. 1382 – that it includes conduct the natural consequences of which would be to provoke others to violence – also describes behaviour by reference to its effects. Conduct which is "wrong rather than right in the judgment of the majority of contemporary fellow citizens", by contrast, is conduct which is not described at all, but merely expressed to be "wrong" in the opinion of a majority of citizens.
>
> Nor can the Court agree that the Government's other examples of behaviour which is defined by reference to the standards expected by the majority of contemporary opinion are similar to conduct *contra bonos* mores as in each case cited by the Government the example given is but one element of a more comprehensive definition of the proscribed behaviour.
>
> With specific reference to the facts of the present case, the Court does not accept that it must have been evident to the applicants what they were being ordered not do for the period of their binding over. Whilst in the case of *Steel v. United Kingdom* (1998) the applicants had been found to have breached the peace, and the Court found that it was apparent that the binding over related to similar behaviour, the present applicants did not breach the peace, and given the lack of precision referred to above, it cannot be said that what they were being bound over not to do must have been apparent to them."

52. Indeed, it may be noted that it was for rather similar reasons that in *Kershaw v. Ireland* [2009] IEHC 166 O'Neill J. rejected a challenge to the constitutionality of s. 6 of the 1994 Act. The section prohibits "threatening, abusive or insulting words or behaviour", but provides that there must either be also an intent to provoke a breach of the peace or the accused is "reckless as to whether a breach of the peace is occasioned." O'Neill J. held that these words "give to the section a certainty and precision which…excludes the kind of vagueness which could lead to innocent behaviour being criminalised…."

53. One might add that, in line with the reasoning of the ECHR in *Hashman*, the conduct prohibited by s. 6 of the 1994 Act is measured by reference to the likely effect of such conduct *on others,* a key consideration in ensuring that the offence prescribed an objective and ascertainable standard.

54. Nor can any true comparison be drawn between s. 18 of the 1935 and the common law offence of outraging public decency which is an indictable misdemeanour at common law. This offence has been defined by O'Malley (Sexual Offences, at 159) as consisting of the performance of an act which is (i) lewd, obscene and disgusting; (ii) an outrage to public decency and (iii) in public. Based on the authority of cases such as *R. v. Lunderbech* [1991] Crim LR 784 the plaintiff might well have been accused of this offence. In *Lunderbeck* the accused masturbated himself while watching children playing in a public park. Even though there was no evidence that the children saw or noticed anything irregular and even though his genital area was covered by a cloth, the accused's conviction following jury trial of the common law offence of outraging public decency was upheld by the English Court of Appeal (Criminal Division).

55. The critical feature of this offence, however, so far as the present case is concerned is that it is *indictable,* so that the determination of whether community standard have been outrageously violated will be determined by a jury. As Hamilton P. noted in *Attorney General (Society for the Protection of Unborn Children Ltd.) v. Open Door Counselling Ltd.* [1986] I.R. 593, 615 in respect of an offence of this kind :

> "When a case turns on public morals or standards, the question is for the jury though, of course, the judge rules whether there is evidence upon which they can find the case proved."

56. The fact, therefore, that the jury is the ultimate judge in such cases of whether community standards have been so violated is itself a factor which points towards the existence of an objective and ascertainable standard. That protection is noticeably absent here, since, by contrast, the offence created by s. 18 is only triable summarily, so that the accused has no right to opt for jury trial.

Conclusions on the constitutional issue

57. In my view, the present case is indistinguishable from cases such as *King, Dokie* and, for that matter, *Hashman*. The offences of causing scandal and injuring the morals of the community are hopelessly and irremediably vague; they lack any clear principles and policies in relation to the scope of what conduct is prohibited and they intrinsically lend themselves to arbitrary and inconsistent application. In these circumstances the conclusion that the offences offend the guarantees of trial in due course of law in Article 38.1, the guarantee of equality before the law in Article 40.1 and the protection of personal liberty in Article 40.4.1 is inescapable.

58. For good measure, I would add that the section also fails the *Cityview Press* test inasmuch as the Oireachtas has failed to articulate clear principles and policies which mark out that conduct which is prohibited and that which is not. To that extent, therefore, I would hold that the relevant offences contravene Article 15.2.1 and, for that matter, Article 15.5.1.

59. None of this is to suggest for a moment that the Oireachtas could not legislate to create new offences which would address conduct of this nature in public. What is, however, required is that any such new legislation contains adequate principles and policies in order to meet the requirements of Article 15.2.1 on the one hand and articulates prohibitions by reference to objectively ascertainable standards in order to meet the requirements of Article 38.1 on the other.

Severance

60. The only remaining issue is whether the offences of causing scandal and injuring the morals of the community can be severed from the remaining offence of offending modesty. In my view it can, as once the offending offences have invalidated, then, to adapt the words of Fitzgerald C.J. in *Maher v. Attorney General* [1973] I.R. 140, 147, "the remainder may be held to stand independently and legally operable as representing the will of the legislature." In the present case, severance is accordingly possible. Recalling that the constitutionality of this remaining offence was not before the Court, one can nonetheless read s. 18 in the wake of the declaration of unconstitutionality which has been made as creating one single offence, namely, that of offending modesty.

Conclusions

61. It remains only to summarise my principal conclusions.

62. First, the plaintiff has standing to challenge the constitutionality of the section. It matters not that the conduct in question might be criminalised under some new version of the statute which the Oireachtas might enact at some point in the future or indeed that he might have been charged with a different offence in respect of this conduct. The plaintiff is entitled to object to legislation which is unconstitutionally vague and lacks clear principles and policies.

63. Second, the plaintiff can, however, only challenge those provisions of the section which directly affect his interests. Accordingly, since he has been charged only with the offences of causing scandal or injuring the morals of the community, he has no standing to challenge the constitutionality of the offence of offending modesty in s. 18 of the 1935 Act.

64. Third, the changes effected to the penalty provisions of s. 18 of the 1935 Act by s. 18 of the 1990 Act do not have the effect of re-enacting s. 18 of the 1935 Act as it were a post-1937 statute. It follows, therefore, that the section enjoys no formal presumption of constitutionality, although the onus of proof in relation to establishing the invalidity of the section rests with the plaintiff.

65. Fourth, the offences of causing scandal and injuring the morals of the community are hopelessly vague and subjective in character and they intrinsically lend themselves to arbitrary and inconsistent application. No clear standard of the conduct which is prohibited by law is articulated thereby and s. 18 does not contain any clear principles and policies. In this respect the relevant provisions of s. 18 are manifestly unconstitutional and are inconsistent with Article 15.2.1, Article 15.5.1, Article 38.1, Article 40.1 and Article 40.4.1 of the Constitution.

66. Fifth, since the plaintiff has no standing to challenge the offence of offending modesty and since that offence is capable of having a distinct and independent existence from the offences of causing scandal and injuring the morals of the community, it is possible to sever the offending words from s. 18 of the 1935 Act.

67. Sixth, I will accordingly declare in accordance with Article 50.1 of the Constitution that the words "or cause scandal or injure the morals of the community" contained in s. 18 of the 1935 Act are inconsistent with the Constitution and that these two offences thereby created by that section did not survive its enactment.

68. Seventh, none of this is to suggest that the Oireachtas could not legislate to create new offences which would address conduct of this nature in public. What is, however, required is that any such new legislation contains adequate principles and policies in order to meet the requirements of Article 15.2.1 on the one hand and articulates prohibitions by reference to objectively ascertainable standards in order to meet the requirements of Article 38.1 on the other.

Approved: Hogan J.