Neutral Citation Number: [2010] IEHC 186

THE HIGH COURT

2010 11 SS

IN THE MATTER OF SECTION 52(1) OF THE COURTS SUPPLEMENTAL PROVISIONS ACT 1961

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR/RESPONDENT

AND

KEITH RING AND SHANNON KEOHANE

ACCUSED/APPLICANTS

JUDGMENT of Mr. Justice Hedigan delivered on the 19th of May, 2010

1. These proceedings are brought by way of a consultative case stated pursuant to s. 52(1) of the Courts (Supplemental Provisions) Act 1961, by Judge Mary Devins of the District Court assigned to District Number three (the District Court area of Castlebar) arising out of the prosecution of the applicants on a charge of violent disorder at Castlebar Courthouse on the 4th March, 2009.

2. The case stated, dated the 26th November, 2009, was outlined by District Judge Devins in the following terms:-

> *"1. At a sitting of the District Court held at District Court No. 3 in the town of Castlebar in the County of Mayo on the 4th day of March, 2009 the Applicants and a third Accused, Adrian Ring, appeared before me on one summons each charged with the one offence as follows:*
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> *a. That you, on the 08-Jun-2008 at Tesco Carpark, Knockcrockery, Castlebar, Co. Mayo in said District Court Area of Castlebar, committed violent disorder in that you (Keith Ring) with other persons, namely Shannon Keoghane and Adrian Ring present together, used or threatened to use unlawful violence and such conduct, taken together, was such as would cause a person of reasonable firmness present at said place to fear for his or another person's safety contrary to section 15 of the Criminal Justice (Public Order) Act 1994.'*
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> *b. That you, on the 08-Jun-2008 at Tesco Carpark, Knockcrockery, Castlebar, Co. Mayo in said District Court Area of Castlebar, committed violent disorder in that you (Shannon Keoghane) with other persons, namely Adrian Ring and Keith Ring present together, used or threatened to use unlawful violence and such conduct, taken together, was such as would cause a person of reasonable firmness present at said place to fear for his or another person's safety contrary to section 15 of the Criminal Justice (Public Order) Act 1994.*
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> *c. That you, on the 08-Jun-2008 at Tesco Carpark, Knockcrockery, Castlebar, Co. Mayo in said District Court Area of Castlebar, committed violent disorder in that you (Adrian Ring) with other persons, namely Shannon Keoghanee [sic.] and Keith Ring present together, used or threatened to use unlawful violence and such conduct, taken together, used or threatened to use unlawful violence and such conduct, taken together, was such as would cause a person of reasonable firmness present at said place to fear for his or another person's safety contrary to section 15 of the Criminal Justice (Public Order) Act 1994."*
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> *d. The summonses, which form part of this case stated, are included at Appendix I.*
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> *2. On the 4th day of March 2009, the within matter having come before my court, the prosecution withdrew the third summons preferred against Adrian Ring, the third accused after being requested to do so by the third accused as the matter was not properly before the Court. The said third accused, Adrian Ring, was a minor and the summons preferred against him was defective as his mother and/or father and/or guardian ought to have also been but were not summonsed in the within matter.*
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> *3. At the said hearing and the subsequent hearing, the Applicants and Adrian Ring were represented by Aidan Crowley, Solicitor of Egan, Daughter & Co., Solicitors, Castlebar in the County of Mayo. The Prosecutor/Respondent was represented by Superintendent William Keavney.*
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> *4. On the 20th day of May 2009, the date to which the matter was adjourned, after hearing the evidence adduced by and on behalf of the Respondent and of the Applicants , the undersigned being one of the Judges of the District Court assigned to the said District and sitting as a Court of Summary Jurisdiction at the Courthouse, Castlebar, County Mayo, and having neither proceeded to a final adjudication of the said complaints nor decided certain questions of law arising herein, do hereby refer such questions of law to the High Court for determination.*
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> *5. I adjourned the said complaints to the 17th day of June 2009 when I directed that a consultative case be stated to the High Court.*
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> *6. I further adjourned the said complaints to the day of the sitting of the District Court next after the expiration of fourteen days from the day upon which the decision of the High Court shall be given.*
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> *7. Wherefore, I, the Judge aforesaid, in pursuance of the Statutes in such case made and provided do hereby state and sign the following case for the opinion of the High Court.*
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> *CASE*
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> *The following evidence was given in the within matter on the 20th May 2009 and in addition 1, the presiding Judge, viewed CCTV footage of this incident from which it was apparent that there were more than two persons involved in this dispute:-*

1. Mr P.J. Scahill of Boffin Street, The Quay, Westport, County Mayo stated as follows:-

a. He was a security guard in Tesco, Castlebar, County Mayo, working on the 7th day of June 2008. At approximately 3.30 am a group of individuals approached Tesco. He observed an individual purchase goods and then proceeded to view the group outside the shop on camera. He observed a black gentleman join the group and a fight broke out between the parties. He went outside the shop and proceeded to bring the black gentleman into the shop premises in order to diffuse the said fight. He spoke to the group of individuals and one of the group accused him of assaulting him. He claims that suddenly he was hit by what he believed to be a phone charger over the left eye. The group gathered around him and proceeded to kick him whilst was on the ground – he got up off the ground and hit two of the group members and walked towards the shop. He was hit again on the back of the head with the said phone charger. The group stood outside the shop and shouted abuse at him and further attempted to damage sensors around the shop and did assault another person who was exiting the premises. He then closed the shutters on the said premises. He gave evidence of the injuries allegedly sustained by him as a result of the alleged assaults.

2. Garda Michelle Patricia Conroy, of Castlebar Garda Station, Castlebar, County Mayo stated as follows:-

a. She was on duty on June 8th 2008 when she received a call to attend the Tesco premises in the town. She attended same and found Mr. Scahill in a distressed and bloody state. She spoke with Mr. Scahill who alleged he was hit over the left eye by a small guy wearing a hoodie and hit again by a tall guy. Mr. Scahill made a statement. She then subsequently proceeded to obtain statements from one independent witness, Mrs. Liz O'Malley, and two other ladies Ms. Kim Moran and Ms. Sinead Mulligan, both latter ladies identified the offenders as Keith and Adrian Ring. She later viewed CCTV footage. On the 4th day of August 2008, she arrested and cautioned Keith Ring, of 50 Castlegrove, Castlebar, County Mayo. She conveyed him to Castlebar Garda Station and introduced him to the member in charge Garda Conway. He was therein searched and detained pursuant to the provisions of section 4 of the Criminal Justice Act, 1984. He was later conveyed to an interview room where he was interviewed and same was electronically recorded. He was released later that evening.

b. On the 24th day of August, she took a cautioned statement from Adrian Ring of 50 Castlegrove, Castlebar, County Mayo.

c. On the 23rd day of October, 2008 Keith Ring attended at the Garda Station in Castlebar and made a counter allegation of assault against the said Mr. Scahill.

d. Garda Conroy consulted Mr. Scahill in relation to the said allegation. He denied same and then became hesitant in proceeding with the within complaint for fear of his good name and job. He requested time to consider the allegations and to consult with his employers. He later contacted Garda Conroy and stated he wished to proceed with the said complaint.

3. Mrs. Liz O'Malley of 8 Rathbawn Avenue, Castlebar, County Mayo stated as follows:-

a. She was working in Tesco on the night of June 7th 2008. She stated at approximately 3.45am Shannon Keoghane entered the shop premises in a very drunk state and purchased some food and cigarettes. He was staggering from side to side and proceeded to walk outside the premises. She saw the security guard, Mr. Scahill, talking to a gentleman and telling him to stay inside the shop as some men were starting a fight. Two other men attempted to enter the shop but were prevented from doing so by Mr. Scahill. During this time, they were shouting abuse at Mr. Scahill. She proceeded to talk to two other gentlemen on the premises and enquired as to the identity of the individuals fighting – she was informed they were two Ring brothers and Shannon Keoghane whom she knew to see. She proceeded to call for assistance namely the shop manager, the Gardaí and an ambulance. Mr. Scahill walked back into the premises covered in blood and the shutters were then closed.

4. Ms. Kim Moran of 18 Nephin Halls, Hopkins Road, Castlebar, County Mayo stated as follows:-

a. On the night of June 7th 2008 she was socialising with some friends and drinking under a bridge in Castlebar, County Mayo. She was in the company of the Applicants and some other girls. She went to the Tesco premises for food with her group of friends including the accused men. She was standing outside Tesco when a gentleman named Allah Allabas called the wrong name out to her friend. She saw Adrian Ring hit this gentleman, she saw Mr. Scahill leave the Tesco premises and he requested Adrian Ring to calm down. Suddenly Keith Ring 'went mad' and started fighting with Mr. Scahill. The fight ended up on the ground. She saw Keith Ring hit Mr. Scahill with a phone charger. She went into the Tesco premises, the shutters went down and the Gardai arrived on the scene.

5. Ms. Sinead Mulligan of 4 The Willows, Castlebar. County Mayo stated as follows:-

a. On the night of June 7th 2008 she was socialising with some friends and drinking under a bridge in Castlebar, County Mayo. She was in the company of the Applicants (Adrian Ring) and some other girls. She went to the Tesco premises with her group of friends, she was talking to a gentleman named Allah Allabas at Tesco. He mistakenly called her Maria believing same to be her name. Suddenly someone from behind her threw a punch at the gentleman. She thought it was Adrian Ring. Mr. Scahill left the Tesco premises and pushed Adrian Ring away from everyone else. Suddenly Keith Ring started to hit Mr. Scahill. She stated Keith Ring had a phone and a phone charger in his hand and he hit Mr. Scahill with same. She recalled Mr. Scahill on top of Keith Ring. She stated Mr. Scahill got up off the ground and was covered in blood and he went into the Tesco premises. She stated she then observed Shannon Keoghane punch a man in the face, this

man had blood on his face.

8. Mr. Aidan Crowley Solicitor on behalf of the accused made the following submissions:

(a) The provisions of section 15 of the Criminal Justice (Public Order) Act 1994 provide as follows:-

'Violent disorder.

15.—(1) Where—

(a) three or more persons who are present together at any place (whether that place is a public place or a private place or both) use or threaten to use unlawful violence, and

(b) the conduct of those persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or another person's safety,

then, each of the persons using or threatening to use unlawful violence shall be guilty of the offence of violent disorder.

(2) For the purposes of this section—

(a) it shall be immaterial whether or not the three or more persons use or threaten to use unlawful violence simultaneously;

(b) no person of reasonable firmness need actually be, or be likely to be, present at that place.

(3) A person shall not be convicted of the offence of violent disorder unless the person intends to use or threaten to use violence or is aware that his conduct may be violent or threaten violence.

(4) A person guilty of an offence of violent disorder shall be liable on conviction on indictment to a fine or to imprisonment for a term not exceeding 10 years or to both.

(5) A reference, however expressed, in any enactment passed before the commencement of this Act—

(a) to the common law offence of riot, or

(b) to the common law offence of riot and to tumult,

shall be construed as a reference to the offence of violent disorder.

(6) The common law offence of rout and the common law offence of unlawful assembly are hereby abolished.'

(b) Mr Crowley stated that the Court did not have jurisdiction to convict the Applicants under section 15 as two people rather than three people had been eventually prosecuted. He submitted that whilst three or more individuals were present on the night the alleged incident occurred, and further whilst three individuals allegedly used or threatened to use unlawful violence, only two of the said individuals were prosecuted in the within matter.

(c) Mr Crowley further stated that section 15(1) clearly and unambiguously states that each of the persons using or threatening to use unlawful violence shall be guilty of the offence of violent disorder with emphasis on the word 'each' would denote 'three or more persons'. He stated that it was clearly the intention of the Legislature that the word 'each' would denote 'three or more persons'. He stated that as three persons were not prosecuted the prosecution itself was defective. The use of the word 'each' meant that at least three persons had to be each convicted of the offence for the individual convictions to be lawful.

(d) For the foregoing reasons, Mr. Crowley submitted that the summonses ought to be dismissed.

8. In reply Supintendent William Keavney on behalf of the prosecution argued that the prosecution was well grounded. He referred to the evidence before the court and stated that all the constituent elements of the offence preferred against the accused men had been proven. He also stated that the evidence before the court clearly indicated the guilt of the accused men and that while three persons were prosecuted initially the section could not be interpreted as requiring each of those three to be convicted. Superintendent Keavney asked the Court to record a conviction.

…

The question upon which the opinion of the High Court is required upon the above statement of facts is whether I should convict the Applicants where the offence alleged requires three or more persons to be present in order to be guilty of the said offence in circumstances where only two persons were prosecuted."

The Submissions of the Parties

3. The applicants made the case that s. 15(1) of the Criminal Justice (Public Order) Act 1994 ("the Act of 1994") clearly states that each of the persons using or threatening to use violence shall be guilty of the offence of violent disorder and they placed emphasis on the word "each". They contended that as three persons were not prosecuted in the instant case the prosecution was defective and that the use of the word "each" inferred that at least three persons had to be each convicted of the offence for the individual convictions to be lawful. In the alternative they submitted that the applicants could only be convicted if there is evidence that they and at least two others are guilty of the offence of violent disorder and that in circumstances where one co-accused was not prosecuted and the summons against each applicant alleges an offence on the part of the applicant specifically with the other two named co-accused, the court must be satisfied beyond a reasonable doubt that each of the three persons were guilty of violent disorder. A number of English authorities concerning the equivalent provision for the offence of violent disorder, s. 2 of the Public Order Act 1986 ("the Act of 1986") were cited by them in this regard such as *R. v. Mahroof* (1989) 88 Cr. App. R. 317; *R. v. Fleming and Robinson* (1989) Crim. L.R. 658 and *R. v. Lemon* [2002] All E.R. (D) 96.

4. Ms. Phelan B.L., for the prosecutor, contended that in order to sustain a conviction that a judge must be satisfied that at least three people had been engaged in unlawful violence during the incident. She submitted that the wording of s. 2 of the Public Order Act 1986, is substantively similar to its Irish equivalent and thus the line of jurisprudence on the interpretation of s. 2 of the Act of 1986 should be followed. In this regard she relied on the authorities of *R. v. Mahroof* (1989) 88 Cr. App. R. 317; *R. v. Worton* (1989) 154 JP 201; *R. v. Lemon* [2002] All E.R. (D) 96 and *R. v. Morris* [2005] EWCA Crim. 609. She argued that on its true construction s.15(1) of the Act of 1994 does not require that at least two other persons be convicted of an offence of violent disorder before any single defendant can be convicted.

Decision

5. There is apparently no decision of the Irish courts addressing the point raised in this case. The point has been decided, however, in the English courts by reference to s. 2(1) of the Act of 1986 which provides as follows:-

> *"Where three or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using or threatening unlawful violence is guilty of violent disorder."*

The phrase "taken together" is not in the Irish provision. I cannot see how this would affect the interpretation sought herein. I am satisfied that this English provision is substantively the same as that which operates in this jurisdiction. For this reason the English authorities may be helpful.

6. In *R. v. Mahroof* (1989) 88 Cr. App. R. 317 the appellant, together with his two co-accused, was charged with violent disorder. No reference was made in the appellant's indictment to two other unnamed Moroccan men who had been present as part of the group at the scene threatening violence. The appellant was convicted of violent disorder under s.2 of the Act of 1986 and his two other co-accused, Mr. Biney and Mr. Sayers, were convicted of an alternative charge under s.4 of the Act of 1986. Mr. Mahroof appealed his conviction by way of case stated posing the following question for determination by the Court of Appeal:-

> *"Where three defendants are indicted for an offence of violent disorder contrary to section 2 of the Public Order Act 1986 and following unanimous verdicts of a jury that two of the defendants are not guilty of this charge, is the jury entitled in law to convict the remaining defendant of the offence provided the jury have been directed that they must be satisfied that the latter defendant is one of the three or more persons who are present together using or threatening violence within the meaning of section 2 of the Act?"*

The Lord Chief Justice, referring to the transcript of the trial, noted that the trial judge seemed alert to the fact that there was a possibility that the jury might acquit two of the defendants but nevertheless convict the appellant. He continued at p.28:-

> *"The only basis upon which the Judge could have founded that proposition was if there were two other people who could, so to speak, stand in the shoes of the acquitted Biney and the acquitted Sayers. The other two could only have been the two Moroccans, unnamed, whom Mr. Wyse had observed standing alongside or behind this appellant when the initial threat to set fire to Biney or Biney's house with the petrol had taken place.*
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> *Strictly speaking, the question comes down to this: Was it a sufficient allegation in the indictment if no mention was made in the indictment of any other potential participant except three men, namely, Biney, Mahroof and Sayers?*
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> *It seems to us that the answer to that, and as a consequence the answer to the certified question is 'Yes, subject to two very important qualifications": first of all, that there is evidence before the jury that there were three people involved in the criminal behaviour, though not necessarily those named in the indictment; secondly, that the defence are apprised of what it is they have to meet. There was such evidence, as already indicated, the evidence coming from Mr. Wyse, namely that there were three Moroccans together at the door of Biney's house when one of them, that is to say the appellant, was threatening to burn the house down, although his evidence in Court was less certain, we are told, than his statement to the police."*

7. In *R v. Worton* (1989) 154 JP 201 the Court of Appeal held that a jury must be warned specifically that if any one of the defendants is to be acquitted of the offence, then they must necessarily acquit the other two unless satisfied that some other person not charged was taking part in the violent disorder. The failure of the trial judge to give such a warning in that case amounted to a misdirection. Lloyd L.J., stated as follows at p.203:-

> *"In cases of this kind, where there are only three defendants accused of violent disorder, it is not in our view sufficient that the offence should be defined in general terms, as it was here. It is necessary that the Judge should go on and warn the jury specifically that if any one of the three defendants should be acquitted of violent disorder, then they must necessarily acquit the other two, unless satisfied that some other person not charged was taking part in the violent disorder. This the recorder in the present case never did. The direction was correct as far as it went. But in our view it did not go far enough. He should have underlined the point that we have just made."*

8. In *R. v. Fleming and Robinson* (1989) Crim. L.R. 658, the two appellants and two other co-accused were indicted for an offence of violent disorder and they were the only persons involved in the incident at issue. One of the co-defendants was acquitted and the jury was unable to agree in respect of the other co-defendant and was discharged from giving a verdict in his case. In the appeal of the two appellants it was argued that it was a condition precedent to conviction that the jury must be satisfied that three or more persons were present together using or threatening unlawful violence and therefore, the convictions of only two defendants were unlawful. It was held as follows:-

> *"On a charge under s. 2 of the Public Order Act 1986, where the only persons against whom there is evidence of using or threatening violence are those named in the indictment, the jury should be specifically directed that if it cannot be sure that three or more of the defendants were using or threatening violence, then it should acquit every defendant, even if satisfied that one or more particular defendants were unlawfully fighting."*

In that case the only evidence of using or threatening violence was against the two appellants. As evidence against three persons was required to convict under s.2 of the Act of 1986, the Court of Appeal quashed the conviction of the two appellants under that section. It indicated, however, that the jury was entitled to convict the appellants of affray under s.3 of the Act of 1986. It held that as the jury must have been satisfied of the facts which constituted that offence that convictions for affray ought to be substituted

for the quashed convictions under s.2 of the Act of 1986.

9. In *R. v. Lemon* [2002] All E.R. (D) 96, the trial judge directed the jury that it was not necessary to identify any of the other two or more participants provided that they were sure that the defendant and at least two others had used unlawful violence. The defendant was convicted and he appealed on the ground that the judge had misdirected the jury regarding the issue of the identification of the parties. The Court of Appeal held that on its true construction s. 2(1) of the Act of 1986 did not require that at least two other persons be convicted of an offence of violent disorder before any single defendant could be convicted and that, as a result, the conviction in the appellant's case was not unsafe.

10. In *R. v. Morris* [2005] EWCA 609 the appellant and two other named persons on the indictment were charged with violent disorder. The appellant and one of the named persons were convicted following a trial by jury. The other named person was acquitted. At the appeal it was argued *inter alia* that because the Crown had pleaded a "closed" violent disorder (i.e. the only persons said to have been present together and using or threatening unlawful violence were the named defendants), that the trial judge should have directed the jury that they would have to be satisfied that that all three participated. The court rejected this argument. It noted that the prosecution did not indicate that reliance was being placed on the named three only. It found that the evidence given by a witness and his witness statement "*assert clearly, if by necessary implication*" that three or more persons had been present. The defence did not seek clarification it was noted, as to how the trial judge proposed to sum up to the jury and no complaint of unfairness was made at the time.

11. It is to be noted that the point raised in this case stated has also been addressed in Smith and Hogan, *Criminal Law* 12th Ed., (Oxford University Press, Oxford, 2008) as follows at p.1037:-

> *"In Mahroof, it seems to have been assumed that if three defendants are the only persons alleged to have been involved in the disorder and one of them is acquitted, the others must also be acquitted. This will usually be the case but it is submitted that it is not necessarily so.*
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> *If, for example, the acquitted person was using or threatening unlawful violence but was not guilty on some other ground, there seems to be no reason why the other two accused should not be convicted. The third person may have been acquitted because he did not so intend to, and was not aware that he might use or threaten violence (perhaps being involuntarily intoxicated) or had some other defence such as duress, insanity or that he was aged only nine. He will nevertheless have been involved in unlawful violence. Such cases are likely to be rare."*

12. I accept this above statement by the learned authors as a reasonable interpretation of the English authorities. The logic seems to be that where there is a finding of the court that a particular person was not involved in such unlawful conduct it is no longer possible to include him in the required minimum number of three because this would involve the court finding two contradictory things. Where, however, a person's acquittal is for reasons that do not reflect a finding on their participation in unlawful violence but is, for instance, for "technical" reasons as set out above, then to include them involves no contradictory finding by the court. It seems to me that the principles which may be deduced from these authorities are also applicable in Irish law.

13. From the above the following principles may therefore be deduced:-

> (a) Provided the accused was not unfairly prejudiced by a lack of knowledge of the case he had to meet, the Court would be entitled to convict one or two persons where the other of the three was acquitted but there was sufficient evidence to hold that there were in fact at least three people involved in the criminal behavior.
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> (b) A jury must be warned (or a judge must be satisfied) that if one of the defendants is acquitted it must be satisfied that some other person not charged participated in the unlawful violence. They must, as it were, be able to "find" some other person to "stand in the shoes" of the acquitted one. There must be three or more persons present together who engaged in such violence. It is not necessary that they be identified. A person charged and acquitted of participating in that unlawful, violent incident cannot be "counted in" to make up the three.
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> (c) Even where the charge of violent disorder is made in a "closed" form i.e. where the other two are named, and one of those is acquitted, there may be a conviction where it is clear on the evidence that three or more persons were present and taking part in the disorder but the person acquitted may not be "counted in" for the purpose of making up the three.
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> (d) There may be circumstances where one of three involved in the disorder is acquitted on grounds such as incapacity but where there has been no finding that he was not involved in unlawful violence. In those circumstances the remaining two may be convicted because the third may be counted in.

Conclusion

14. Applying the above principles to the facts of this case: the applicants are charged in a "closed" form i.e. the other persons allegedly involved are named. The District Judge has evidence before her that three persons named in the charge were involved in violent disorder. One of those was a minor and the charge was withdrawn in respect thereof because of a defective summons i.e. the parents were not named thereon. The minor has not been acquitted. No findings have been made as to whether or not the minor was involved in unlawful violence. The charges have been withdrawn. If the District Judge is satisfied on the evidence that the two applicants together with the minor were involved in violent disorder then notwithstanding the withdrawal of the charge against the minor she may convict either or both of the two.